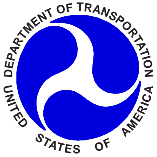
Order 2004-2-20



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

Issued by the Department of Transportation
on the **24th day of February, 2004**

SERVED: February 24, 2004

Complaint of
LYN-LEA TRAVEL CORP. d/b/a
FIRST CLASS INTERNATIONAL
TRAVEL MANAGEMENT

Against

AMERICAN AIRLINES, INC. and
THE SABRE GROUP, INC.
for violations of 14 CFR Part 255 and
49 U.S.C. §41712

Docket OST-98-3963

ORDER

By this order the Department of Transportation ("the Department") dismisses the complaint of Lyn-Lea Travel Corp. d/b/a First Class International Travel Management ("First Class") against American Airlines, Inc. ("American") and The SABRE Group ("Sabre"), the Computer Reservation System ("CRS") controlled by American at the time relevant to the complaint.[1] The Department also grants the motion for confidential treatment of certain proprietary and commercially sensitive information filed by American and Sabre.

The Complaint

[1] Until 1996, Sabre was a wholly-owned subsidiary of AMR Corporation, the parent company of American. During that year, AMR divested 18 percent of Sabre to the public. As of March 2000, Sabre became 100 percent publicly held.

First Class alleges violations of 49 U.S.C. §41712 and 14 CFR Part 255 by American and Sabre and seeks a formal enforcement proceeding, damages, punitive damages, a declaration that American and Sabre violated federal law, and an injunction against future violations.

A. Alleged Facts

First Class alleges that it served as an agent for American, which for most of the relevant time period was legally the same entity as Sabre, and had a positive relationship with that carrier from 1983, when First Class began operating, until 1996. From 1991 until 1996, First Class received significant commission override payments and "waivers and favors"[2] from American. First Class was not subscribing to Sabre during this period.

According to First Class, American tried to persuade favored commercial customers to switch from non-Sabre agencies to Sabre agencies and would do all it could to keep accounts at Sabre agencies.

The souring of the relationship between American and First Class began in 1994, First Class claims, when it decided to buy a competitor, Air-O Travel ("Air-O"), owned by Mary Earhart ("Earhart"). Air-O, a Sabre subscriber had significant time left on its Sabre agreement. Largely due to American's promises of benefits if First Class had Sabre, First Class decided to try Sabre as a secondary CRS. First Class informed American that it wanted only a limited commitment to Sabre because it had signed a new CRS agreement with Worldspan the previous summer that it did not want to break.

First Class signed a Sabre subscriber agreement in December 1994. The agreement contained what First Class characterizes as a liquidated damages clause: First Class had to use Sabre for at least 1,200 transactions a month (300 per terminal) or it would have to pay American a fixed amount based on future lost bookings. Air-O was making 4,000 bookings a month and First Class was booking 7,000 to 8,000 segments a month on Worldspan, so First Class did not anticipate any problems.

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[2] According to First Class, a "waiver" is an agreement not to enforce restrictions on a particular fare, and "favors" are free tickets, first class upgrades, movie and ticket vouchers, etc.

Six weeks into the agreement, American changed its commission structure from ten percent of the fare to a cap of $25.00 each way for domestic fares. This change caused an immediate 25 percent drop in First Class's income. American did not inform First Class during the negotiations for the Sabre contract that it was considering reducing the domestic commissions, and First Class contends that if it had had that information, it would not have been willing to assume the personnel and other overhead costs of operating two CRSs simultaneously. As a result of the commission change, First Class maintains, it had to cut costs. It asked employees to take voluntary layoffs, charged some customers fees, and "closed its Southwest desk." After several months, First Class cut back on its use of Sabre terminals.

