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Order 2000-10-8

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 11th day of October, 2000

SERVED October 11, 2000

**Third-Party Complaint of
The Association of Retail Travel
Agents (ARTA)
against
Continental Airlines, Inc., Delta Air
Lines, Inc., Northwest Airlines, Inc.,
and United Air Lines, Inc.**

DOCKET OST 99-6691 - 9

ORDER

By this order, we dismiss the third-party complaint of the Association of Retail Travel Agents (ARTA) against Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc., in Docket OST 99-6691, filed December 21, 1999.

The Complaint

ARTA, a trade association, represents some 4,600 retail travel agents in the United States and Canada. Most of its members are authorized to sell tickets to the public for air transportation on each of the four respondent carriers. ARTA takes the position that its members compete directly with the airlines in the sale and distribution of airline tickets.

ARTA's complaint concerns the jointly-owned Internet travel site that Continental, Delta, Northwest, and United have announced that they plan to launch. (This site was known temporarily as "T2" and is currently known as

"Orbitz.")¹ Consumers will be able to use Orbitz to book not only air transportation but also hotels, car rentals, cruises, tours, and other travel services. ARTA states that according to press reports, Orbitz will differ from competing web sites by "offering features such as a one-stop shopping location for discount trips and perks such as preferred seating that would normally require a carrier's frequent flyers to sign onto an airline's individual Web site to request," Complaint at 3. Current plans call for Orbitz to be launched officially in June of 2001.

ARTA contends that through Orbitz, the respondent carriers will violate 49 U.S.C. §41712 by engaging in unfair and deceptive practices and unfair methods of competition *vis-a-vis* both the traveling public and ARTA's members. ARTA attributes the respondents' combined 55-percent share of domestic air traffic to factors such as their frequent flyer programs, hub-and-spoke route systems, airport gate leases, take-off and landing rights, and computer reservations systems. ARTA claims that Orbitz will similarly serve the respondents as a means of maintaining their dominance and will enable them to inflate prices, limit services, and make it more difficult for smaller, low-cost carriers to compete. ARTA also claims that Orbitz will increase the likelihood that the respondent carriers will engage in illegal display bias and price signalling. In the sale of air transportation, ARTA maintains, Orbitz will chill entry by new on-line travel sites as well as innovation by existing sites, resulting in fewer choices and higher prices for consumers and onerous terms and conditions for both consumers and competing travel agents. In addition, ARTA maintains that because Orbitz will offer consumers prices and services that the carriers will not also make available through their travel agent competitors, Orbitz will enable the four respondents to dominate air transportation sales. The ensuing elimination of competition from other on-line travel sellers and appointed travel agents will harm consumers, according to ARTA, by depriving them of independent, unbiased advice on the lowest fares and the best service, schedules, and routes.

ARTA asks the Department to block these adverse developments by instituting a formal enforcement proceeding to enjoin the respondents from launching Orbitz. ARTA also seeks the adoption of a rule prohibiting certificated carriers from jointly owning and operating on-line travel sites open to the public.

¹ Since ARTA filed its complaint, American Airlines, Inc., has joined the original four carriers as an owner. ARTA did not amend the complaint to include American, and American did not file an answer.

