

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

In Re:

**ASSOCIATION OF RETAIL TRAVEL AGENTS
("ARTA")**

v.

**CONTINENTAL AIRLINES, INC., DELTA AIR LINES,
INC., NORTHWEST AIRLINES, INC., and UNITED AIR
LINES, INC.**

Docket OST-99-6691

ANSWER OF DELTA AIR LINES, INC.

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January 28, 2000

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Delta Air Lines, Inc. ("Delta") hereby answers the complaint filed by the Association of Retail Travel Agents ("ARTA"). The essence of ARTA's complaint is that the Department should prevent the named airlines from creating a website that would provide consumers with another choice in fulfilling their needs for online travel services. In addition, ARTA urges the Department to adopt special new rules to regulate the sale of air transportation made through online services. ARTA's complaint and request for rulemaking should be dismissed.

ARTA represents, for the most, traditional brick and mortar travel agents in a world where the web is changing everything. Internet technology is creating a revolution in every industry in the country. People are buying groceries, toys, pet supplies and drug store products on the web. All industries are seeking to connect

with customers who are no longer obligated to rely on traditional storefronts – or travel agents -- for their purchases.

A number of old-line and newly formed companies have recognized that the Internet is changing the way consumers buy goods and services from travel suppliers. There are hundreds of Internet companies using the web to offer new and better travel information to consumers. Some are traditional travel agents. Others such as Microsoft's Expedia, are new to the travel business. The new website under formation by the four carriers is a technology company that will offer travel services on the web. This new company will offer another choice for consumers in the sale of online travel services, including air transportation. ARTA's complaint amounts to nothing more than a misplaced attempt restrain the development of Internet competition in order to protect ARTA's brick and mortar constituents.

I. The Creation of a New Travel Website is Procompetitive.

The joint airline website will be another choice for consumers in purchasing online travel. While the total volume of online travel purchases are small, this is an area that is growing rapidly. Many individual airlines, hotels, and other travel suppliers have their own proprietary websites. However, many of these sites are unattractive to consumers since they do not offer a comprehensive listing of products available from multiple suppliers. The new joint venture site will offer comprehensive online travel information from a variety of airlines, hotels and other

travel service providers. The new site will be similar to other online travel stores including such well known names as Travelocity, Expedia and Preview Travel.

The big winner in the development of online travel services is, of course, the consumer. The open and unrestricted architecture of the Internet makes it incredibly easy for consumers to comparison shop prices and services offered by airlines. Consumers also have the ability to use multiple Internet "stores" and can move from one storefront to another with the click of a mouse. Thus, consumers have been empowered to chose those services they want without the need to rely on the information provided by airline employees or travel agents.

E-commerce has become a fact of life. Consumers have demonstrated a growing desire to use the Internet for making travel arrangements, and large, comprehensive websites make this easier. The joint airlines' travel site will be one more choice for consumers on the web. It will compete with a number of other e-commerce vendors in the sale of online travel services for consumers.

ARTA seeks regulatory protection from these competitive developments. ARTA would have the Department turn back the clock on the Internet revolution and limit competition for online sales by asking the Department to enjoin the airlines from creating a new competitive travel website. There is no public interest rationale to support ARTA's position, which is defective both as a matter of law and as a matter of policy.

II. As a Matter of Law, There is No Competition Between an Airline and its Ticket Agents.

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ARTA's complaint begins with the flawed premise that "ARTA members compete directly with the airlines themselves" for the sale of air transportation. Complaint at 2. This contention is squarely contradicted by numerous holdings of the Department and the courts which expressly recognized that airlines and travel agents are not competitors for purposes of antitrust law. *See Illinois Corporate Travel v. American Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *Brian Clewer, Inc. v. Pan American World Airways, Inc.*, 674 F. Supp. 782, 786-87, (C.D. Cal. 1986). *aff'd*, 811 F.2d 1507 (9th Cir. 1987); *Pacific Travel International v. American Airlines, Inc.*, Order 95-1-2 (January 4, 1995); *Association of Retail Travel Agents v. The International Air Transport Association*, Order 99-4-19 (April 29, 1999).

Travel agents are merely sales agents and cannot reasonably be considered to compete with their airline principals. As stated by the court in *Illinois Corporate Travel, supra*, "[t]ravel service operators are 'agents' for the purposes on antitrust law when they sell tickets for air carriers' accounts." 889 F.2d at 753. Furthermore, the standard ARC agreement provides that "[t]his agreement establishes a principal-agency relationship between the airline and the travel agency." ARC Agreement, Section 1, Paragraph B. One of the fundamental duties of an agent is a duty not to compete with its principal concerning the subject matter of the agency. *See*, Restatement of the Law, Agency, 2d, § 393.

Delta competes with other airlines, not its travel agents, in marketing and selling air transportation to the public. Delta has the right to establish multiple

distribution outlets for its transportation product. While traditional travel agents are far and away the largest outlet for Delta's products, they are not the only outlet.

There is no existing legal or policy basis to require airlines to favor one distribution outlet over another, and the Department should not now, at ASTA's request, adopt special measures to artificially prevent airlines from exploring the use of other evolving distribution channels.

