



Order 2002-9-2

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

Issued by the Department of Transportation
on the 4th day of September, 2002

SERVED SEPT. 4, 2002

**Complaint of
The American Society of Travel Agents, Inc.,
and Joseph Galloway**

against

**United Air Lines, Inc., American Airlines,
Inc., Delta Air Lines, Inc., Northwest
Airlines, Inc., Continental Airlines, Inc., US
Airways, Inc., Trans World Airlines, Inc.,
America West Airlines, Inc., Alaska Airlines,
Inc., American Trans Air, Inc., Horizon Air
Industries, Inc., d/b/a Horizon Air, Midwest
Express Airlines, Inc., Air Canada, KLM
Royal Dutch Airlines, TACA International
Airlines, S.A., and Société Air France**

Docket OST-99-6410

**Complaint of
The American Society of Travel Agents, Inc.,
and Hillside Travel, Inc.**

against

**Delta Air Lines, Inc., United Air Lines, Inc.,
American Airlines, Inc., Northwest Airlines,
Inc., Continental Airlines, Inc., US Airways,
Inc., America West Airlines, Inc., American
Trans Air, Inc., Air Canada, and Orbitz, L.L.C.**

Docket OST-02-12004

ORDER

On October 26, 1999, the American Society of Travel Agents and Joseph L. Galloway¹ (collectively, "ASTA") filed a complaint against United Air Lines, Inc. ("United"), American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), Northwest Airlines, Inc. ("Northwest"), Continental Airlines, Inc. ("Continental"), US Airways, Inc. ("US Airways"), Trans World Airlines, Inc. ("TWA"),² America West Airlines, Inc. ("America West"), Alaska Airlines, Inc. ("Alaska"), American Trans Air ("American Trans Air"), Horizon Air Industries, Inc., d/b/a Horizon Air ("Horizon"), Midwest Express Airlines, Inc. ("Midwest Express"), Air Canada, KLM Royal Dutch Airlines ("KLM"), TACA International Airlines, S.A. ("TACA"), and Soci  t   Air France ("Air France") in Docket OST-99-6410. ASTA alleges that these carriers are attempting to impede consumers' access to travel agencies in violation of 49 U.S.C. §41712.

Subsequently, on March 28, 2002, ASTA and Hillside Travel, Inc. (again, collectively, "ASTA") filed a complaint against Delta, United, American, Continental, US Airways, America West, American Trans Air, Air Canada, and Orbitz, L.L.C. ("Orbitz"). In this complaint ASTA makes a similar allegation regarding more recent practices.

Most of the issues that ASTA raises are slated to be investigated in other contexts. Because we cannot find that the public interest would be served by addressing any of these issues in an enforcement proceeding, we dismiss the complaint.

The Complaint in Docket OST-99 6410

ASTA is a trade association; its members are mostly travel agencies, which are "ticket agents" within the meaning of 49 U.S.C. §41012(a)(40). On October 25, 1999, ASTA filed this complaint, in which it charges the respondents, all either "air carriers" within the meaning of 49 U.S.C. §40102(a)(2) or "foreign air carriers" within the meaning of 49 U.S.C. §40102(a)(21), with engaging in

¹ Mr. Galloway is ASTA's President and Chief Executive Officer and the owner of a travel agency.

² Although American acquired control of TWA after the latter filed its response to ASTA's complaint, TWA's arguments are summarized independently of American's.

unfair practices and unfair methods of competition in air transportation and its sale in violation of 49 U.S.C. §41712.

ASTA maintains that travel agencies have played an essential role in fostering competition in the air transportation industry, a major policy goal of the federal aviation statutes ever since passage of the Airline Deregulation Act of 1978. According to ASTA, travel agencies promote competition by giving all air carriers, new entrants as well as incumbents, access to a professional distribution system without additional investment. Travel agencies also promote competition, ASTA contends, by serving as consumers' only neutral sources of comprehensive information and advice concerning carriers' complex arrays of fares and services. ASTA asserts that as sellers, travel agencies compete with the carriers themselves as well as other travel suppliers, but traditionally, consumers have paid the same price for the same fare whether using a travel agency or buying directly from the carrier. ASTA claims, moreover, that consumers have often saved money on travel by buying air tour packages offered by travel agencies. ASTA states that in 1995, travel agencies accounted for over 80 percent of all airline ticket sales, and it cites this figure as evidence of an overwhelming consumer preference for travel agencies' services.

ASTA alleges that in recent years, large carriers have been taking deliberate steps to undermine and perhaps even cut off consumers' access to travel agencies, to their own advantage but to the detriment of competition and consumer welfare. First, in 1995, with the exception of Southwest Airlines ("Southwest"), the major carriers capped travel agencies' commissions for domestic air transportation at \$50 per round trip. Second, in September of 1997, the carriers reduced their base commission rate for domestic air transportation from ten percent to eight percent, retaining the \$50 cap. Third, in 1998, carriers capped their commissions for international air transportation. In concert, ASTA maintains, these three steps reduced travel agency compensation by more than thirty percent, made much of travel agencies' airline-ticketing activity no longer remunerative, contributed to the demise of twelve percent of all independent travel agencies from 1995 through 1998, and forced many of the remaining travel agencies to shift resources away from the sale of air transportation. Then came the fourth step: beginning in October of 1999, first United, then American and Delta, and then Northwest and Continental reduced their base domestic commissions from eight percent to five percent.

In addition to paying travel agencies progressively less for selling air transportation, ASTA claims that both individually and collectively, the carriers have taken other steps to raise travel agencies' costs, reduce their

efficiency, and ultimately obstruct consumers' and travel agencies' access to one another. These steps include the following: the Airline Reporting Corporation's ("ARC's") imposition of unnecessary and unwanted training requirements and unnecessary ticket security requirements, carriers' inadequate compensation for travel agents' sales on the Internet (*i.e.*, a five-percent commission with a cap of \$10), carrier-owned Computer Reservations Systems' ("CRSs'") resistance to efficient displays of code-shared services, carriers' refusal to pay commissions for tickets issued for passive segments³ (and charging back CRS booking fees for such segments to the travel agencies), carrier-owned CRSs' discontinuation of productivity credit for unticketed passive segments, carrier-owned CRSs' rigorous enforcement of productivity quotas while the carriers themselves are making it more difficult for travel agencies to achieve these booking levels, carriers' refusal to allow travel agencies to collect service fees that the latter charge consumers via ARC's Area Settlement Plan, carriers' discrimination against travel agencies in enforcing their own ticketing policies, carriers' joint sponsorship (until 1998) of SATO, Inc., to compete against travel agencies, and carriers' misuse of travel agencies' confidential business information.

ASTA contends that as the carriers continue to reduce commissions, many more travel agencies will be forced out of business, and those that remain will have no choice but to charge consumers progressively higher service fees. ASTA predicts that under these circumstances, many consumers will not be able to afford to use travel agencies and will be forced to deal directly with the carriers, which will not offer them the complete and unbiased comparative information about prices and services that travel agencies provide. With ill-informed consumers, ASTA predicts, competition will decline and prices will rise. ASTA also predicts that the decimation of travel agencies will lessen competition by burdening small domestic carriers and many international carriers as well as new entrants, since these carriers particularly depend on the agency system to distribute their services.