The Answers

All four respondents filed answers opposing the complaint on January 28, 2000.²

Continental urges the Department to dismiss the complaint. It argues that ARTA provides no evidence that Orbitz will inflate prices, curtail consumer choices, lessen competition from any airline, or otherwise engage in unfair or deceptive practices or unfair methods of competition. To the contrary, claims Continental, Orbitz will expand intercarrier competition for price-conscious consumers and will expand consumers' choices by letting them explore more alternatives than they now can on a single web site. Continental denies that smaller, low-cost carriers, which it says are already joining Orbitz to promote their services, will be harmed by the site. Continental states that Orbitz is open to all carriers that wish to participate and denies that a jointly-owned site will increase the owners' temptation or ability to bias flight listings or signal prices, claiming that ARTA does not explain why it believes otherwise. Continental characterizes ARTA's assertions as not only unsubstantiated but also premature and speculative; moreover, Continental denies that ARTA has standing to bring its complaint. Affirmatively, Continental charges ARTA with asking the Department to disregard Congress's mandate and regulate the airlines' decisions on distribution, thus artificially preserving the traditional distribution system despite the ongoing development of more efficient and less costly distribution channels. Continental maintains that §41712 protects competition and the public interest, not individual competitors. Moreover, Continental also takes issue with ARTA's assertion that travel agents are the carriers' competitors in the sale of air transportation, arguing that within the meaning of the antitrust laws and §41712, carriers and travel agents have a true principal-agent relationship in which the agent is bound not to compete with its carrier principal.

Delta joins Continental in urging the Department to dismiss the complaint, and it makes many of the same arguments. Like Continental, Delta denies that ARTA has substantiated its complaint and maintains that Orbitz will expand competition in the sale of air transportation, not curtail it. Delta asserts, for example, that given the nature of the Internet and consumers' ability to switch websites with a mere click of the mouse, Orbitz cannot become a "fortress website:" if its displays are biased, its prices inflated, or its choices limited, and if low-fare carriers do not participate, Orbitz will not be

² The answer date was set by mutual agreement between the Office of Aviation Enforcement and Proceedings and all the parties.

attractive to consumers, so they will do business elsewhere. Delta, like Continental, denies that it is in the respondents' interest to bar any carrier from participating in Orbitz and notes that several low-fare carriers have already enrolled, and Delta, too, denies that Orbitz will increase its owners' incentive or ability to bias flight displays or signal their prices. Also like Continental, Delta asserts that ARTA lacks standing to bring its complaint and characterizes the complaint as a misplaced attempt to block the development of internet competition in order to protect traditional travel agencies. Delta, too, asserts that as a matter of law, competition between an airline and its appointed agents does not exist. Even if this were not the case, Delta contends, §41712 would not protect individual competitors such as ARTA's members, as its purpose is to protect competition. Furthermore, Delta cites retail travel agents' share of over 75 percent of its own sales as evidence that the respondents' collective provision of about 55 percent of domestic air transportation services does not translate into dominance of air transportation sales, ARTA's implication to the contrary notwithstanding. Delta maintains that there is no legal or policy basis for the Department to require airlines to favor one distribution outlet over another and that the Department should not artificially prevent airlines from exploring the use of distribution channels other than travel agents. Agreeing with Continental's contention that the complaint is premature and speculative, Delta states that §41712 by its terms only authorizes action when an entity is or has been engaged in an unfair or deceptive practice or an unfair method of competition and argues that the Department thus has no power to block Orbitz.

Northwest, too, urges the Department to dismiss the complaint on many of the grounds asserted by Continental and Delta: that ARTA has not substantiated its claims and hence has provided no justification for enforcement action or rulemaking, that ARTA is improperly seeking to preserve the dominance of travel agencies as the primary distribution channel for air transportation services, that Orbitz will facilitate competition in both air transportation and its sale, that ARTA lacks standing to bring its complaint, that Orbitz will not create new opportunities for price signalling, that travel agents do not compete with carriers in the sale of air transportation within the meaning of the antitrust laws, and that the relief ARTA seeks is contrary both to the statute and to long-established policy. In addition, Northwest argues that if the services ARTA's members offer are as valuable to consumers as ARTA claims, and if they are promoted effectively, the travelling public will continue to do business with ARTA's members. Northwest contends that ARTA has presented no evidence that providers of "independent and unbiased advice regarding the lowest available fares and best service . . ." will go out of business if consumers have a choice between

paying for such advice or using Internet options to plan their travel. Northwest asserts that by reducing carriers' distribution costs as well as expanding the information available to consumers on the Internet, Orbitz will promote competition.

