

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION

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DOCKET SECTION

96-27737

Petition of)
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AMERICA WEST AIRLINES, INC.)
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for Amendment of Part 255 of the)
Department's Economic Regulations to Limit)
CRS Vendor Charges to Booking Fees for)
Actual Travel and Permit Termination of)
Passive Bookings by Participating Carriers)
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_____)
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Comments of)
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AMERICA WEST AIRLINES, INC.)
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In Response to Department of Transportation)
Advanced Notice of Proposed Rulemaking)
on Computer Reservation Systems)

Docket No. OST-97-3014-1

Docket No. OST-97-2881 - 4

PETITION OF AMERICA WEST AIRLINES, INC. FOR RULEMAKING

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Table of Contents

| | | |
|------|--|----|
| I. | INTRODUCTION | 2 |
| II. | REGULATORY BACKGROUND | 6 |
| | A. CRS Proceedings and Issues 1984-1992 | 6 |
| | B. Relationship of Petition to ANPRM on CRS Regulation | 11 |
| III. | THE ABUSIVE BOOKING PROBLEM | 12 |
| | A. Carrier Payment for Abusive Bookings | 12 |
| | B. The Market Structure Problem | 18 |
| | 1. CRS Vendor Conduct - Productivity Incentives | 18 |
| | 2. Travel Agent Conduct | 20 |
| | C. Self-Help is Ineffective to End Booking Fee Problems | 21 |
| | D. The Internet Problem | 23 |
| IV. | PROPOSED RELIEF | 25 |
| | A. Booking Fee Limitation | 26 |
| | B. Authorize Termination of Passive Segment Functionality | 27 |
| | C. Prohibition of Abusive Bookings and Arbitration of Disputes | 28 |
| V. | CONCLUSION | 29 |

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PETITION OF AMERICA WEST AIRLINES, INC. FOR RULEMAKING

America West Airlines, Inc. ("America West") files this Petition in accordance with 49 C.F.R. § 5.11 (1996) and 14 C.F.R. § 302.38 (1997) to request that the Department of Transportation (the "Department") take immediate action pursuant to its authority under 49 U.S.C. § 41712 to prevent Computer Reservation System ("CRS") vendors from engaging in unfair or deceptive practices and unfair methods of competition by strategic manipulation of

booking practices and fees which result in excessive payments by participating carriers to airline-owned CRS vendors and in direct harm to the travelling public.¹

On September 10, 1997, while America West was preparing this petition, the Department issued an Advanced Notice of Proposed Rulemaking ("ANPRM") on Computer Reservation System (CRS) Regulations, Docket No. OST - 97 - 281. As discussed in Section II, this petition addresses many of the questions raised in the ANPRM.² In view of the urgency of the issues raised in the petition, America West asks that the Department immediately request comments on the Company's proposed solutions in conjunction with industry responses to the broader review of the regulations contemplated by the ANPRM. This procedure would save the Department time and resources by providing it with complete industry information on critical CRS issues and enable it to proceed quickly to a Notice of Proposed Rulemaking ("NPRM") based on the rules proposed in this petition.

I. INTRODUCTION

¹The four airline-owned CRSs in the U.S. are SABRE, Apollo (Galileo), System One and Worldspan. Although there has been some change in ownership over the last several years, American Airlines still owns 82.1 percent of SABRE and United still owns 77 percent of Apollo Travel Services Partnership, which is scheduled to be acquired by Galileo. United also owns 38 percent of Galileo International Partnership.

² Accordingly, America West is also filing a copy of this petition as a comment in Docket No. OST - 97 - 2881.

The Department, its predecessor the Civil Aeronautics Board ("CAB") and the Department of Justice ("DOJ") have found that CRS vendors have market power over participating carriers. This market power enables CRS vendors to impose contractual terms governing the services provided and booking fees charged to participating carriers. The participating carriers have no negotiating power over the terms of these agreements and, historically, the CRS vendors have imposed terms that adversely affect competition for air transportation services by diverting revenues to the CRS vendors and their carrier owners. Although the Department has regulated some of these practices out of existence, the CRS vendors have exercised their market power to create new, unfair and anticompetitive practices.

