



Order 2004-6-17

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

Issued by the Department of Transportation
on the 21st day of June, 2004

SERVED June 21, 2004

**Complaints of
United States Travel Agent Registry**

against

**Delta Air Lines, Inc.
United Air Lines, Inc.
American Airlines, Inc.
Continental Airlines, Inc.
Northwest Airlines, Inc.**

Violations of 49 U.S.C. §41712 *et al.*

**Docket OST-98-4776
Docket OST-98-4785
Docket OST 98-4786
Docket OST-98-4836
Docket OST-99-6188**

ORDER

The United States Travel Agent Registry (USTAR) is "a not-for-profit business cooperative of travel agents throughout the United States" that "represents the interests of U.S. travel agents in [matters concerning] automation, technology, sales and marketing, and distribution." USTAR filed complaints against Delta Air Lines, Inc., United Air Lines, Inc., American Airlines, Inc., and Continental Airlines, Inc., in Dockets OST-98-4776, 4785, 4786, and 4836, respectively. In these complaints, USTAR generally alleged that the named carriers, which had lowered the commissions that they paid travel agents for selling their international air transportation services, engaged in an unfair method of competition in violation of 49 U.S.C. §41712 by discriminating against U.S. travel agents and U.S. consumers and by competing unfairly in the sale of international air transportation. In addition, USTAR filed a complaint against Northwest Airlines, Inc., in Docket OST-99-6188, alleging that Northwest violated §41712 by making certain of its fares for international air transportation available only through

Northwest itself, either on its internet web site or by telephone, and not through travel agents.

The respondent carriers all filed answers in opposition to USTAR's complaints. USTAR filed a consolidated reply to the answers of United, American, Delta, and Continental and a separate reply to that of Northwest. We orally granted the first four carriers' requests for leave to file their answers late. Pursuant to Rule 6(c) of our Rules of Practice, 14 CFR 302.6(c), we now grant leave to file all subsequent responsive documents that are otherwise unauthorized.

Because the conduct of which USTAR complained does not amount to unfair competition within the meaning of the statute, we dismiss all five complaints.

Summary of the Parties' Positions

In the fall of 1998, Delta, United, American, and Continental¹ all cut their base commissions for international air transportation sold in the United States and Canada to 8 percent and imposed caps of \$100 (\$140 in Canada) for round-trip travel and \$50 (\$70 in Canada) for one-way travel. In so doing, USTAR contended, the carriers abused their dominance of North American air transportation to compete unfairly in the sale of air transportation by driving North American travel agents' income down to levels at which they would no longer be able to do business. USTAR noted that the carriers did not impose the same cuts on travel agents outside of North America; it attributed this disparate treatment to the carriers' continuing reliance on the support of travel agents in areas where they do not enjoy dominant positions.

USTAR also accused the carriers of discriminating against travel agents within the United States in favor of SatoTravel, an unaccredited but full-service travel agency that they jointly owned² along with several other carriers. According to USTAR, SatoTravel "receives a 'cost factor,' equivalent to a commission, which is in excess of 11% (eleven percent) per ticketed transaction." Maintaining this level of compensation for SatoTravel guaranteed it significantly higher commission revenues than any of its travel agent competitors, which in USTAR's view constituted an unfair competitive advantage.

USTAR asserted that travel agents in the United States would be forced to charge consumers high service fees in order to compensate for the revenue shortfalls that they would suffer under the lower commissions structure. Thus, consumers would pay less for air transportation that they buy directly from the carriers.³

¹ USTAR made essentially the same complaint against each of these carriers.

² After the complaints were filed, the carrier owners sold Sato Travel, which now operates (and receives commissions) as an accredited travel agent.

³ U.S. travel agents would also be competing at a disadvantage *vis-a-vis* travel agents outside North America, as the latter were not subject to the new
(footnote continued on next page)

USTAR contended that this difference would harm consumers, as travel agents provide more complete and objective information on all available fares, routings, promotions, and services than consumers get when they deal directly with the carriers. Not only would revenue shortfalls force U.S. travel agents to charge consumers service fees, USTAR maintained, but they would deprive these agents of the means of competing for business by offering rebates. USTAR stated that travel agents outside North America would thus enjoy additional advantages in competing for U.S. customers.

USTAR contended further that in a sale of a code-shared service where the transporting carrier was the partner of Delta, United, American, or Continental, the partner would effectively be bound by the reduced commission structure without its consent unless it specifically arranged for a higher commission. Similarly, USTAR contended that in a sale of interline international air transportation involving one single "through" ticket where one of the four named carriers flew at least one segment in each direction, the reduced commission structure would deprive a North American travel agent of commissions for segments flown by other carriers.

