

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of	:	
	:	
ASSOCIATION OF RETAIL TRAVEL AGENTS	:	
("ARTA")	:	
	:	
Complainant,	:	
	:	
v.	:	Docket OST-99-6691
	:	
CONTINENTAL AIRLINES, INC., DELTA AIR	:	
LINES, INC., NORTHWEST AIRLINES, INC., AND	:	
UNITED AIR LINES, INC.	:	
	:	
	:	
	:	
Respondents.	:	

ANSWER OF
CONTINENTAL AIRLINES, INC.

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Although ARTA claims that a jointly-owned website will become a “fortress Web site” which the carriers “will use to inflate prices, curtail consumer choices, and choke competition from smaller, low-cost carriers” (ARTA Complaint at 4), ARTA provides not a shred of evidence that the jointly-owned website will inflate prices, curtail consumer choices or “choke” competition from any airlines. In fact, the jointly-owned website will expand the competition among airlines for price-conscious consumers and expand consumer choices by allowing consumers to explore more alternatives on a single website, and “smaller, low-cost carriers” are themselves joining the website to promote their own products. Similarly, combining numerous airline price offerings on a single site will not “increase the temptation for the named air carriers to engage in practices of display bias and price signaling” (ARTA Complaint at 5), and ARTA has not even attempted to explain why it thinks the jointly-owned site would do so.

Continental urges the Department to dismiss ARTA’s complaint because, inter alia, ARTA has failed to state any cognizable claim of unfair competition, ARTA has no standing to submit such a complaint pursuant to 49 U.S.C. § 41712 even if a cognizable claim could be stated, and ARTA’s injury claims are premature and speculative even if ARTA had standing to submit its complaint. In support of its position, Continental states as follows pursuant to Rule 204(b):

¹ Common names are used for airlines.

II. SINCE ARTA'S ALLEGATIONS AGAINST CONTINENTAL CONCERN "PRIVATE GRIEVANCES" AND DO NOT AFFECT A MEASURABLE "PUBLIC INTEREST," THE DEPARTMENT SHOULD DISMISS ARTA'S COMPLAINT

In its third-party complaint, ARTA demands that the Department directly regulate the ability of Continental and the other named airlines to participate in the formation of a jointly owned and operated Internet travel website to preserve artificially the particular ticket distribution system which ARTA alleges is threatened by Continental's business decision. ARTA seeks a directive from the Department which would require Continental and the other named airlines to forego an exciting new business opportunity which would allow the travelling public even greater direct access to a variety of travel-related services offered by the named airlines.² In effect, ARTA insists that the Department force the named airlines to utilize a particular mode of airline ticket distribution which is quickly becoming outdated and inefficient in today's Internet age. What ARTA really is asking, however, is for the Department to become involved in a dispute between private parties which does not concern any measurable "public interest" – an area clearly beyond Congress' mandate regarding the scope of the Department's enforcement authority.

² Efforts by current intermediaries to inhibit distribution through new online media are not limited to the aviation industry. See "Racing for Slice of a \$350 Billion Pie, Online Auto-Sales Sites Retool," Wall Street Journal, January 24, 2000, at B1.

Section 41712 makes clear that before commencing an investigation, the Secretary must conclude that such an investigation “is in the public interest.” 49 U.S.C. § 41712. No less than the Supreme Court has observed that “[§41712] is concerned not with punishment of wrongdoing or protection of injured competitors,³ but rather with protection of the public interest.” Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301 (1976) (emphasis added) (quoting American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79, 85 (1956)). In addition, the Second Circuit has held that alleged violations of private rights are the concern of neither § 41712 nor its predecessor, § 411:

[A]n administrative agency, with authority similar to that of this Board, may not employ its powers to vindicate private rights. If the Board were to assume jurisdiction over all such matters, the public-private distinction which lies at the base of its jurisdiction under §411 would be hopelessly blurred. The maintenance of such distinction requires that the Board assume jurisdiction under §411 only in those cases where the injury to the public is substantial.

REA Express, Inc. v. Civil Aeronautics Bd., 507 F.2d 42, 46 (2d Cir. 1974) (emphasis added) (internal citations omitted).