This petition proposes modest amendments to the CRS rules in Part 255 of the Department's Economic Regulations designed to mitigate the adverse effects of the CRS vendor charging practices that have evolved since the Department's 1992 review of those rules. CRS vendors now exploit their market power over participating carriers which pay for the booking transactions by encouraging abusive and fictitious bookings by travel agents on a CRS and requiring participating carriers to pay for them. As described in detail in this Petition, the CRS vendors have developed pricing policies which marry a requirement that participating carriers pay booking fees for unnecessary and abusive CRS transactions with incentive programs provided by the vendors to travel agents which foster the abusive CRS usage. These abusive practices include fictitious, speculative and duplicative bookings as well as passive bookings, which may be used to generate bogus reservations or improper fares and other transactions of

no benefit to the participating carrier. By use of this pricing strategy, commonly referred to as either transactional or net segment pricing, participating carriers are forced to pay for a multitude of CRS transactions which are unrelated to whether any passenger travels on the airline. Thus, participating carriers are subsidizing the CRS-owning carriers through millions of dollars in excessive payments for these improper and abusive bookings. In addition, the CRS vendors further exploit their market power by refusing requests from carriers to terminate the capacity for travel agents to make passive bookings, the principal source of improper charges, or to take action to prevent other improper uses of the CRSs. These practices result, among other things, in the spoilage of airline inventory and improper over-booking situations, which, in turn, raise participating carrier costs and cause consumer harm through higher fares and delayed or unavailable flights.

The Department, in recent Congressional testimony, stated its concern over predatory conduct by major carriers against smaller new entrant low fare carriers. The Department can take action now to control significant anticompetitive conduct by restricting CRS vendors from obtaining booking fees for abusive bookings. Immediate action by the Department is required because escalating CRS distribution costs are eroding the ability of participating carriers to compete with the major CRS-owner carriers. For America West, CRS costs are now 25 percent of distribution costs, and booking fees per passengers carried have risen 10 percent a year since 1992 -- approximately three times the average rate of inflation for this period with marginal increase in value.

Spread across the air travel industry, the financial impact of these practices is enormous. The CRS booking revenues enable the CRS-owner carriers to subsidize competition against non-owner participating carriers. The CRS-owner carriers have no incentives to remedy these abusive booking practices absent action by the Department. Moreover, the financial impact of these practices is further magnified by the rapid growth of Internet reservation services. These services, now being offered directly to the public, through the CRSs and create substantial new opportunities for CRS vendors to obtain additional monopoly profits by charging participating carriers for myriad booking transactions created by individual Internet users. The recent explosion of Internet bookings makes it imperative that the Department act before the harm suffered by the non-owner participating carriers escalates further.

This petition proposes two complementary rules which constitute market-oriented solutions to these urgent problems. The first proposal would prevent charges for abusive bookings by limiting booking fees to payment for actual travel. This rule would thereby eliminate the need for expensive auditing programs to monitor abusive practices and enhance the ability of participating carriers to control and reduce distribution costs to the benefit of both the carriers and consumers. The second companion rule would authorize participating carriers to prohibit CRS vendors from allowing travel agents to enter passive bookings. This rule is necessary to supplement the first proposed rule because regardless of whether an airline is charged for passive bookings, agents will continue to use them. Authorizing carriers to cut off passives will substantially contribute to eliminating overbooking and inventory spoilage

problems, which impose needless costs on the carriers and disrupt the travelling public. In a competitive market environment where participating carriers have bargaining leverage, these two proposed rules would likely be negotiated as terms of CRS participation agreements. As the Department and the DOT have repeatedly noted, CRS markets are not competitive markets. If adopted, the rules will substantially contribute to the Department's efforts to enhance competition. The proposed new rules will lower payments to vendors which now subsidize competing CRS-owner airlines and reduce fraud and waste that result in higher fares, overbooking and inventory spoilage, which in turn directly harm consumers.