Anticipating claims by the respondents that they must cut distribution costs and pass the savings on to consumers, ASTA contends that such claims are belied by the carriers' record profits and the concurrent steady increase in

³ ASTA does not define the term, "passive segments" in its complaint. America West has proposed in its Petition for Rulemaking to Amend 14 CFR Part 255, (Dockets OST-97-2881 and OST-97-3014, October 14, 1997), at 29, to define the term "passive booking" as "the creation of or change in a passenger name record (PNR) which is not transmitted to the participating carrier's internal reservation system."

ticket prices. ASTA asks that the Department find the respondents' reduction of travel agency commission rates from eight to five percent to be an unfair method of competition in air transportation or its sale and order the respondents to cease and desist immediately from paying commissions at the reduced level.

The Answers

The respondents all filed answers,⁴ all taking the position that the complaint should be dismissed. Legally, they argue (1) that ASTA does not have standing to bring this complaint, (2) that 49 U.S.C. §41712 serves to protect not competitors but competition and is concerned not with violation of private rights but with threats to the public interest, (3) that the Department does not have the authority to grant the relief ASTA seeks, (4) that the Civil Aeronautics Board and the Department have consistently confirmed in post-deregulation cases under 49 U.S.C. §41712 (and its predecessor, §411 of the Federal Aviation Act) that commission rates are not subject to federal regulation, (5) that as a matter of law travel agents do not compete with their carrier principals, and (6) that carrier-agency agreements provide for the carriers to set commissions unilaterally and therefore bar ASTA's complaint. Factually, the respondents argue (1) that they must reduce and control their distribution costs in order to remain competitive, (2) that the Internet has made distribution highly competitive and has precipitated efforts by all sellers to reduce their costs and operate more efficiently, (3) that ASTA's claims of unfair competition are without merit and devoid of factual support, (4) that ASTA's allegations concerning matters other than domestic travel agent commissions are both misplaced and irrelevant to its request for relief, (5) that just as commission rates rose as a result of market forces after deregulation, they are now declining due to market forces and not because the carriers are out to destroy travel agencies, and (6) that travel agencies have options for replacing revenues lost through lower commissions.

Legal Arguments

Delta, Northwest, Continental, TWA, and TACA assert that ASTA has no standing to bring this complaint under 49 U.S.C. §41712, because it is not one of the three types of entity that the statute expressly permits to file complaints:

⁴ On November 2, 1999, we granted American's request for a 30-day extension of the answer period, making answers due December 10. We accepted American Trans Air's inadvertently late-filed answer. Alaska and Horizon are commonly owned and filed a joint pleading.

an "air carrier," a "foreign air carrier," or a "ticket agent." Several of these carriers deny that ASTA's naming of Mr. Galloway as a co-complainant satisfies the standing requirement; TWA points out that it is the agency that Mr. Galloway owns, and not Mr. Galloway himself, that is the "ticket agent," the entity carriers appoint to sell tickets on their behalf. TACA states that it has no agency agreement with Mr. Galloway.

United, Continental, Midwest, and TACA contend that ASTA's allegations do not give rise to an enforcement action under 49 U.S.C. §41712, because this statute is concerned with protection of consumers, the public interest, and competition and not with protection of injured competitors or vindication of private rights. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976); *REA Express, Inc. v. Civil Aeronautics Board*, 507 F.2d 42, 46 (2d Cir. 1974); see Order 95-1-2 (January 4, 1995) at 5 and Order 80-5-11 (May 1, 1980). Continental points out that in *In re Travel Agency Commission Antitrust Litigation*, 898 F.Supp. 685, 689 (D.Minn. 1995), the court held that a dispute between travel agencies and carriers over commission rate reductions does not involve any significant public interest. These carriers deny that reducing domestic commissions harms consumers or threatens competition or the public interest.

United, American, Delta, Northwest, Continental US Airways, America West, Air Canada, and KLM maintain that the Department lacks the authority to grant the relief ASTA requests. Since passage of the Airline Deregulation Act of 1978, they argue, the Department has not had the power to dictate the industry's structure, including the distribution system that ASTA seeks to preserve, nor has the Department had the power to dictate commission rates: rather, Congress has ordained that these be determined by competitive market forces. In addition, KLM states that the U.S.-Netherlands Air Transport Services Agreement of September 1992 guarantees it the freedom to set or match fares, rates, and charges in air transportation, including agent commissions.

In a similar vein, United, Delta, Northwest, Continental, US Airways, Midwest Express, and Air Canada observe that since deregulation, the Department and its predecessor, the Civil Aeronautics Board, have repeatedly and consistently declined to regulate commission rates and have instead relied on competition to fashion commission rates as well as other features of the distribution system. They argue that the case law under 49 U.S.C. §41712 and its predecessor, §411 of the Federal Aviation Act, thus bars ASTA's complaint. Continental describes ASTA's complaint as a request that "the Department ... require airlines to pay supracompetitive commissions to agents to preserve the effective monopoly of travel agents for airline

passenger sales despite the advances in technology and changes in consumer buying preferences which characterize the current marketplace."

United, American, Delta, Northwest, Continental, US Airways, TWA, America West, Alaska and Horizon (filing jointly), Midwest Express, Air Canada, and TACA all take the position that the relationship of air carriers and their appointed travel agencies is a true principal/agent relationship and that therefore, as a matter of law, there is no "true competition between the airline and its agent," *Illinois Corporate Travel v. American Airlines*, 700 F.Supp 1485, 1492 (N.D. Ill. 1988), *aff'd*, 889 F.2d 751 (7th Cir. 1989). In fact, Continental and others argue, travel agencies have an affirmative duty not to compete with the airlines in the sale of air transportation, as it is a fundamental tenet of agency law that an agent is under a duty not to compete with its principal over the subject matter of the agency. See Restatement of the Law, Agency, 2d, §393.

United, American, Delta, US Airways, Midwest Express, and Air Canada claim that their agreements with travel agencies expressly allow them to set commission rates unilaterally, thus barring actions like the instant complaint. TACA states that it has no written agreements with travel agencies regarding commissions, but it, too, asserts the right to set its commissions unilaterally.

Factual Arguments

United, American, Northwest, Continental, US Airways, TWA, America West, Alaska and Horizon, American Trans Air, Midwest Express, Air Canada, TACA, and Air France deny that they cut commissions for any reason other than to reduce and control their distribution costs in order to remain competitive. They assert that competition drives all of their decisions on how to distribute their services, not just their recent commission reductions. Several of these carriers maintain that distribution costs are among any carrier's highest expenses. Some contend that reducing distribution costs increases efficiency and is thus pro-competitive, and they take issue with ASTA's allegation that they have failed to pass cost savings on to passengers.

United, Delta, Continental, US Airways, TWA, America West, Alaska and Horizon, American Trans Air, Midwest Express, Air Canada, and KLM claim that the growing use of the Internet has made the distribution of air transportation services much more competitive and much more efficient. Delta observes that Internet efficiencies have pushed commission levels down in various other businesses, such as brokerage firms, retailers, and automobile dealers, and it asserts that current commission levels reflect

merely the competitive marketplace's valuation of travel agents' services. As noted above, Continental characterizes ASTA's complaint as a request that the Department require the carriers to use a particular channel for distributing their tickets and to pay a supracompetitive price to do so. TWA states that the travel agency system developed at a time when it was more efficient for each carrier to appoint agents than to support hundreds of city ticket offices, but with the emergence of electronic tickets and direct Internet sales, travel agencies may no longer be carriers' least costly and most efficient means of distribution, especially given that travel agency sales entail high CRS booking fees in addition to commissions. TWA maintains that this development puts pressure on travel agencies to lower their costs if they are to remain a competitive means of distribution. Similarly, America West concludes that technical innovations like electronic ticketing have reduced the value of travel agencies' traditional services. Alaska and Horizon, American Trans Air, and Air Canada all assert that consumers now use Internet travel sites to get the same broad, objective information that ASTA says is only available from travel agencies.