United also takes the position that the complaint should be dismissed. United maintains that by lowering producers' costs and increasing consumers' access to products, services, and information, the Internet is increasing competition in all industries. Like the other three respondents, United opposes regulatory intervention to block innovations in distribution in order to preserve traditional channels. United agrees with Continental and Delta that ARTA has failed to state a claim under §41712, because that section protects competition and not individual competitors. Characterizing itself as a leading industry innovator both as a general matter and in exploiting the Internet in particular, United claims credit for proposing Orbitz and taking the lead in its creation. United argues that the antitrust laws and the Joint Department of Justice/Federal Trade Commission Draft Guidelines for the Collaboration of Competitors permit competitors to enter into joint ventures, such as Orbitz, that do not dictate prices but do enhance efficiency. Orbitz's operating premise, according to United, is to enhance demand by giving consumers an easy alternative, not to restrict access to other distribution channels, and not to raise price or reduce output, service quality, service quantity, or innovation. Like Delta, United denies that the respondent airlines' market shares of air transportation services have any relevance to Orbitz and suggests that in fact ARTA's members are more likely than airlines to have market power in the sale of travel products, although United also agrees with the other three respondents that within the meaning of the antitrust laws, there is no competition between airlines and retail travel agents. United states that participants in Orbitz remain free to operate their own web sites and to use any other distribution channels, including traditional travel agents, and that each participating airline will set its own commission policies for travel agent sales unilaterally. Like the other respondents, United contends that ARTA lacks standing to bring its complaint.

Disposition

As a preliminary matter, we reject the contention that we should dismiss the complaint because ARTA does not have standing to file it. It is true that ARTA is not an "air carrier, foreign air carrier, or ticket agent" within the meaning of 49 U.S.C. §40101. Nevertheless, the statute authorizes us to investigate questions of unfair methods of competition on our own initiative as well as on the complaint of an air carrier, foreign air carrier, or ticket agent.

Consistent with this broad authority, our procedural regulations contemplate formal complaints not just from the entities enumerated in the statute but from "any person;" *see* 14 CFR §302.404 (65 F.R. 6446, 6476 [February 9, 2000], effective March 10, 2000); *cf.* 14 CFR 301.201 (in effect when the complaint was filed). We believe that we serve the public interest most effectively by entertaining all complaints that raise timely and germane issues, without regard to the identity of the complainant.

We nevertheless dismiss ARTA's complaint, and we do so without reaching the merits. The Department has already begun an informal investigation into Orbitz and the terms on which it is to operate in order to determine whether and to what extent regulating it may be warranted under §41712 and the policy directives set forth in 49 U.S.C. §40101.³ Depending on its outcome, this investigation may serve as the basis for a rulemaking proceeding or an order to cease and desist. We are dismissing ARTA's complaint without prejudice: if Orbitz does go forward, ARTA is free to complain that its operation violates §41712.

³ The Department is concerned about the implications for competition and consumer welfare of a number of developments in airline marketing and distribution practices, including the expanding use of the Internet. Orbitz is one such development.

ACCORDINGLY, we dismiss the third-party complaint of the Association of Retail Travel Agents (ARTA) against Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., and United Air Lines, Inc., in Docket OST 99-6691 without prejudice.⁴

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

*An electronic version of this document is available on the World Wide Web
at the following address:*

http://dms.dot.gov/reports/reports_aviation.asp#orders

⁴ We take no action here on ARTA's request for a rule banning certificated carriers from jointly owning and operating on-line travel sites open to the public. The rulemaking issues ARTA raises are already under consideration in our pending Computer Reservation System Regulations (14 CFR Part 255) Rulemaking (Advance Notice of Proposed Rulemaking, Docket OST-97-2881, 62 FR 47606 [September 10, 1997]; Supplemental Advance Notice of Proposed Rulemaking, Docket OST-1998-4775, 65 FR 45552 [July 24, 2000]).