II. REGULATORY BACKGROUND

A. CRS Proceedings and Issues 1984-1992

The ability of CRS vendors to strategically manipulate CRS booking fees and practices to benefit their airline owners is well documented in rulemaking proceedings conducted by the CAB and the Department.³ As the CAB and the Department closed various avenues of abuse intended to benefit their owners, the vendors turned to new and unregulated areas of abuse. Booking fees is the remaining unregulated aspect of CRS operations which the vendors have exploited in the 1990s.

³See Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11644 (proposed March 27, 1984); Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 32540 (August 15, 1984); Computer Reservations System (CRS) Regulations, 56 Fed. Reg. 12586 (proposed March 26, 1991); and Computer Reservation System (CRS) Regulations, 57 Fed. Reg. 43780 (September 22, 1992).

In 1984, the CAB first officially recognized the market power of CRS vendors to distort the operation of these systems for anticompetitive purposes to benefit their airline owners. In 1984, approximately 80 percent of all domestic passenger tickets were being issued by travel agents who almost always subscribed to only a single CRS. Thus, the CAB found that participating carriers needed to be in all these systems to effectively compete or risk an unacceptable loss of passengers. As a result, the vendors had substantial market power which they exercised in three distinct ways. First, they biased the data in the system to encourage bookings on the owner airlines. Second, they imposed different or discriminatory charges on various participating carriers depending on the degree of competition with the CRS owner, and third, all the vendors charged excessive fees to participating carriers. Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11644, 11655 (proposed March 27, 1984), hereinafter 1984 NPRM. In 1984, the CAB focused its efforts on eliminating display bias and discriminatory charging practices and established Part 255 of its Economic Regulations to impose some restraints on these priorities. Although expressing concern about the level of booking charges, the CAB anticipated that "the bargaining power of some participating carriers, combined with a non-discrimination requirement, will generally hold fees close to reasonable levels." Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 32540, 32552 (August 15, 1984), hereinafter 1984 Final Rule.

In 1991-1992, the Department conducted a review of the CRS rules. The Department found that "the CRS rules remain essential because each of the carriers operating the four CRSs

may have the power and incentive to use its system to prejudice the competitive position of other carriers in ways that will raise consumer costs and reduce the level of airline services." Computer Reservations System (CRS) Regulations, 57 Fed. Reg. 43780, 43781 (September 22, 1992), hereinafter 1992 Final Rule. Based on these findings, the Department continued Part 255 through December 31, 1997, and is now reviewing the effectiveness of the current rules.

In this review, the Department found that CRS vendors retained market power and used that power to maintain booking fees at "supracompetitive" levels. Indeed, the Department found that as a result of the CAB rules prohibiting discriminatory fees, booking fees for all participating carriers had gone up. The Department determined that carriers have no choice but to pay these fees because virtually all airlines must participate in the CRSs or lose a prohibitively large number of bookings.⁴ Computer Reservations System (CRS) Regulations, 56 Fed. Reg. 12586, 12595 (proposed March 26, 1991), hereinafter 1991 NPRM; 1992 Final Rule, *supra*, at 43783-4. Accordingly, the Department concluded that "participating carriers have no ability to bargain over the terms of their participation in the system." *Id.* at 43819.

In 1991, participating carriers and the Department of Justice expressed serious concerns over booking fee rates and CRS charging practices. The carriers requested the Department to regulate both the fee level and the types of transactions for which fees could be charged, while DOJ proposed a "zero fee" system under which participating carriers would not be charged for

⁴Since the 1992 rulemaking, even Southwest Airlines, the only substantial carrier which was not a participant in any CRS, has become a participant in SABRE.