United, Delta, Northwest, Continental, US Airways, TWA, America West, Alaska and Horizon, American Trans Air, Air Canada, KLM, and Air France argue that ASTA's claims of unfair competition are devoid of factual support. They note that ASTA does not even allege collusion on commission levels, much less provide any evidence that the carriers acted other than unilaterally, as several expressly affirm that they did. America West maintains that ASTA neither alleges nor shows any violation of the antitrust laws. All of these carriers also argue that ASTA has not provided any evidence of harm to competition or consumers but has merely speculated that the commission cuts will impede consumers' access to low fares and information about the carriers. They take issue with this speculation: Delta contends that with the proliferation of Internet sites offering comprehensive information about and access to low fares and comparative service options, the carriers have no power to keep this information from consumers. Similarly, Continental claims that consumers now have access via the Internet to information that formerly was only available to—and through—travel agents and carriers; Air Canada agrees.

The carriers argue that ASTA's claims of unfair competition are devoid of factual support in other ways as well. Continental, United, and Air Canada assert that ASTA has provided no hard evidence that commission rate reductions are causing travel agencies to fail. United, America West, and Air France argue that because travel agencies still account for a high percentage of sales, the airlines do not have the power to eliminate them as a distribution channel. America West also takes issue with ASTA's characterization of

travel agencies as the only source of unbiased information about carriers' fares and services, contending that many receive commission overrides that increase their revenues and "may encourage them to direct customers to specific airlines."⁵ On two grounds, Midwest Express and Air Canada dispute ASTA's allegation that potential new entrant carriers may fail to materialize if they do not have access to travel agencies for distributing tickets: (1) that ASTA has provided no supporting evidence, and (2) that as a practical matter, a computer and a web page and a server are all that any new entrant would need to reach what Midwest Express calls "the increasingly greater number of 'wired' consumers." Air France observes that not all carriers have lowered their commission rates and that as a foreign carrier, it has no base domestic commission level; it also states that since it accounts for less than one percent of all ticket sales in the United States, it has no power to drive travel agents out of business.

United, Delta, Northwest, Continental, TWA, America West, Alaska and Horizon, Midwest Express, Air Canada, and Air France contend that ASTA's allegations concerning matters other than domestic travel agent commissions are both misplaced and irrelevant to its request for relief. United and Delta defend the practices at issue as reasonable and prudent measures that have been adopted not to harm travel agencies but to further the carriers' legitimate business interests. United maintains that ASTA's interests are well represented whenever ARC is considering a new policy. United also maintains that ARC now has a program that does let travel agents assess fees through the Area Settlement Plan. United denies that it discriminates against travel agencies in enforcing its ticket policies. Delta and America West observe that passive segments are at issue in the Department's CRS rulemaking (Docket OST-97-2881); Northwest makes a similar observation regarding displays of code-shared services. United and Northwest assert that any complaint concerning SATO is moot in view of SATO's sale by the airlines and that in any event the airlines did not pay SATO commissions. Delta and Midwest Express note that ASTA's complaint does not ask the Department to intervene in any matter other than the level of domestic commissions. Continental asserts that ASTA does not show or even allege that any of the practices of which it complains is unreasonable; Alaska and Horizon note that ASTA does not label them unfair; and Continental denies

⁵ The Department's Inspector General has voiced a similar concern, questioning whether a travel agency that receives override commissions can always be relied upon to direct the consumer to the carrier offering the best fares or services even when that carrier is only paying standard commissions. See Office of Inspector General Audit Report CE-1999-060 (March 2, 1999).

that these practices are intended to raise travel agencies' costs, reduce their efficiency, or obstruct consumers' and travel agencies' access to one another as ASTA alleges. Similarly, TWA contends that ASTA has provided no evidence of anticompetitive intent. Air France claims that it is not involved at all in any of these practices.

Delta, Northwest, and Continental contend that like the increase in travel agent commission rates following deregulation, the recent decrease in commission rates merely reflects market forces, including the rise of the Internet, and does not evince any intent or ability on the part of the carriers to drive travel agencies out of business. Delta and Continental chide ASTA for supporting a deregulated marketplace only when commission rates are high.

Delta, Continental, America West, Air Canada, and TACA maintain that travel agencies have options for replacing revenues lost due to lower commissions. Delta suggests that travel agencies might improve their efficiencies, enhance the value of their services to consumers, and focus on increasing segments of their business that are more profitable. All five carriers contend that if the services of travel agencies are as valuable to consumers as ASTA believes, consumers will readily pay fees to get these services, as some already do. Continental claims that many travel agencies have already been actively marketing their expertise to consumers with positive results. Continental also claims that in the current economy, the trend in industries where agents do play a role in distribution is for agents' income to derive from the customer, not the supplier. TACA states that travel agents are free to book on airlines offering higher commissions.

ASTA's Reply and First Amendment

In response to the answers, ASTA filed a reply and a motion to amend the complaint.⁶ In its reply, ASTA takes issue with all of the carriers' arguments. First, ASTA denies that it is seeking to protect competitors or to vindicate private rights. To the contrary, ASTA says, it seeks to protect competition and to vindicate the public interest: it seeks to curb the carriers' exercise of market power before the public is deprived altogether of objective, comparative information about air transportation and is thus consigned to making poorly informed choices and paying higher fares. Second, ASTA contends that because the complaint alleges unfair methods of competition and seeks to

⁶ We grant ASTA's motions for leave to file its reply and to amend its complaint, filed January 20 and January 24, 2000, respectively.

further the public interest, the Department has ample authority to investigate it, as 49 U.S.C. §41712 is broader than the antitrust laws.

Third, ASTA maintains that it has standing to file its complaint, both by virtue of its long practice of appearing as the representative of the "ticket agents" who constitute the bulk of its members and under principles of associational standing, *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977). ASTA also maintains that Mr. Galloway has standing by virtue of earning his living as a travel agent, but it states that to avoid controversy, it will amend the complaint to add his agency as a complainant. Furthermore, ASTA asserts, even aside from the question of standing, the statute allows the Secretary to begin an investigation of the issues ASTA has raised on his own initiative.

Fourth, ASTA takes issue with the contention that as a matter of law, travel agencies do not compete with their carrier principals. ASTA apparently believes that the *Illinois Corporate Travel* case does not apply because it is over ten years old. It claims that whatever may have been true in 1989 when the case was decided, today, carriers are striving to divert sales from travel agencies, and agencies are competing with carriers for sales by offering consumers the information that lets them choose intelligently between carriers' competitive services.

Fifth, ASTA restates its belief that without travel agencies providing ready sales outlets for new entrants and giving consumers comprehensive and objective information, entry, exit, and price and service competition will all decline. ASTA observes that despite the growth of Internet sales, the vast majority of consumers still prefer to deal with travel agencies, and it believes that this preference would persist indefinitely were it not for the carriers' active, deliberate interference. ASTA claims that the carriers' reduction of their distribution costs will not result in the best outcome—or even an acceptable outcome—for consumers. Since the carriers pay very low commissions for bookings originating on the Internet, only those on-line travel agencies that are owned by carriers are ultimately likely to survive, ASTA asserts, so the Department should not rely on the Internet to give consumers the same quality of information that travel agencies have traditionally provided.