Thus, it is clear that ARTA’s request is beyond both the scope of the Department’s authority and the Department’s expressed desire to use its “enforcement authority and resources . . . to protect the public interest and not

³ ARTA alleges in its third-party complaint that travel agents “compete directly with” air carriers like Continental in the distribution of airline tickets. See, e.g., Complaint at 2. Continental disputes ARTA’s theory that travel agents and the airlines are competitors. See Section III.A., infra.

merely to resolve private grievances.” Order 95-1-2 at 5; see also Order 80-5-11 (May 1, 1980) (finding that “[w]here there has been no injury to the traveling public, we do not believe that it is in the public interest to expend our limited enforcement resources on private and isolated agent-carrier disputes which can be appropriately resolved in other forums.”).

Under the Airline Deregulation Act, the Department does not have the jurisdiction necessary to dictate the business and marketing restrictions that ARTA is seeking to impose upon Continental and the other named airlines. Continental’s independent decision to investigate the feasibility of a jointly owned and operated Internet website is driven by significant changes in the marketplace for the purchase of airline tickets by the flying public and its need to remain competitive with its major airline competitors in the industry.

With the advent of the Internet Age, the traveling public now has access to fare and schedule information which only a few years ago was available only to travel agents and the airlines. See, e.g., “The Second.com-ing? A Breakthrough Fare-Finder May Transform Web Travel,” The Washington Post (December 5, 1999), at E1 (describing one of the many low-cost airfare search tools available to consumers over the Internet), “Expedia to Expand Priceline Battle With Ticket Move,” Wall Street Journal, December 10, 1999 at B9 (describing expanded name-your-own price Internet search competition) and “ARN Lowers Ticket Prices,” Aviation Daily, December 10, 1999 at 9 (describing reduced ticket prices offered by Airline Reservation Network). Consumers now find that they are not beholden to

the travel agency industry monopoly and have begun to move away from reliance upon traditional travel agents for the purchase of airline tickets. Consumers increasingly are purchasing their tickets from on-line websites or the airlines themselves. These are the realities of a market-based economy which have led the named airlines to discuss the formation of a joint website to better meet consumer needs and demand. Although no one disputes that travel agents perform a valuable service, competitive forces now dictate that these services are not the only game in town. To remain competitive in the marketplace, air carriers must seek out new, technologically advanced methods of ticket distribution to meet the needs of today's "cyber-traveler." The proposed website at issue is simply one such method under consideration by the named airlines.

As stated above, travel agents continue to be an important part of Continental's distribution network. Like other airlines, however, Continental must struggle with the competing imperatives of increasing its sales, including travel agency sales, and reducing its distribution costs to remain competitive with other airlines. The proposed formation of a joint website to offer one-stop ticket shopping for the flying public is one such pro-competitive attempt to expand Continental's access to consumers and reduce its distribution costs. Under these circumstances, Continental must be free of government action that would preclude it from balancing the competing demands upon it as its own management sees fit and determining whether more effective distribution channels are available in this new economy. Thus, the Department has "as a general matter, consistently read the

pro-competitive policy directives [of the Airline Deregulation Act] 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.” See e.g., ARTA v. IATA, et al., Order 99-4-19 (April 29, 1999), at 5. Moreover, Congress itself recognized the necessity for such freedom when it enacted the Airline Deregulation Act, and the Department and the Civil Aeronautics Board have concluded repeatedly that market forces, not regulation, should dictate the airlines’ respective distribution decisions. Thus, ARTA’s complaint must be dismissed.

III. ARTA CANNOT ESTABLISH A CLAIM OF UNFAIR
COMPETITION AGAINST CONTINENTAL

A. Basic Agency Principles Undermine ARTA’s Ability
To Establish A Claim Of Unfair Competition Against
Continental

It has been well-settled both before the Department and the courts that travel agencies are “agents” of the airlines. See, e.g., Investigation Into Competitive Marketing of Air Transportation – Agreements Phase, DOT Order 82-12-85 (Dec. 16, 1982), at 59 (“[i]n writing the ticket, the travel agent acts as that particular carrier’s agent on the transaction”); Illinois Corporate Travel v. American

Airlines, 889 F.2d 751, 753 (7th Cir. 1989) (“[t]ravel service operators are ‘agents’ for the purposes of antitrust law when they sell tickets for air carriers’ accounts.”)⁴

One of the fundamental tenets of agency law is that an agent is under a duty not to compete with its principal concerning the subject matter of the agency. See Restatement of the Law, Agency, 2d, § 393. Thus, travel agents have a legal duty not to compete with Continental in the sale of air transportation to the public. Yet the prevailing theme of ARTA’s third-party complaint is that Continental is in direct competition with travel agents in the sale of air transportation, and that Continental’s decision to explore the possibility of forming a joint website in conjunction with the other named airlines is designed to gain the upper hand in the competitive marketplace. ARTA complains that the proposed website is anticompetitive “in relation to independent retail travel agents.” Complaint at 3.