CRS services. The Department chose not to impose booking fee regulations at that time because between 1985 and 1992 the vendor fee increases had been less than the rate of inflation and, without a clear showing of need, the Department was hesitant to engage in additional regulation. *Id.* at 43817-8. However, the Department imposed two new rules which it believed would help participating carriers reduce booking fees. The first rule permits subscribers to use third-party hardware and software to enable access from a single terminal to multiple CRSs and to the internal databases of carriers. The second rule requires vendors to make available to participating carriers "adequate" billing information concerning bookings so that carriers could audit vendor bills to determine if they were "accurate." 14 C.F.R. § 255.6(d) (1997). The Department believed the new rule providing for third-party hardware and software would "begin to discipline booking fees by giving airlines an alternative to CRS bookings," i.e. enhanced ability to make direct bookings on carriers. *Id.* at 43817.

Unfortunately, as is often the case when dealing with companies with entrenched market power, the Department's predictions regarding booking fees were not accurate. Rather, the position of participating carriers vis-a-vis CRS vendors has dramatically declined since the issuance of the 1992 rules. In summary:

1. The ability of travel agencies to use third-party hardware and software has not created any meaningful competition to the CRSs.⁵ Little third-party hardware and software are used by travel agencies and there is no evidence that this capability has reduced the agents' reliance on a single CRS.
2. America West and other participating carriers, by analyzing the Billing Information Data Tape ("BIDT") tapes supplied by the vendors as required by the 1992 rule, have discovered they are paying millions of dollars a year to their competitors for CRS transactions which, as discussed below, provide no benefit to them and which distort inventory control and thus directly harm their operations and the travelling public. America West has determined that between 7 and 10 percent of its CRS booking fee charges are for these abusive bookings.
3. CRS vendors such as SABRE and Apollo have refused requests from America West and other participating carriers to settle booking fee disputes, to better police abusive practices by travel agents or to restrict the type of transactions that agents may perform on their system.

⁵Indeed, the continuing controversy over the American Airlines/SABRE Preference MAAnager software which American distributed to travel agents to alter the SABRE display at the travel agency suggests that the rule resulted in the opposite effect from what the Department anticipated.

4. Under contract terms unilaterally imposed by the vendors, participating carriers have no contractually available remedy to contest improper fees. Under these contracts, the vendors have no obligation to refund any disputed fees. Thus, when America West withheld contested fees for abusive charges and attempted to negotiate a resolution, both SABRE and Apollo threatened to terminate America West's participation in their respective systems.
5. The development of new technologies, particularly the Internet, is further strengthening the position of the CRS vendors vis-a-vis participating carriers because all the Internet travel agency sites for individual users are simply gateways to various CRSs. America West believes there are at least 400 Internet travel agency sites that interface with CRSs. Among the largest are Travelocity, which claims over a million users, is owned by the SABRE Group and linked to SABRE; Microsoft's Expedia, which is linked to Worldspan; and Excite Travel and Preview Travel, which are both linked to Apollo. Through these websites, individual consumers can create multiple booking and cancellations with no knowledge that these transactions will be generating CRS booking fees charged to those carriers.

For all these reasons, it is imperative that the Department act immediately and issue a notice of proposed rulemaking for the rules set forth in this Petition.

B. Relationship of Petition to ANPRM on CRS Regulation

On September 10, 1997 the Department issued an ANPRM which among other issues, raises concerns over the competitive implications of the five developments discussed above.

America West emphasizes that this petition addresses these concerns and specifically:

- documents how CRS vendors still exert market power over participating carriers, makes a compelling case for the need for a market related solution to control abusive practices and is responsive to questions 1-4 posed in the ANPRM;
- discusses how the right of agents to use third-party hardware and software has had no substantial effect on promoting CRS competition for participating carriers which is related to issues raised in question 5;
- details the relationship of the CRSs to Internet booking services and explains how, to date, the Internet has actually enhanced the market power of the CRS vendors which is responsive both to question 7 and the general questions raised in the ANPRM concerning the Internet;
- analyzes the structural problems associated with booking fees raised in question 11;
- and details the nature and effect of abusive booking practices in the industry and suggests practical, market oriented solutions which are responsive to question 12.