III. ARTA Has Failed to State a Claim Under § 41712.

First, ARTA is not a ticket agent, and therefore lacks standing to bring this complaint. Moreover, even if the Department were to entertain ARTA's arguments (which are meritless), there is no basis grant the type of speculative injunctive relief sought by ARTA.

Second, ARTA's complaint is premature. Section 41712 authorizes the Secretary to take action only when an 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. . ." (emphasis added). The statute requires the Secretary to make concrete findings based on actual current or past practices found to be harmful to the public interest before issuing an injunction. Id. ARTA is asking the Secretary to issue speculative injunctive relief to prevent the formation of the joint airline website before the website is even created and before any harm to the public interest could possibly be demonstrated. Such a remedy would not only be inadvisable as a matter of policy, but would exceed the Secretary's authority under § 41712.

For the reasons stated above in Section I, there is every reason to expect that the new joint airline website will be beneficial and procompetitive. Because the statute authorizes the Secretary to issue injunctive relief based only on actual existing or past practices, ARTA's complaint is premature and must be dismissed.

Third, even if it were not premature, the injunctive relief sought by ARTA to block the allegedly "unfair" competitive practice of creating a new travel website would not qualify under § 41712. ARTA has failed to demonstrate that the availability of a new Internet portal offering competitive travel information would cause any harm to competition or the public interest. ARTA only complains that the convenience and attractiveness of the new online service might make it more difficult for ARTA's more traditional brick and mortar members to retain customers.

Assuming arguendo that agents did compete with airlines for the sale of air transportation (which they do not) it is well established that the § 41712 remedies available to the Department are intended to protect competition, not individual competitors. As such, it would exceed the Secretary's statutory authority and contravene the intent of Congress if the Department were to use § 41712 as a basis to limit competition for online travel services in order to protect one segment of the marketplace.

IV. The Joint Website Will Not Have Any of the Anticompetitive Effects Alleged by ARTA.

A. Alleged "Fortress Website"

ARTA alleges that "a jointly owned online travel site become[s] a 'fortress Web site' that the named carriers will use to inflate prices, curtail consumer choices, and choke competition from smaller, low-cost carriers." Complaint at 4. However, the very nature of the Internet makes the formation of a "fortress website" impossible in the virtual world.

On the Internet, consumers are free switch websites with the click of a mouse. If any one of the alleged competitive maladies suggested by ARTA -- biased displays, inflated prices, lack of choice, or absence of low-fare carrier participation -- were to afflict the joint airline website, consumers would quickly migrate to another site. The success of the website is critically dependent on being able to offer a wide array of unbiased competitive fare information. The air transportation business is fiercely competitive, and web airfare shoppers are among the most value-conscious consumers. Thus, the new website will have a powerful commercial incentive to provide the best and most complete list of the lowest prices available to consumers.

Contrary to ARTA's suggestion, it is not in the joint airlines' interest to exclude any airline from the participation in the website. In fact, this new portal will offer information on as many carriers as possible. Low fare carriers including American Trans Air, AirTran, Frontier and Vanguard have all signed up to participate. Each of the joint website proprietors has and will continue to maintain its own

website dedicated to the purpose of selling its individual products. However, the joint website is something entirely different that depends on maximum supplier participation to succeed.

B. Display Bias

ARTA erroneously claims that "[t]he jointly owned site will greatly increase the temptation for the named carriers to engage in practices of display bias and price signaling." Complaint at 5. Display bias on the Internet is self-policing. If consumers are not getting accurate comparative information from one site, they will quickly move to another portal.

The conditions surrounding travel websites are entirely different than those of CRSs prior to the adoption of the Department's regulations. Travel agent CRS terminals are linked to and dependent upon a single source of information -- that of the CRS vendor. In fact, most agency-subscriber contracts effectively prevent agencies from using leased equipment to access any other system than that of the primary CRS vendor. Moreover, it is unusual for an agency to rely on more than one CRS because productivity pricing and other contractual restrictions discourage agents from using multiple CRSs. Thus, if the information provided by the agency's CRS was biased, the travel agent has no means to access comparative data. On the other hand, consumer Internet connections may be used to access an almost infinite number of different comparative information sources. Accordingly, there is substantial competition among Internet travel sites to provide good comparative

information. This makes it unnecessary and inappropriate to engage in regulation of the Internet.

These issues have been extensively discussed by Delta and other commenters in the Department's comprehensive CRS rulemaking in Docket OST-97-2881.

ARTA's complaint is not the appropriate vehicle to examine these policy issues.

There is no reason to engage in a duplicative parallel inquiry here to entertain

ARTA's request.

C. Price Signaling

ARTA alleges that a jointly owned travel website will increase the likelihood of price signaling, but fails to offer any explanation of why this would be so. In fact, the joint airline website will do nothing to change the near perfect price information and instant access to competitors' fares that is already available today through CRSs and other distribution channels.