Sixth, ASTA takes issue with the carriers' claims that they must reduce distribution costs in response to market forces. In ASTA's view, nothing about the Internet requires the carriers to reduce commissions below the travel agencies' costs of doing business, raise the agencies' costs, impair their competitive effectiveness, and strain their relationships with consumers.

Seventh, ASTA denies that the provisions in its members' agreements with individual carriers that allow the latter to set commission rates unilaterally vindicate the commission reductions or deprive the Department of the power to act under 49 U.S.C. §41712. ASTA likens these provisions to adhesion contracts and claims that its members have no power to avoid them.

Eighth and finally, turning to the practices other than commission reductions listed in its complaint, ASTA argues that even if these practices are lawful individually, the Department must still consider their concerted effects, along with the effects of the commission reductions, on the public interest. Together, ASTA complains, these practices threaten the long-term availability of independent, neutral, comparative price and service information to consumers. ASTA asks the Department to assess not only these practices but also any others that may come to light during its investigation.

In its motion to amend the complaint, to resolve the standing issue, ASTA asks to add Galloway International, Inc., d/b/a Trans-Continental Travel, the travel agency owned by Mr. Galloway, as a party complainant. To broaden its request for relief beyond commission rates, ASTA asks to amend its request for relief to include "such other and further relief as the Department finds to be in the public interest."⁷

ASTA's Second Amendment

On March 27, 2000, ASTA filed a motion for leave to amend its complaint again to allege that some of the respondents have engaged in additional unfair practices and unfair methods of competition since the complaint was filed.⁸ ASTA states that in mid-January, a number of U.S. carriers, including United, American, Delta, Northwest, Continental, US Airways, TWA, America West, Alaska, American Trans Air, Horizon, and Midwest Express, added a fuel surcharge of \$10 per flight segment to their fares. On February 16, by letter, ASTA asked the Department to investigate certain carriers' failure to include these fuel surcharges in the CRS fare displays used by travel agents and for publication in carriers' Internet web sites. On March 23, the Department issued a notice in Docket OST-2000-6821, in which the United States Travel Agent Registry has raised related issues, directing the

⁷ ASTA believes that 49 U.S.C. §41712 would empower the Department to grant additional relief even without this explicit request.

⁸ We grant ASTA's motion for leave to amend its complaint.

respondents in that case, including American, Continental, Delta, Northwest, and United, to respond *inter alia* to ASTA's letter.⁹

ASTA claims that these carriers' responses in Docket OST-200-6821 show "a conscious and deliberate pattern of conduct whose purpose and effect is to impose additional work burdens, and costs, on travel agents while offering better information to consumers who deal 'direct' through their Internet web sites." Specifically, ASTA reports, the carriers state that they provide fare information to the Airline Tariff Publishing Company, which in turn provides it to the CRSs. The carriers disclaim responsibility for any failure by the CRSs to include fuel surcharges in the fares listed on the first fare display screen. Each affirms that its own web site fully complies with the Department's advertising requirements by including fuel surcharges in the first fare display that the consumer sees. ASTA says that this is so even when the data base for the carrier's web site and the data base for a CRS that does not include fuel surcharges in its initial fare display are one and the same. ASTA concludes that the carriers are deliberately putting travel agencies at a disadvantage *vis-a-vis* their own web sites; ASTA argues that they are thus taking yet another step to undermine the travel agencies' ability to adapt to changes in the marketplace and to continue serving as consumers' neutral and independent sources of comparative price and service information.

Answers to ASTA's Second Amendment

American, ATA, Continental, Delta, Midwest Express, Northwest, United, and US Airways filed responses to ASTA's second amendment. Each carrier denies that it has engaged in any unfair or deceptive practice within the meaning of 49 U.S.C. §41712. American and US Airways maintain that the fare search displays that do not include fuel surcharges on the first screen—the subject of ASTA's second amendment—are not deceptive to consumers, who do not see them; US Airways points out that the Department, like its predecessor, the Civil Aeronautics Board, has long permitted fare surcharges as long as the total price, including any surcharge, is disclosed before booking and in fare advertisements. American, Continental, Delta, Midwest Express, Northwest, United, and US Airways all assert that the fare search displays are designed and provided by the CRS vendors, not the carriers. Some of these carriers take the position that the complaint in ASTA's second amendment belongs before the vendors, not the Department,

⁹ The Department also asked US Airways, which is not a respondent in Docket OST-2000-6821, to respond to ASTA's letter, but the carrier filed no response.

and most deny that they have any control over any vendor's choice of content or functionality.¹⁰

American, Midwest, and Northwest claim that as a practical matter, these fare search displays cannot show total fares, because applicable surcharges, fuel or other, can vary by airport, routing, or itinerary, which in these displays are not specific. American and US Airways point out that these fare search displays have never listed total fares and that travel agents have always had to price an itinerary in a specific city-pair in order to find the lowest total fare.¹¹ They also claim that as professionals, travel agents are aware of airlines' surcharges, are well-trained in exploiting CRS functionality, and can readily use a combination of CRS tools to find the lowest available fare for any given itinerary.

Delta likens airlines' web sites for consumers and CRSs' fare search displays for professional travel agents to the proverbial "apples and oranges," and Midwest Express, Northwest, United, and US Airways make similar arguments. They all maintain that airlines' web sites require input of specific itinerary information and are themselves required by regulation and policy to indicate the full price of any transportation before a consumer makes a purchase commitment. In contrast, they maintain, CRSs' fare search displays provide a useful starting point for travel agents looking for low fares. They are not designed to be itinerary-specific, as noted above, and thus cannot yield the same all-inclusive fare information that a consumer sees on an airline's web site.¹²

ATA, Continental, Northwest, and United argue that ASTA's second amendment fails to sustain its allegation of a "conscious and deliberate pattern of conduct" that harms travel agents, burdens them with additional costs, or puts them at a disadvantage.¹³ ATA and Northwest characterize

¹⁰ This disclaimer is made by Northwest and United, each of which holds an equity interest in a CRS vendor, as well as several other carriers.

¹¹ Midwest Express asserts that these displays do warn the travel agent that fuel surcharges may apply.

¹² Delta observes that travel agents are always free to use airlines' web sites to find low fares for their clients if they believe them superior to CRSs as a tool.

¹³ Northwest specifically denies that its answer in Docket OST-2000-6821 constitutes an admission of such conduct. United states that travel agents still sell the bulk of its tickets despite the rise in Internet sales and thus contends that it derives no benefit from any business practice of CRS vendors that
(footnote continued on next page)

ASTA's second amendment as mere repetition of its initial complaint, itself merely a protest against the efficiency and convenience of Internet sales. In addition, Northwest and United assert once again that travel agents legally do not compete with their airline principals in ticket sales.

The Complaint in Docket OST-02-12004

On March 28, 2002, ASTA and Hillside Travel, Inc., a "ticket agent" within the meaning of 49 U.S.C. §41012(a)(40) (again, collectively, "ASTA"), filed a complaint against Delta, United, American, Northwest, Continental, US Airways, America West, American Trans Air, Air Canada, and Orbitz, LLC, an Internet travel agency owned by Delta, United, American, Northwest, and Continental. Incorporating by reference much of its complaint in Docket OST-99-6410, ASTA alleges that the respondent carriers have violated 49 U.S.C. §41712 anew by eliminating their base commissions to travel agencies for U.S.-originating air transportation and also refusing to make their low Internet fares available for sale by travel agencies through CRSs, which ASTA claims its members must use to obtain information and make bookings.¹⁴ ASTA contends that in offering their lowest Internet fares only on their own websites or through Orbitz, the five carriers that own Orbitz are deliberately inducing consumers not to do business with travel agencies.¹⁵ Reasoning that the abolition of base commissions means that the respondent carriers can now do business with travel agencies at virtually no cost to themselves, ASTA contends that these carriers no longer have any business justification for refusing to offer their low Internet fares through the CRSs. ASTA argues that this refusal, the carriers' elimination of base commissions, and their selling these low fares through Orbitz together constitute their latest effort "to (a) eliminate and reduce competition from the affected travel agencies as independent sources of information and booking services for consumers, and

makes travel agents do additional work to identify consumers' best price and service options.