However, as a matter of law, there is no “true competition between the airline and its agents,” Illinois Corporate Travel, 700 F. Supp. 1485, 1492 (N.D.III 1988),

⁴ Continental generally sells airline tickets to the flying public directly through its own ticketing and reservations system or indirectly through authorized travel agents, who sell tickets on behalf of Continental from Continental’s inventory. To sell tickets on a Continental flight to the public, a travel agent must be accredited by the Airlines Reporting Corporation (“ARC”). Once accredited by ARC, an agent may apply to Continental for authorization to sell Continental tickets, and must accept and abide by the terms and conditions of the standard ARC travel agency agreement, which provides in pertinent part that “[the] agreement establishes a principal-agent relationship” between the travel agent and the airline. ARC Carrier Services Agreement at 1. Thus, the agency relationship which exists between travel agents and Continental is a matter of contract as well as a matter of law.

aff'd, 889 F.2d 751 (7th Cir. 1989). In fact, in a case recently brought by ARTA itself against a number of airlines alleging unfair methods of competition, the Department dismissed ARTA's third-party complaint and accepted the airlines' argument that:

[F]or antitrust purposes, travel agents are not the airlines' competitors in the sale of air transportation.

ARTA v. IATA, et al., Order 99-4-19 (April 29, 1999), at 6 (emphasis added). By definition, therefore, the actions of Continental as principal in considering the formation of an Internet travel website cannot constitute an "unfair method of competition." Since it is impossible to establish a claim of unfair competition when the parties at issue are not "competitors," ARTA's claims must fail as a matter of law.

B. ARTA Has Failed To Plead Any Basis To Conclude That Continental Is Engaged In Any Unfair, Deceptive, Predatory And/Or Anticompetitive Practices By Planning To Participate In A Jointly Owned And Operated Travel Website

For the reasons stated above, ARTA simply raises no competitive issues that would warrant action under 49 U.S.C. § 41712. ARTA's vague and conclusory allegations that the airlines "plan" to engage in "unfair, deceptive, predatory and/or anticompetitive" practices without ever pleading facts sufficient to support its claims simply do not suffice (see, e.g., Estate Constr. Co. v. Miller & Smith Holding

Co., 14 F.3d 213, 220-21 (4th Cir. 1994); Reynolds Metal Co. v. Columbia Gas Sys., 669 F. Supp. 744, 750 (E.D.Va. 1987)), and ARTA's complaint must be dismissed.⁵

IV. ARTA'S CLAIM THAT THE PROPOSED TRAVEL WEBSITE WILL LEAD TO CARRIERS ENGAGING IN DISPLAY BIAS AND PRICE SIGNALING IS PREMATURE, SPECULATIVE AND UNFOUNDED

ARTA's third-party complaint alleges that the Internet travel website which - by ARTA's own admission - remains in the "plan[ning]" stage at present "will greatly increase the temptation for the named air carriers to engage in practices of display bias and price signaling." Complaint at 3, 5 (emphasis added). However, §41712, the legal basis relied upon for ARTA's Complaint, states in pertinent part that:

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.

49 U.S.C. § 41712 (emphasis added). This section clearly contemplates the Department investigating past or present alleged violations, and not the premature, speculative and unfounded allegations of possible future practices which ARTA has

⁵ Even if the jointly-owned website acts as a ticket agent itself, directly or indirectly, ARTA would have no grounds to complain because the activities and effects of the jointly-owned website are clearly pro-competitive. See 1999 DOJ/FTC Antitrust Guidelines for Collaborations among Competitors.

pled. Section 41712 cannot be applied prospectively to alleged injuries which may or may not occur at some time in the distant future. Thus, ARTA's claims must fail.

V. ARTA'S CLAIM THAT THE PROPOSED TRAVEL WEBSITE WILL LEAD TO INFLATED PRICES AND CURTAILED CONSUMER CHOICES IS PREMATURE, SPECULATIVE AND UNFOUNDED

ARTA also claims that the proposed, yet-to-be-developed website will lead "directly to inadequate competitive choices, suprapremium pricing, and onerous terms and conditions for competing travel agents and consumers, as well as low-cost, start-up carriers that would be largely forced off the online playing field for sales." Complaint at 6. Once again, ARTA's claims allege predictions regarding a proposed website whose form and functions have not been determined conclusively at present. The Department must not entertain claims based on pure conjecture.