Thus, there will be no signaling or collusion by the joint participants. Each carrier will independently establish its own fares. There will be no sharing of information that would not otherwise be publicly available. The airline industry is intensely price competitive and the formation of a new travel website will not reduce price competition.

D. Effect on New Entry

ARTA contends that because the joint carriers provide 55% of the domestic air transportation sold in the United States that they will have "enormous market

power to discourage competition against [their] core products" and will be able to "discourage other online travel sellers from engaging in spirited competition" leading to a lack of competitive choices, suprapremium prices, onerous terms for travel agents, and forcing low-cost start up carriers "off the online playing field for online sales." Complaint at 6.

Again, ARTA's allegations are completely without foundation. The fact that airlines provide air transportation in the real world does not give them any advantage in selling air transportation on the Internet. If anything, e-commerce has shown a company's brick-and-mortar operations are a poor indicator of the likelihood of success on the Internet. For example, Barnes and Nobel is the largest conventional bookseller in the United States, but this does not give them an advantage on the Internet, where Amazon.com is bigger. Some of the most successful e-commerce businesses, such as e-bay, have almost no business or tangible assets other than in the virtual world.

Furthermore, although the joint airlines provide approximately 55 percent of the nation's domestic air transportation, the airlines themselves sell a small fraction of the seats on those flights. Retail travel agents are Delta's predominant distribution channel, currently accounting for over 75 percent of Delta tickets sold. Direct sales by Delta account for only about 25 percent of its sales. If there were any credibility to ARTA's argument that a dominant share of real-world sales would lead to domination on the Internet (which there is not), then a joint website

sponsored by ARTA members would be far more dangerous than the joint airline website, given the very small share of direct airline sales.

ARTA, however, is not proposing to launch a website to compete for online business. Rather, ARTA seeks to protect the large existing market share of its members by blocking the joint airlines from creating a convenient online marketplace that would be an attractive alternative for consumers. The Department's rules exist to protect competition, not competitors. It would be both unlawful and a grievous policy mistake to enjoin the development of this important competitive distribution outlet merely to protect ARTA members.

Rather than having a "chilling effect on new entry and innovation in online travel sales" (complaint at 5), the joint airline website will have the opposite effect of injecting beneficial new competition and forcing the major established Internet travel sites innovate and keep up with the product and customer service enhancements of the joint airline site. There is vigorous competition today among the major online travel sites, and there will be even greater competition following the entry of the joint airline site. There are new travel websites forming every day. The addition of one new competitor is unlikely to change the competitive landscape and force smaller companies and start-up carriers "off the online playing field for travel sales." Complaint at 6.

IV. Specific Allegations

ARTA's complaint, is, for the most part general and argumentative in nature, and does not lend itself to a particularized list of admissions and denials. Delta generally denies the allegations of the complaint. However, to the extent necessary, Delta states as follows:

Paragraph 1. Admitted that the Complainants complain as described. Denied that "ARTA member compete directly with the airlines themselves."

Paragraph 2. Admitted that the named airlines have determined to form a joint venture to create a comprehensive online travel website. Delta lacks sufficient knowledge to admit or deny the accuracy of the press reports cited by ARTA.

Paragraph 3. Denied.

Paragraph 4. Denied.

Paragraph 5. Denied.

Paragraph 6. Denied.

Paragraph 7. Paragraph 7 is a request for relief and is neither admitted nor denied.

Paragraph 8. Paragraph 8 is a request for relief and is neither admitted nor denied.

Paragraph 9. The request for relief and is neither admitted nor denied.

ARTA has shown no basis for instituting a rulemaking procedure to prevent air carriers from jointly owning and operating online travel sites open to the public.

Delta denies that airlines are horizontal competitors of travel agents.

Delta denies that the services and features available on the website will lead to domination by the carriers. In particular, Delta notes that airlines have the right to determine where and how to market special Internet fares. Each participating carrier will make its own independent determination as to where to market such fares.

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Paragraph 10. Paragraph 10 is a legal argument, which is neither admitted nor denied.

Paragraph 11. Paragraph 11 is a request for relief and is neither admitted nor denied.

Paragraph 12. Paragraph 12 is a request for relief and argument, which is neither admitted nor denied.

V. Affirmative Defenses

1. The complaint fails to state a cause of action upon which relief can be granted.
2. The relief sought by complainant is precluded by the Airline Deregulation Act.
3. The relief sought is barred by waiver and estoppel.
4. The complainants lack standing to bring this action.

VI. Conclusion

ARTA's complaint and request for rulemaking should be dismissed. There is no public interest basis to restrict the marketing strategies chosen by airlines or to prevent them offering services through online travel businesses. ARTA's complaint has failed to demonstrate any harm to competition or the public interest that would result from increased competition for online sales. ARTA seeks to block the competitive entry of the airlines into this arena in the hope that it will slow the proliferation of Internet sales and preserve the large market share of its brick and mortar constituents. Well settled law and policy require the Department to reject ARTA's call for such unwarranted regulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of January, 2000, served the foregoing Answer of Delta Air Lines, Inc., on those persons below via first class mail, postage prepaid.

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