¹⁴ ASTA asserts that travel agencies have no practical alternative to CRSs because no other technology offers them such complete information, because the booking thresholds in most agencies' subscriber contracts make booking other than via their CRSs prohibitively expensive, and because, as most agencies' CRSs are electronically linked to their automated back-office accounting and reporting systems, booking other than via the CRSs is prohibitively inefficient.

¹⁵ ASTA continues to maintain that travel agencies and carriers are competitors in the sale of air transportation and adds that its members now compete with Orbitz as well.

(b) eliminate and reduce competition from the affected agencies as competitors ... in the distribution of air transportation services." ASTA predicts that with the success of this effort, which it characterizes as "acts of monopolization and attempted monopolization," the respondent carriers will raise fares and cut service. It asks us to forbid the respondent carriers from withholding their low Internet fares from sale by travel agencies through CRSs in conjunction with their elimination of base travel agency commissions.

The Answers

As in the case of Docket OST-99-6410, the respondents all filed answers,¹⁶ all taking the position that the complaint should be dismissed. Among other things, the carrier respondents argue (1) that in lowering their distribution costs they are meeting competition, to the benefit of consumers, (2) that there is no legal basis and no factual basis for intervention by the Department, (3) that ASTA's claims have no factual support, and (4) that CRS market power and high CRS booking fees are the true cause of the difficulties in which travel agencies now find themselves.¹⁷

Each of the carrier respondents maintains that it eliminated base commissions unilaterally as a cost-cutting measure to meet low-fare competition and that it does not distribute its low Internet fares through CRSs because this channel is prohibitively costly. Some cite the successful low-fare carriers Southwest and JetBlue, both of which sell a majority of their tickets directly and thereby avoid paying high CRS fees, as a motivating factor. Some speculate that development of lower-cost distribution channels such as Orbitz might eventually diminish the CRSs' market power and thus lower the costs to carriers of selling their services through brick-and-mortar travel agencies. Some defend the use of special pricing to draw customers to low-cost distribution channels as a time-honored technique that should be permitted

¹⁶ On April 1, 2002, we granted American's request for a 14-day extension of the answer period, making answers due April 29, 2002.

¹⁷ The respondents also argue that the travel agencies are not their competitors within the meaning of 49 U.S.C. §41712, that this complaint is barred by the ARC agreement, that ASTA lacks standing to bring this complaint, and that they are not seeking to remove travel agencies from the distribution network. These arguments have already been advanced in Docket OST-99-6410 and are not summarized again here. Similarly, the following summary of the arguments listed above includes only new material.

to air carriers just as it is to firms in other industries, because reducing distribution costs enables carriers to offer both lower fares and better service.¹⁸ American Trans Air asserts that its need to control costs has grown particularly acute in the aftermath of the terrorist attacks of September 11, 2001.

Each of the carrier respondents except American argues here that there is no legal or factual basis for intervention by the Department. In addition to arguments already advanced in Docket OST-99-6410, some contend that in light of the Department's pending review of the CRS rules and its ongoing scrutiny of Orbitz, using an enforcement proceeding to resolve open questions about distribution would be particularly inappropriate. Some deny that there is anything unfair or deceptive in a carrier's offering deeply discounted fares only through distribution channels with the lowest costs. Citing the benefits consumers have reaped from their deeply-discounted web fares, some accuse ASTA of asking the Department to turn consumer protection law on its head by depriving consumers who are willing to shop through the highly-efficient Internet channels of the benefits that competition and new technologies have brought them. This approach, they reason, would benefit travel agencies at consumers' expense. American Trans Air and US Airways point out that they have no ownership interest in Orbitz; American Trans Air states that it does not even participate in Orbitz.

Each of the carrier respondents except American Trans Air argues in detail that ASTA's claims are devoid of factual support. In particular, these carriers argue that there is no evidence (a) that they eliminated base commissions with the intent of reducing competition from travel agencies, (b) that the end of base commissions will force travel agencies out of business, (c) that without travel agencies new entrants would find it harder to compete and the respondent carriers would gain market power, (d) that travel agencies are consumers' only "independent" source of fare information and booking services,¹⁹ (e) that without travel agencies consumers would lack access to

¹⁸ Carriers pay no commissions and no CRS booking fees on sales they make on their own websites. For sales through Orbitz, they pay set fees to Orbitz and reduced CRS booking fees. According to Northwest, this arrangement lowers its CRS distribution costs for fares booked on Orbitz by approximately one-third. Orbitz is also developing "direct connect" technology that will enable participating carriers to avoid CRS booking fees altogether when selling seats through Orbitz.

¹⁹ Some contend that indeed it is now the Internet that is the most neutral, unbiased source of travel information.

critical information regarding their travel options and would suffer losses, and (f) that selling low web fares on carrier-owned Internet sites will lead to higher fares or keep consumers from getting competitive price information or is in any other respect unfair or deceptive. Several of these carriers challenge ASTA's contention that the abolition of base commissions means that the carriers now have no business justification for refusing to sell their web fares through the CRSs. They accuse ASTA of ignoring both the substantial booking fees that carriers must pay on tickets travel agencies sell via CRS and the override commissions that many travel agencies still receive. Some dispute ASTA's assertion that travel agencies have no practical alternative to CRSs and claim that other vendors are already developing innovative systems that let travel agencies search for fares, make bookings, and manage their customers' accounts efficiently and effectively. Some argue that even without these alternatives, travel agencies are free now to book web fares for their clients via the Internet: Delta reports that its "Online Agency Service Center," a special travel agency-only web site hosted at *delta.com*, allows any travel agency to sell a ticket at any of Delta's web fares. Northwest asserts that its web fares contribute a very small percentage of its total ticket sales and that over the past year under five percent of its passengers have bought web fares. The vast majority of its passengers bought tickets that could have been sold through any distribution outlet. United contends that ASTA's complaint fails to show any harm to consumers.

America West, American, Continental, Delta, and United attribute the problems that ASTA's members face to the market power of CRSs and the high booking fees that this power allows CRSs to exact from participating carriers. They argue that supracompetitive CRS fees make airfares artificially high and that granting the relief ASTA requests would reinforce the CRSs' market power and could push distribution costs, and hence airfares, even higher. They argue that two of the Department's CRS rules, the mandatory participation rule (14 CFR §255.7) and the non-discrimination rule (14 CFR §255.6) should be rescinded because they have the perverse effect of reinforcing the systems' market power. United claims that although it has made notable progress in its drive to reduce overall distribution costs, in 2001 these costs exceeded \$2.0 billion, of which CRS booking fees constituted "a significant portion."