First, ARTA's claim with regard to low-cost carriers being "forced off" the Internet is patently inconsistent with one of the press quotes upon which ARTA has relied in its Complaint, which states in pertinent part that the airlines planning this website "are trying to get all airlines to participate." Complaint at 3 (emphasis added). Clearly, if by ARTA's own admission the named airlines are attempting to secure the participation of all airlines in their proposed website project, ARTA's claim that some airlines will be "forced off" the Internet is unfounded. In fact, low-fare airlines such as ATA, Air Tran and Vanguard have already signed up to participate. (See, "Two Dozen Airlines Join Web Site Led By Four U.S. Majors," Aviation Daily, January 14, 2000, article #148032).

Second, for the reasons stated in the previous section, these allegations of possible future practices which ARTA has pled are premature, speculative and unfounded, and, as such, ARTA's claims must fail pursuant to the express terms of 49 U.S.C. § 41712.

VI. ARTA LACKS STANDING TO BRING THIS COMPLAINT

ARTA's third-party complaint is premised upon vague and conclusory allegations that Continental, among others, "plan[s]" to engage in "unfair, deceptive, predatory and/or anticompetitive" practices in air transportation and the sale of air transportation, "as prohibited by 49 U.S.C. § 41712." Complaint at 3.

The code section relied upon by ARTA states in pertinent part that:

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.

49 U.S.C. § 41712 (emphasis added). However, ARTA is not an "air carrier, foreign air carrier, or ticket agent," and thus lacks standing to bring this enforcement action against Continental under this code provision. ARTA is a trade association which has travel agents as members, but is not itself a ticket agent, and has not made any representations to the contrary. ARTA cannot circumvent this statutory standing requirement. Since ARTA is not an "air carrier, foreign air carrier, or ticket agent" and the language of the statute clearly fails to empower representative

parties such as ARTA to complain to the Department, ARTA lacks standing to bring this enforcement action against Continental.

VII. ADMISSIONS AND DENIALS

1. Continental lacks knowledge sufficient to admit or deny the allegations regarding ARTA's corporate organization, membership and purpose. However, Continental denies that travel agents "compete directly with the airlines themselves" in "the sale and distribution of airline tickets to the public" in the Introduction And Factual Background section of the Complaint.

2. Continental lacks knowledge sufficient to admit or deny the allegations regarding the accuracy of press reports cited by ARTA in the Introduction And Factual Background section of the Complaint. Continental denies any allegations that could be construed to admit that the proposed website's features were decided upon in November, 1999.

3. Continental admits that 49 U.S.C. § 41712 provides that 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," but denies that the statute cited in this section of the Complaint could be interpreted to conclude that Continental's "plan" to participate in a proposed travel services website is unlawful, as alleged in the remainder of the complaint.

4. Continental denies the allegations contained in this section.

5. Continental denies the allegations contained in this section.

6. Continental denies the allegations contained in this section.

7. Continental lacks knowledge sufficient to admit or deny the allegations contained in this section.
8. Continental denies the allegations contained in this section.
9. Continental denies the allegations contained in this section.
10. Continental denies the allegations contained in this section.
11. Continental denies the allegations contained in this section.
12. Continental denies the allegations contained in this section.

VIII. CONCLUSION

The essence of ARTA's complaint is that its travel agent members are displeased that Continental and the other named airlines are exploring the possibility of creating a state-of-the-art, consumer-friendly travel website and concerned that other avenues of distribution will become more attractive. As the Assistant Secretary of the Department said in a slightly different context,

You seem to be asking us to restrict the marketing strategies chosen by airlines that may benefit the public in order to preserve the agencies' market share. We are unwilling to interfere with airline choices on distribution methods as long as the carriers neither violate antitrust law principles nor otherwise harm the public. The statute directs us to foster competition in the airline industry, and more efficient distribution methods should promote airline competition.⁶

⁶ Letter from Charles A. Hunnicutt to Mr. Bruce Bishins, President and CEO, United States Travel Agent Registry (Sept. 27, 1996), at 3 (rejecting a claim that airlines were selling fares available only on the Internet unlawfully).

For the reasons stated above, Continental urges the Department to dismiss ARTA's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document on ARTA and counsel for all parties complained of in accordance with the Department's Rules of Practice.

Michael R. Finley