First Class alleges that in November or December of 1994, and again in August of 1995, American representatives told First Class that if it did not make any Sabre bookings, it would owe $1,000 to $1,200 per month. On March 1, 1996, First Class received an invoice from American for $20,794.63 for six months' use of Sabre without meeting the minimum contractual booking requirements. That invoice was followed by another on April 1, 1996, showing the same amount due, an April 18th letter from American demanding $20,982.02, an increase of $187.39, and a May 10th letter confirming that the reason for the bill was First Class's failure to satisfy the fixed monthly discount booking level.

First Class states that it offered to meet the minimum levels on Sabre with a six-month extension on the terms of the Sabre agreement, but American refused the offer. American disconnected Sabre in mid-May 1996 when First Class did not pay. In June, American demanded $94,949.03 exclusive of interest and attorneys' fees, which included $72,240.00 in estimated future lost booking fees pursuant to what First Class characterizes as the liquidated damages clause of the agreement. American stated in a letter that it would consider reinstating the Sabre agreement after First Class paid the entire amount.

American then began what First Class characterizes as tortious interference with First Class's relationships with Earhart and several of its best customers. In early 1997, First Class obtained business from MAI Systems ("MAI") and entered into a written exclusive booking agreement with MAI for a two-year term. MAI already had a discount agreement with American that required the use of Sabre, but First Class

no longer had Sabre. MAI and First Class asked American to waive the Sabre booking agreement. After a delay of several months, American refused without explanation, although American had previously waived the Sabre requirement in other cases.

According to First Class, American then allowed a Sabre agency to steal First Class client Mendoza Dillon via a "waivers and favors" deal. The other agency could buy tickets for Mendoza Dillon for less than First Class or other agencies without a special relationship with American and Sabre. As a result, First Class lost an exclusive booking agreement with Mendoza Dillon.

First Class states that when it bought Air-O, it hired Earhart, but she left in January 1996, hired a lawyer, and was considering litigation. First Class and Earhart reached a settlement of their differences in July 1996. First Class claims that it later learned that in March 1996, Earhart had already contacted American and had received its assistance and encouragement in her efforts to take First Class clients and go to a Sabre agency. First Class's employment contract with Earhart included a non-compete clause, as First Class alleges is standard practice in the industry when someone buys an agency to get new business. First Class claims that after meeting with American, Earhart took several First Class clients to an agency that used Sabre, including the largest client First Class got when it bought Air-O, Sensormedics, with which First Class had an exclusive booking agreement.

In July 1997, First Class lost the entire business of Hyundai Motors, another large corporate customer that had an exclusive booking agreement with First Class. American approached Hyundai without First Class's knowledge, according to the latter, and offered a corporate discount program requiring the use of Sabre. First Class could not book using Sabre, so it lost Hyundai to a Sabre agency.

B. Alleged Violations of Law

First Class alleges that what it characterizes as the liquidated damages provision in the Sabre agreement is unenforceable because it violates 14 CFR §255.8(b), which provides that "[n]o system may directly or indirectly impede a subscriber from obtaining or using another system. Among other things, no subscriber contract or contract offer may require the subscriber to use a system for a minimum volume of transactions."

First Class also alleges that the provision is unenforceable because it violates Sabre's promise to the Department in Docket 48808 to substitute an actual damages provision for its liquidated damages provision in all of its Sabre agreements, unless a subscriber requested the liquidated damages provision.

According to the complaint, the provision in the Sabre agreement at issue ("Section 5") provides as follows:

> IF CUSTOMER DOES NOT ACHIEVE 100.00% OF THE FIXED MONTHLY DISCOUNT BOOKING LEVEL, AS STATED IN 3) A) ABOVE, FOR ANY MEASUREMENT PERIOD, AMERICAN WILL CHARGE CUSTOMER AN AMOUNT EQUAL TO THE PREVAILING BOOKING FEE THAT AMERICAN CHARGES TO AIRLINES THAT PARTICIPATE IN THE FULL AVAILABILITY FEATURES OF SABRE MULTIPLIED BY THE DIFFERENCE BETWEEN THE FIXED MONTHLY DISCOUNT BOOKING LEVEL IN 3) A) ABOVE AND THE ACTUAL SABRE BOOKING LEVEL, MULTIPLIED FURTHER BY THE TOTAL NUMBER OF PRODUCTIVE VIDEO AGENT SETS AND VIDEO AGENT SET TERMINAL ADDRESS AT THE PSEUDO CITY CODE IDENTIFIED ON PAGE ONE OF THIS SCHEDULE A, AND MULTIPLIED BY THE NUMBER OF MONTHS IN THE MEASUREMENT PERIOD. HOWEVER, AMERICAN AGREES THAT AS LONG AS CUSTOMER PROCESSES AN AVERAGE OF 100 SABRE BOOKINGS PER VIDEO AGENT SET AND VIDEO AGENT SET TERMINAL ADDRESS PER MONTH DURING THE MEASUREMENT PERIOD, THE MAXIMUM AMOUNT CHARGED WILL NOT EXCEED THE TOTAL FIXED MONTHLY DISCOUNT AS STATED IN 3) A) ABOVE, MULTIPLIED BY THE NUMBER OF MONTHS IN THE MEASUREMENT PERIOD.

First Class lastly alleges that American's discount contracts tying discounts to the use of Sabre violate 14 CFR §§255.8 (c) and (d), which provide as follows:

> (c) No system owner may require use of its system by the subscriber in any sale of its air transportation services.
>
> (d) No system owner may require that a travel agent use or subscribe to its system as a condition for the

> receipt of any commission for the sale of its air transportation services.

Any violation of 14 CFR Part 255, the Department's CRS regulations, is a violation of 49 U.S.C §41712, which prohibits unfair and deceptive practices and unfair methods of competition in air transportation and its sale.

C. Request for Relief

First Class asks the Department to institute an enforcement action against both American and Sabre, order American and Sabre to pay damages caused by the actions described in the complaint, order American and Sabre to pay exemplary and punitive damages for the actions described in the complaint, enter a declaration interpreting the Sabre agreement and declaring rights and other legal relations under the agreement, and order American and Sabre to pay First Class's reasonable and necessary attorneys fees incurred in bringing the complaint.

Finally, First Class claims that it was forced to file its complaint with the Department because the United States District Court for the Northern District of Texas had held that First Class's state law claims for damages and injunctive relief were preempted by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C §41713(b)(1). *See Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 1997 U.S. Dist. LEXIS 21119 (N.D. Tex., Dec. 2, 1997), *aff'd.*, 139 F.3d 899 (5th Cir. 1998). First Class requests an examination by the Department of the scope of preemption of its state law claims.

The Answer

American and Sabre deny that they have violated 14 CFR Part 255 or 49 U.S.C §41712. They assert that First Class is essentially complaining about two widespread industry practices that the Department has considered and decided not to prohibit: the use of productivity pricing and the limited distribution of fares that are not commonly available. They characterize First Class’s complaint as an attempt to relitigate

the commercial dispute that was properly before the District Court.[3] They deny that First Class's allegations of interference with respect to Mendoza Dillon, Mary Earhart, and Sensormedics have any relevance to 14 CFR Part 255 or 49 U.S.C §41712. They assert that First Class knew during negotiations that American might adjust its domestic commissions; they also assert that American was under no contractual or other legal obligation to maintain its commission schedule unchanged or disclose that it was considering making changes.

The Court Decisions

In its complaint filed in the United States District Court for the Northern District of Texas, First Class alleged breach of contract, tortious interference with business relationships, fraud, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). All of the allegations, except for those of tortious interference, stemmed from American's implementation of the fee cap on commissions paid to travel agents. American counterclaimed alleging that First Class breached the Sabre agreement.