The respondent carriers generally argued in response that they and their appointed travel agents are by definition not competitors, that they do not have dominant positions to abuse, and that they have the right to set the terms by which their appointed agents are authorized to sell their services. Each asserted that it adjusted its commission structure because it needed to trim its distribution costs in response to market forces. The carriers stated that Sato Travel was a not-for-profit corporation that received no commission compensation, retained a percentage of each ticket it sold solely to recover its costs, and was required to return any amounts in excess of its costs to its airline owners. They denied imposing commission levels on the services of their code-share partners, and they denied discriminating against North American travel agencies. They maintained that the Department has no authority to regulate the pricing and channels by which air carriers distribute their services. They also maintained that if travel agency services are as valuable to consumers as USTAR claimed, consumers should be willing to pay fees for these services.

In its complaint against Northwest, USTAR alleged that the carrier held out certain low international fares via e-mail that could only be booked on the internet and paid for with a credit card. Although consumers could book by telephone directly with Northwest, they would have to pay a surcharge of \$20. USTAR claimed that Northwest's appointed travel agents could not sell these fares. It argued that in discriminating against consumers who do not have credit cards and in refusing to make the fares available through its appointed travel agents, Northwest was competing unfairly in violation of 49 U.S.C. §41712.

commission structure and thus would not need to charge service fees to U.S. consumers.

In response, Northwest denied that it was not making the low fares available through travel agents. It stated that travel agencies could sell the fares by making bookings via its web site or its reservations department but would not receive commissions for such sales; it denied that this latter factor amounted to unfair competition. The carrier defended the \$20 surcharge by claiming that processing telephone bookings carries a higher cost than processing internet bookings. It denied that it was engaging in invidious discrimination or otherwise harming consumers, and like the other four carriers, it asserted that under principles of agency laws, it and its appointed travel agents are not competitors. Northwest also asserted its right under §41712 to choose how and under what terms to distribute its services.

Disposition

Because we cannot find that the conduct challenged by USTAR amounts to unfair methods of competition within the meaning of 49 U.S.C. §41712, we will dismiss these complaints.

49 U.S.C. §41712 gives us the authority to prohibit and take enforcement action against unfair and deceptive practices and unfair methods of competition by air carriers and ticket agents in air transportation and its sale. Within the meaning of §41712, unfair methods of competition are practices (1) that violate the antitrust laws, (2) that are not yet serious enough to violate the antitrust laws but may well do so if left unchecked, or (3) that violate antitrust principles even if they do not violate the letter of the antitrust laws. The pleadings here do not suggest that the respondent carriers have engaged in any such conduct. USTAR has presented no evidence of collusion among the respondent carriers to reduce their commissions to travel agents in the United States. USTAR also has presented no evidence suggesting that any of the five respondent carriers has monopolized, attempted to monopolize, or combined or conspired to monopolize any relevant market. As we stated in Order 2002-9-2 (September 4, 2002), in which we dismissed complaints by the American Society of Travel Agents against a number of carriers that had eliminated their base travel agent commissions altogether,

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,] 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. [citation omitted] 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.

Order 2002-9-2, *supra*, at 22-24; see also *Department of Transportation, Office of the Secretary, 14 CFR Part 255 (Dockets Nos. OST-97-2881, OST-97-3014, OST-98-4775, and OST-99-5888)*, RIN 2105-AC65, *Computer Reservations System (CRS) Regulations, Final Rule*, 69 FR 976, 1020-1021 (January 7, 2004), in which the Department declined to require air carriers to make all fares available through all distribution channels. Furthermore, the commission that Congress established to study the financial condition of the travel agency industry and any implications for consumers⁴ concluded in its report, *Upheaval in Travel Distribution: Impact on Consumers and Travel Agents* (November 13, 2002) ("Report") that the government should not deprive air carriers of their flexibility to choose distribution channels. This commission, like the Department, recognized that carriers might withdraw some low fares altogether if forced to distribute them through all channels and that this result would harm consumers more than it would help travel agents. Report, *supra*, at 3, 56-58.

The sale of Sato Travel has rendered USTAR's allegation of discrimination in Sato's favor moot.

For all of these reasons, we find that the challenged conduct does not constitute unfair methods of competition within the meaning of 49 U.S.C. §41712 and that enforcement action is thus not in the public interest.

ACCORDINGLY, we dismiss the complaints of the United States Travel Agent Registry against Delta Air Lines, Inc., United Air Lines, Inc., American Airlines, Inc., Continental Airlines, Inc., and Northwest Airlines, Inc., in Dockets OST-98-4776, OST-98-4785, OST-98-4786, OST-09-4836, and OST-99-6188, respectively.

⁴ 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"), established the National Commission to Ensure Consumer Information and Choice in the Airline Industry and directed it to make appropriate recommendations to improve the condition of travel agents and to improve consumer access to travel information.

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

BY:

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(SEAL)

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