Orbitz agrees with the carrier respondents that this complaint should be dismissed as a matter of policy and law. Advancing many of the same contentions as the carriers, Orbitz also argues that the ongoing changes in the distribution of air transportation are serving to correct flaws inherent in the traditional distribution system. Theoretically, Orbitz reasons, well-informed consumers who pay for services directly can assess costs and benefits and

make economically rational choices, which in turn will force sellers in a competitive market to offer services of high quality at reasonable prices. Air transportation, however, has not followed this model. Instead, travel agencies have served the consumer but have been paid commissions by the carriers, and CRSs have provided information and booking services to travel agents but have similarly been paid booking fees by the carriers. Both commissions and booking fees have thus been part of the carriers' distribution costs, which eventually became their third highest cost after labor and fuel.

Orbitz asserts that the carriers began lowering travel agency commissions in 1995 in response to competitive pressures to reduce their costs, recently eliminating base commissions altogether. Travel agencies have had to compensate for lost revenues by charging consumers directly for the benefit of their knowledge, expertise, and professional service. Orbitz asserts that those agencies that have earned their fees by providing good service have succeeded in making the necessary transition from revenue based on commissions to revenue based on consumer fees.

Like several of the respondent carriers, Orbitz attributes the travel agencies' current problems to the carriers' need to cut their distribution costs further by avoiding high CRS booking fees.²⁰ Travel agencies have traditionally depended on CRSs for information and booking but have had no control over booking fees, which have continued to increase, and no incentive to bargain over these fees, since they are paid by the carriers. With the exception of Southwest and JetBlue, the carriers in turn have been forced to pay the high booking fees or lose sales through thousands of travel agencies if eliminated from any CRS's displays. This, in Orbitz's view, accounts for the carriers' having seized upon the Internet as a lower-cost channel for distributing their services, first by developing their own websites and more recently by participating in Orbitz, which offsets the CRS booking fees, as well. Orbitz predicts that the Internet can eventually compete more directly with CRSs and that this competition should force the systems to lower their booking fees and negotiate with the carriers to get their low Internet fares. Orbitz believes that these changes will benefit travel agencies by making them a more competitive distribution channel.

²⁰ In support of its characterization of the CRS booking fees as supracompetitive, Orbitz states that these fees have continued to rise annually even as the major costs of the CRS business, namely computing costs and telecommunications costs, have markedly declined.

Galileo International's Response to Orbitz, Orbitz's Reply, and Galileo's Second Answer

Galileo International, which operates the Apollo CRS, filed a response to Orbitz's answer; Orbitz filed an answer to Galileo's response; and Galileo filed a second answer.²¹

Galileo essentially maintains in its response that CRS booking fees are not excessive, that the systems compete vigorously for travel agent subscribers, and that the relative costs of Orbitz and CRSs as distribution channels have little to do with the carriers' decisions to make web fares available only through Orbitz. According to Galileo, the premium CRS services that most carriers now use rely on sophisticated functionality that is expensive to develop and maintain. Galileo observes that as a percentage of air fares, CRS booking fees are low relative to other service fees, such as those charged by Telecharge, Ticketmaster, and ATMs. Galileo claims that while some of its computing and telecommunication costs may have fallen, its hardware, development, and marketing costs have risen substantially, and it has had to increase booking fees to cover these costs. Its booking fees also reflect the substantial financial incentives it claims it must pay to travel agencies both to win new Apollo subscribers and to keep existing subscribers from switching to another system, especially now that the carriers have eliminated base commissions. Galileo takes issue with Orbitz's claim of being a lower-cost distribution channel than the CRSs²² and suggests that a CRS's cost advantage over Orbitz would be even greater for low Internet fares than for regular fares.²³ According to Galileo, CRSs must have access to these web fares in order to be attractive to travel agents and help them retain business; otherwise, over time, both travel agents and CRSs will go out of business, which will hurt consumers.

In its answer, Orbitz claims that comments filed in the pending CRS rulemaking proceeding by carriers of all sizes conclusively show that CRS

²¹ All three pleadings, filed May 20, June 18, and July 31, 2002, respectively, were accompanied by motions for leave to file an otherwise unauthorized document, which we grant.

²² Galileo argues that override commissions should not be considered as part of the carriers' costs of selling through travel agencies that use CRSs on the grounds that the carriers pay these commissions voluntarily.

²³ Galileo also questions whether, given how low these Internet fares are, listing them on Orbitz would improve profitability even if Orbitz were a less costly distribution channel.

booking fees, which carriers have little or not choice but to pay, have long been excessive and have continued to rise at an unjustified rate. Orbitz argues that Ticketmaster and Telecharge serve roughly the same function for consumers as a travel agent and CRS combined and that ATMs are not analogous to either, and it concludes that Galileo's comparison is therefore inapt; in addition, Orbitz notes that the fees charged by Ticketmaster, Telecharge, and ATMs are frequently criticized as excessive. Orbitz also takes issue with Galileo's contention that CRSs lack market power over travel agencies, arguing that many CRS practices work to keep the agencies from switching systems. Orbitz disputes Galileo's calculation of the relative costs to carriers of selling through Orbitz and selling through travel agencies and CRSs and maintains that in fact a charter associate of Orbitz would pay half again as much to sell an itinerary through a travel agent as it would pay to sell the same itinerary through Orbitz. Finally, Orbitz denies that the non-discrimination rule, 14 CFR §255.6(a), prohibits a CRS from competing for access to carriers' low Internet fares by offering lower booking fees or other benefits, provided that it makes the same offer to all airlines that participate at the same service level.

Galileo submits in its second answer that Orbitz has not substantiated its contention that Galileo's booking fees are excessive. It claims that Orbitz's calculation of the relative cost to the carrier of selling the same itinerary through Orbitz and through a travel agent using a CRS shows the latter to be fifty percent higher because it includes a "hypothetical override commission that has nothing to do with Galileo, a commission the airline voluntarily pays the travel agent in an effort to win more business from that agent." (Galileo also implies without expressly stating that the booking fee that Orbitz assumed in its calculation is not correct.) Finally, Galileo claims to have offered carriers lower booking fees for their low web fares and asserts that the carriers have "generally declined to make their web fares available unless Galileo provides wholly unrealistic concessions on other types of bookings."

ASTA's Reply

ASTA filed a reply to the respondents' answers.²⁴ First, ASTA clarifies that this complaint is not against the carriers' elimination of base commissions *per se*, but rather the combination of eliminating base commissions and denying travel agents access to their low Internet fares. Second, ASTA denies that it lacks standing to file this complaint. Third, ASTA contends that even if Orbitz is correct in characterizing travel agencies as "the collateral victims of

²⁴ We grant ASTA's motion of July 9, 2002, for leave to file this reply.

CRS monopoly pricing," Orbitz itself amounts to "replacing CRS market power with the market power of the five largest airlines through their chosen instrument for dominating the retailing of air travel on the Internet and elsewhere." ASTA complains that Orbitz's guaranteed minimum fee structure gives it an unfair competitive advantage over travel agencies. Fourth, ASTA maintains that notwithstanding the principles behind the deregulation of the air transportation industry, 49 U.S.C. §41712 still empowers the Department to address abuses of market power that fall short of antitrust violations but threaten harm to consumers. Fifth, ASTA denies that its members can readily book low Internet fares for their clients at the carriers' web sites, because when they do not use their CRSs they have no effective passenger record management system and receive no credit towards CRS booking thresholds.