The court granted summary judgment for American and Sabre, which was affirmed on appeal without opinion, on all of First Class's claims, concluding that there was insufficient evidence to support First Class's breach of contract claim and that all the remaining claims were preempted by the ADA. *See Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 1997 U.S. Dist. LEXIS 21119 (N.D. Tex., Dec. 2, 1997), *aff'd*, 139 F.3d 899 (5th Cir. 1998). In a later order, the court also dismissed First

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[3] American and Sabre state that the facts set forth in Appendix A of their answer "are drawn from the District Court's Memorandum Opinion and Order and the Statement of Undisputed Facts that American and [Sabre] submitted to the District Court in connection with their Motion for Summary Judgment." Answer at 6. According to Appendix A, "[i]n March 1996, [Sabre] sent [First Class] an invoice for $20,982.02 for amounts owed under the [Sabre] Agreement. [First Class] failed and refused to pay the invoice. In June 1996, after providing notice and an opportunity to cure, [Sabre] properly terminated the subscriber contract. [Sabre] then notified [First Class] that, as a result of [First Class's] default, [First Class] owed actual damages to [Sabre] for breach of the subscriber agreement." *Id.* at 28.

Class's fraudulent inducement defense to the counterclaim on the basis of ADA preemption, leaving only the breach of contract counterclaim against First Class. *See Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 1999 U.S. Dist. LEXIS 15191 (N.D. Tex., Sept. 29, 1999). The parties settled the counterclaim.

On appeal, the Fifth Circuit again concluded that First Class's affirmative state law claims were preempted, but it found that First Class's defense to the breach of contract claim was not. *See Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir.), *cert. denied*, 537 U.S. 1044 (2002).

Relevant Law

First Class's complaint raises issues under both the federal aviation statutes and the Department's CRS regulations—specifically, 49 U.S.C. §§41712 and 41713 and 14 CFR §§255.8(b), (c), and (d).

Section 41712 authorizes the Department to take enforcement action against an air carrier, foreign air carrier, or ticket agent for engaging in unfair and deceptive practices and unfair methods of competition in air transportation or in the sale of air transportation.

Section 41713 prohibits states from regulating an air carrier's rates, routes, or services. Specifically relating to the issue of preemption, the statute provides as follows:

> Except as provided in this subsection, a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. §41713(b)(1).

The Department's CRS regulations that were in effect at all times relevant to the complaint proscribed a range of practices in order to promote airline competition and provide consumers with accurate, unbiased fare information. *See* 14 CFR Part 255. Section 255.8(b) proscribed practices by air carrier system owners that impede the usage of multiple CRSs by travel agent subscribers. Section 255.8(c)

prohibited air carrier system owners from using contractual provisions that require travel agent subscribers to use their CRS when selling their air transportation services. Section 255.8(d) prohibited air carrier system owners from requiring the use of their CRS as a condition for the receipt of a commission on the sale of their air transportation services. The Department adopted these CRS regulations pursuant to its authority under 49 U.S.C. §41712 to define unfair and deceptive practices and unfair methods of competition; therefore, any violation of 14 CFR Part 255 would also be an unfair method of competition or an unfair or deceptive practice that violates Section 41712.

A significant development has occurred since the pleadings in this case were filed. The Department recently completed a major rulemaking proceeding in which it revisited the CRS rule to determine whether, in light of ongoing developments in the distribution of air transportation, the CRS regulations should continue in effect, and if so, in what form. *See* Final Rule, *Computer Reservations System (CRS) Regulations*, 14 CFR Part 255 [Dockets Nos. OST-97-2881, OST-97-3014, OST-98-4775, and OST-99-5888], RIN 2105-AC 65, 69 *Fed. Reg.* 976 *et seq.* (January 7, 2004). The Department concluded that most of the CRS regulations, including all regulations concerning the relationship between a system and its travel-agent subscribers, should expire as of January 31, 2004. The prohibition of display bias and the prohibition of unreasonably restrictive requirements in contracts between systems and airlines are to continue in effect for a transition period of six months, and on July 31, 2004, they are to expire. Among the myriad factors contributing to the Department's decision to let the regulations expire was the change in CRS ownership: not only does American no longer have any ownership interest in Sabre, but all U.S. airlines that once held ownership interests in CRSs have divested themselves of their interests. American, for example, no longer has the same power it had as Sabre's owner to use that CRS to prejudice the competitive positions of its airline competitors.

Disposition and Analysis

We find on the basis of the pleadings that First Class's allegations that American and Sabre have violated the CRS rule have no merit. Furthermore, even if we could not make this finding, given that the Department has now determined that the regulations at issue are no longer necessary to prevent unfair or deceptive practices or unfair

methods of competition in the sale of air transportation, instituting an enforcement proceeding to determine whether American and Sabre's past conduct violated these regulations would provide little if any public benefit.

First Class misconstrues both Section 5 of the Sabre agreement and the Department's CRS rule. Section 5 is a productivity pricing provision, not a liquidated damages provision as First Class alleges. *See* 57 Fed. Reg. 43826-27. For one thing, 14 CFR §255.8(b) did not prohibit liquidated damages provisions. For another, unlike the minimum use provisions that §255.8(b) did prohibit, Section 5 does not make failure to achieve a minimum booking level a breach of contract. Rather, Section 5 makes the availability of discounted rates dependent on the achievement of certain levels of booking.

As for the discounted fares offered in corporate agreements, the contracts First Class complains of that require the use of Sabre are between a system owner and consumers (*i.e.*, the corporations) and not between a system owner and a subscriber (*i.e.*, First Class). Such contracts did not invoke the provisions of 14 CFR §255.8(c), nor did that section apply to contracts between First Class and the corporations that have discount agreements with American. That section only applied to contracts between a system owner (*i.e.*, at the time covered by the complaint, American) and a subscriber (*i.e.*, First Class) that require the use of the system by the subscriber in any sale of its air transportation services. The Sabre agreement at issue does not require First Class to use Sabre to purchase American air transportation services, a requirement that would have violated 14 CFR §255.8(c). First Class was free to purchase American air transportation services through Worldspan without running afoul of the Sabre agreement.

Similarly, there was no violation of 14 CFR §255.8(d) here. That provision prohibited a system owner from requiring travel agents to subscribe to its system for the receipt of any commission for the sale of its air transportation services. The complaint here is based on contracts between American and corporate customers, contracts to which First Class is not a party. The obligation complained of to book reservations on Sabre runs to the corporate customers, and not to any travel agent subscriber, *i.e.* First Class. Contracts between the corporate customers and First Class would not make the corporation's contracts with American illegal under 14 CFR §255.8(d). Here, First

Class was free to book American's services through Worldspan, and it would receive a commission from American for doing so. Only an agreement that refused commissions for booking American air transportation services on any CRS other than Sabre would have violated 14 CFR §255.8(d). That is not the case here.

Aside from finding no violations of the CRS regulations, we find no independent violations of 49 U.S.C. §41712, nor has First Class alleged any. Thus, the only remaining issue raised in First Class's complaint is the scope of ADA pre-emption. This Department, however, does not have authority to review court decisions, so we cannot grant the declaratory relief First Class has requested.

Finally, we grant American and Sabre's motion under 14 CFR §302.39 for confidential treatment of certain proprietary and commercially sensitive information. None of the materials deemed "sensitive" by American and Sabre was necessary for us to reach our decision in this case. Thus, there is no reason to disturb the order entered by the United States District Court for the Northern District of Texas granting confidentiality to the subject materials. *See* Order Regarding Plaintiff's Motion to Show Cause and Defendant's Motion for Protective Order, Civil Action No. 3:96-CV-20668-BC (N.D. Tex., June 3, 1998).

ACCORDINGLY, we dismiss the complaint of Lyn-Lea Travel Corp. d/b/a First Class International Travel Management against American Airlines, Inc. and The SABRE Group, Inc. in Docket 98-3863.

This order is issued under authority assigned in 14 CFR §302.406 and shall be effective as the final action of the Department 30 days after service.

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and
Proceedings

(SEAL)

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