Sixth, ASTA denies that it was or is anomalous for the carriers to pay commissions to travel agencies for services the latter render to consumers and booking fees to CRSs for services the latter render to travel agencies. ASTA characterizes this arrangement as "a function of the fact that air transportation, as a service, requires distribution as much as it requires the law of gravity." Observing that the carriers would have had to perform distribution services themselves had they not paid intermediaries to perform them, ASTA insists that these services have value to the carriers as well as to consumers and contends that the carriers are only able to push all commission expenses onto the consumer, in the form of travel agencies' service fees, by virtue of their market power. By forcing travel agencies to charge service fees and thus become a more costly channel to consumers, while simultaneously offering consumers low Internet fares but not making them available through travel agencies, and by doing the latter collectively through a joint venture controlled by the five largest carriers, ASTA maintains, the carriers are engaging in an unfair method of competition.

Seventh, ASTA denies that distribution is cheaper through Orbitz than through travel agencies and that the carriers are therefore justified in withholding their low Internet fares from travel agencies. ASTA reasons that the low web fares are not based on any costs, including distribution costs, but solely on what the market will bear, and it contends that because these fares generally do not cover the carriers' costs, the carriers have no valid reason for not selling them through travel agencies. ASTA also argues that the founding carriers' investment in Orbitz, including Orbitz's operating losses, should be counted as part of their costs of selling through that channel. ASTA implies that the founders have engaged in an unfair method of competition by creating Orbitz in order to destroy their travel-agency competitors via below-cost pricing. Eighth, ASTA reiterates its contention

that its members are the carriers' competitors and adds that at least those carriers that own Orbitz cannot be heard to disavow competing with travel agencies. ASTA maintains that the carriers are not free to turn consumers against the travel agency distribution channel by denying that channel low Internet fares.

Disposition

Because neither of the records in these two proceedings indicates that the respondent carriers and Orbitz have likely been engaging in unfair practices or unfair methods of competition within the meaning of our statute, we find that an investigation of the matters alleged by ASTA would not be in the public interest. We therefore dismiss ASTA's complaints. Many of the issues ASTA raises, moreover, will be investigated in other contexts.

The complaints seek relief under 49 U.S.C. §41712, which provides in pertinent part as follows:

§41712. Unfair and deceptive practices and unfair methods of competition

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

* * *

Also relevant to the complaints are paragraph (a), entitled "Economic Regulation," of 49 U.S.C. §40101, entitled "Policy," which directs the Secretary to consider a number of public interest goals, including the following:

- (4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

* * *

(6) placing maximum reliance on competitive market forces and on actual and potential competition—

(A) to provide the needed air transportation system; . . .

* * *

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

* * *

(12) encouraging, developing, and maintaining an air transportation system relying on actual and potential competition—

(A) to provide efficiency, innovation, and low prices; and

(B) to decide on the variety and quality of, and determine prices for, air transportation services.

(13) encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry.

The Complaint in Docket OST-99-6410

As a preliminary matter, we reject the contention that we should dismiss this complaint because ASTA and Mr. Galloway do not have standing to file it. It is true that neither of them is a "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.²⁵ 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 (as amended February 9, 2000 and effective

²⁵ The amended complaint includes Mr. Galloway's travel agency, which has express standing to complain, as a complainant.

March 10, 2000); cf. 14 CFR 302.201 (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 nature of the complainant.

Turning to the merits of this complaint, our authority to prohibit unfair methods of competition is, as ASTA observes, broader than the antitrust laws. It is not so broad, however, that it permits action against any and all conduct that could be characterized as unfair or even anticompetitive. We may prohibit practices by airlines or travel agencies that violate the antitrust laws or antitrust principles, but we may not prohibit other competitive practices, not even in an attempt to improve competition or make it fairer. Specifically, 49 U.S.C. §41712, which Congress modeled on §5 of the Federal Trade Commission Act, 15 U.S.C. §45, empowers us to prohibit anticompetitive conduct (1) that violates the antitrust laws, (2) that is not yet serious enough to violate the antitrust laws but may well do so if left unchecked, or (3) "[that], although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit," *E.I. Du Pont de Nemours and Co. v. Federal Trade Commission*, 729 F.2d 128, 136-137 (2d Cir. 1984); see *United Air Lines, Inc., v. Civil Aeronautics Board*, 766 F.2d 1107, 1112, 1114 (7th Cir. 1985) and cases cited therein; see also H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5. Thus, for us to take enforcement action against the respondent carriers for engaging in unfair methods of competition, we would have to find that the pleadings, taken together, show conduct that is likely either a violation of the antitrust laws or one of the following quasi-violations: an incipient violation, a near violation, or conduct contrary to these laws' spirit. The record does not support such a finding.

We see no evidence in the record that the respondent carriers have colluded to reduce the commissions paid to travel agencies or that they have conspired to raise travel agencies' costs for the purpose of weakening their relationships with consumers. Absent any such evidence, we cannot find that it is in the public interest to undertake an investigation of whether the carriers have committed a violation or a quasi-violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

The record is similarly devoid of evidence warranting an investigation of whether any of the respondent carriers has monopolized, attempted to monopolize, or combined or conspired to monopolize any relevant market in the air transportation industry, in violation or quasi-violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The antitrust laws generally allow firms to decide how to distribute their own goods and services, including whether and to what extent to do so directly or by agents. A carrier's unilateral decision to

stop selling its services through travel agencies would thus violate no antitrust principle. Moreover, ASTA has failed to sustain its claim that its members and their carrier principals are competitors within the meaning of the antitrust laws. As the court held in *Illinois Corporate Travel, Inc., supra*, 889 F.2d 751, 753 (7th Cir. 1989), "[t]ravel service operators are 'agents' for purposes of antitrust law when they sell tickets for air carriers' accounts."²⁶ The court noted that even when this case had earlier been before it, it had

thought it tolerably clear that travel service operators are the air carriers' agents. They carry no inventory and can book space only by requesting it from the carrier's computer; air carriers set the price for each ticket (sometimes changing the allocation of seats among price and travel-date-restriction categories by the hour), produce the service, deliver it direct [*sic*] to travelers, and take the risk of unsold seats. Although each travel service operator (conventionally called a "travel agent," a telling phrase) works with many airlines, hotel chains, and other suppliers of travel services, this is a common form of organization.

Id. at 752. ASTA has not shown that the court's observations and conclusions are no longer valid or that they are not legally germane to its complaint, *cf.* Order 99-4-19 (April 29, 1999), at 6. As the carriers' agents, moreover, travel agencies are by definition not their competitors: §393 Restatement, Second, of the Law of Agency states that "[u]nless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." In this competitive vacuum there can be no unfair competition.

Both ASTA and the respondents rely on the statute's policy directives in support of their respective positions. ASTA's reliance, however, is unavailing. As we have stated elsewhere,

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.

²⁶ The court went on to state that "[b]ulk sales – outright purchases by the travel agents and resales to flyers – are a different matter," *id.*, but bulk sales are not at issue here.

Order 99-4-19, *supra*, at 5. We do not read these directives as giving us authority to intervene in disputes over commission levels or other aspects of the contractual relationships between carriers and travel agencies absent evidence of a violation or quasi-violation of the antitrust laws.²⁷

We also cannot find that an investigation into whether the respondent carriers are violating 49 U.S.C. §41712 by engaging in unfair practices would serve the public interest. Within the meaning of that section, conduct may constitute an unfair practice "if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits," Order 92-5-60 (May 29, 1992) at 12. As stated above, longstanding public policy affirmatively allows each airline to decide how to distribute its tickets—subject, that is, to the antitrust laws. Moreover, the actions of which ASTA complains may well stem from the airlines' legitimate need to reduce their distribution costs in order to remain competitive, as they assert. Without evidence of unlawful collusion or actual harm to consumers, neither of which ASTA has provided, we cannot conclude that an airline's business decision is likely contrary to public policy and hence illegal.

ASTA's allegations that the challenged practices are injuring consumers substantially and not affording them any countervailing benefits are thus too speculative to support enforcement action at this stage. Nevertheless, we recognize that traditionally, consumers have benefited considerably from the services of travel agencies. The Enforcement Office is aware that the Department is continuing to monitor changes in airline distribution practices and can take appropriate action if and when it determines that they are likely reducing airline competition or depriving consumers of adequate information on fares and services in violation of 49 U.S.C. §41712.²⁸

²⁷ Of course, as 49 U.S.C. §41712 empowers us to prohibit deceptive practices as well as unfair methods of competition, we do have the authority to take action against practices that deceive consumers. We have exercised this authority, for example, to regulate advertising. ASTA does not allege consumer deception in its complaint. ASTA does allege that the carriers' conduct will drive travel agencies out of business, which in turn will harm consumers by depriving them of access to a neutral source of information on air travel. While this issue is not amenable to resolution in an enforcement proceeding, Congress has provided that it will be addressed by a commission, as discussed below.

²⁸ In addition, while we do not find here that the omission of fuel surcharges and other airline-imposed surcharges from CRSs' fare search displays means that the respondent carriers are engaging in unfair practices or
(footnote continued on next page)

Although we are dismissing ASTA's enforcement complaint, the Department will be examining a number of the issues it raises in another context. In our CRS rulemaking proceeding in Docket OST-97-2881, we are considering the display of code-shared services, passive segments, carriers' access to travel agencies' confidential business information, and whether travel agencies should be entitled to renegotiate CRS contracts with vendors whose carrier owners substantially change business conditions affecting the agencies—for example, by lowering commissions.

Distribution issues are also being addressed in a study mandated by Congress. Section 228 of P.L. 106-181, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, April 5, 2000, 114 Stat. 61 ("AIR-21"), provided for the establishment of the "National Commission to Ensure Consumer Information and Choice in the Airline Industry" to study the broad questions raised by ASTA: in particular,

(A) whether the financial condition of travel agents is declining and, if so, the effect that this will have on consumers; and

(B) whether there are impediments to information regarding the services and products offered by the airline industry and, if so, the effects of those impediments on travel agents, Internet-based distributors, and consumers.

Congress specifically directed the Commission to "pay special attention to the condition of travel agencies with \$1,000,000 or less in annual revenues." Based on its findings, the Commission is to make appropriate recommendations to improve the condition of travel agents and to improve consumer access to travel information.²⁹

unfair methods of competition, this is one CRS practice that the Enforcement Office has been monitoring in connection with its implications for consumers. See Notice of the Assistant General Counsel for Aviation Enforcement and Proceedings, "Prohibition on Deceptive Practices in the Marketing of Airfares to the Public Using the Internet," January 18, 2001 (posted at <http://airconsumer.ost.dot.gov/airconsumer> under "Rules and Guidelines").

²⁹ The legislation provided for the Secretary of Transportation to appoint three of the Commission's nine members. Of the other six, the Speaker of the House of Representatives appointed two, the House minority leader, one, the *(footnote continued on next page)*

Secretary Mineta formally announced the establishment of the Commission on May 16, 2002. David L. Winstead, a former Maryland Secretary of Transportation and a former chairman of the Maryland Aviation Commission, is the chairman. The other commissioners include Patrick V. Murphy, Jr., a former Deputy Assistant Secretary of Transportation for Aviation and International Affairs, Maryles Casto, President and CEO of Casto Travel, Inc., Ted R. Lawson, President and CEO of National Travel, Inc., Ann B. Mitchell, President and Owner of Carlson Wagonlit/Travel First, Inc., Joyce Rogge, Senior Vice President-Marketing of Southwest Airlines, Paul M. Ruden, ASTA's Senior Vice President for Legal and Industry Affairs, Gerald J. Roper, President and CEO of the Chicagoland Chamber of Commerce, and Thomas P. Dunne, Sr., Chairman, CEO, and President of the construction company Fred Weber, Inc. Richard J. Fahy, Jr., a former associate general counsel of American and a travel industry veteran, is serving as the Commission's executive director. The Commission has now held hearings in Washington, DC, on June 12, in Chicago, Illinois, on June 26, in San Francisco, California, on July 11, and again in Washington on July 31. It will issue its report in mid-November.³⁰

In sum, we are dismissing ASTA's complaint because the evidence does not show that an investigation is warranted under 49 U.S.C. §41712, but issues that ASTA raises will nevertheless be considered thoroughly and carefully in other, more appropriate contexts.

The Complaint in Docket OST-02-12004

The reasoning set forth above compels the dismissal of ASTA's later complaint as well. We see no evidence in the record that the carriers have colluded either among themselves or with Orbitz to eliminate base commissions and at the same time not make their low Internet fares available for sale through CRSs. We similarly see no evidence that any of the respondents has monopolized, attempted to monopolize, or combined or conspired to monopolize any relevant market in the air transportation. As

Senate majority leader, two, and the Senate minority leader, one. The Secretary was directed to appoint one representative of the travel agent industry, one representative of the airline industry, and one individual who is not a representative of either industry to chair the Commission.

³⁰ Transcripts of the hearings, written testimony, and other pertinent information have been posted on the Commission's web site, <http://www.ncecic.dot.gov>.


noted above, the carriers are generally free under the antitrust laws and 49 U.S.C. §41712 to choose the channels and the terms for distributing their services. We remain unpersuaded that ASTA's members are competitors of the carrier respondents within the meaning of the antitrust laws and our statute. We similarly remain unpersuaded that our statute's policy directives empower us to intervene in this dispute between carriers and travel agencies given the lack of evidence of a violation or quasi-violation of the antitrust laws. We also see no evidence that the respondent carriers and Orbitz have engaged in an unfair or deceptive practice within the meaning of our statute. Here again, ASTA's allegations that the challenged practices are injuring consumers substantially without providing compensatory benefits are too speculative to warrant enforcement action at this stage, although these allegations are sure to receive careful attention from the Commission. As noted above, the Enforcement Office is aware that the Department continues to monitor changes in airline distribution practices and can take appropriate action if and when it discerns that airline competition has lessened or that consumers are blocked from obtaining adequate information on fares and services.³¹

ACCORDINGLY, we dismiss the third-party complaint of the American Society of Travel Agents, Inc., Joseph Galloway, and Galloway International, Inc., d/b/a Trans-Continental Travel, against United Air Lines, Inc., American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Continental Airlines, Inc., US Airways, Inc., Trans World Airlines, Inc., America West Airlines, Inc., Alaska Airlines, Inc., American Trans Air, Inc., Horizon Air Industries, Inc., d/b/a Horizon Air, Midwest Express Airlines, Inc., Air Canada, KLM Royal Dutch Airlines, TACA International Airlines, S.A., and Société Air France in Docket OST-99-6410, and we dismiss the third-party complaint of the American Society of Travel Agents, Inc., and Hillside Travel, Inc. against Delta Air Lines, Inc., United Air Lines, Inc., American Airlines, Inc., Northwest Airlines, Inc., Continental Airlines, Inc., US Airways, Inc., America West Airlines, Inc., American Trans Air, Inc., Air Canada, and Orbitz, L.L.C. in Docket OST-02-12004.

³¹ The CRS issues raised by Orbitz and Galileo are under consideration in the Department's CRS rulemaking proceeding.

This order is issued under authority assigned in 14 CFR 302.406 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

(SEAL)

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