By requesting comments on the petition which could be due concurrently with comments on the ANPRM, the Department would immediately have detailed responses from the industry on critical booking fee issues and would substantially expedite the comprehensive CRS review

contemplated by the ANPRM. Indeed, the petition would focus the industry's immediate attention on specific proposals designed to control booking fee abuses which represent the major area in the CRS - participating carrier relationship where vendors exercise unrestrained market power. The exercise of this market power directly injures competition and consumers.

In addition, following receipt and consideration of the comments, the Department would be in a position to quickly issue an NPRM with the rules proposed in this petition. Such expedited action is required so that the Department can move quickly to help establish the more balanced relationship between vendors and participating carriers envisioned by the Department in 1992 and which would likely exist in a competitive market where carriers could freely negotiate the terms of their contract with the CRS vendors.

III. THE ABUSIVE BOOKING PROBLEM

A. Carrier Payment for Abusive Bookings

Apart from the requirements of Part 255, the relationship between the CRS vendors and the participating carriers is governed by private contracts commonly referred to as Participation Agreements. As noted above, these agreements are unilaterally imposed by the CRS vendors and can be changed by the vendors at virtually any time. Specifically, under the participation agreements imposed by all the CRS vendors, participating carriers pay a set fee for every segment booked for the carrier through each system. This obligation to pay is not limited to bookings by travel agents but applies to any customers of the CRS with the right to make bookings.

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Prior to the early 1990s, participating carriers, which participated at the full availability or direct access level, paid a "booking fee" for each segment in a passenger's itinerary not cancelled before day of departure. Thus, for example, an airline carrying one passenger on a direct flight would be charged one booking; an airline carrying one passenger on a two-segment connecting flight would be charged two bookings. DOT, Study of Airline Computer Reservation Systems at 36 (1988) (1988 Study). However, under either of the current transactional or net segment pricing schemes, participating carriers are charged per segment created regardless of whether the segment reflects a valid or invalid use of the system. A segment is treated essentially as an entry in a passenger name record ("PNR") in the CRS. A segment can be active, where a message is sent to the participating carrier's internal reservation system or passive, in which case no message is sent to the participating (non-vendor) carrier's internal reservation systems. For example, if an agent makes a reservation (active or passive) and then cancels it, the carrier is charged two bookings fees. Under the existing participation agreements, the carriers are required to pay for many travel agent transactions that are unrelated to whether a passenger ever travels on the participating carriers.⁶ When the Department conducted its CRS review in 1991-1992, the participating carriers had little or no experience with either transactional pricing or net segment pricing and their pernicious impact on the industry.

⁶The lack of competition among the CRSs for participating carriers is reflected in the fact that while there are some variations among the vendors as to the specific chargeable transactions or charging methodology, the average booking charge per passenger carried works out to be virtually the same on each of the CRSs.

Following the Department's amendment to Part 255 to require that vendors make available billing data, America West and other participating carriers obtained auditing software to analyze booking transactions. This software made it possible to assess the impact of the vendor pricing strategies and abusive practices.⁷ America West acquired audit software in February 1995 and identified categories of CRS transactions ("abusive bookings") charged to the carrier that are not related to intended travel and provide no benefit to the carrier. Significantly, many of these transactions actually harm other travellers by adversely affecting inventory management through the creation of false bookings.⁸ America West identified six categories of abusive booking practices:

1. Passive Segments - the agent creates a booking segment wholly within the CRS which is not communicated to America West's internal reservation system. Agents use passive bookings when they want to access the system for some reason other than to book a legitimate flight such as to issue a ticket on an overbooked

⁷The BIDT tapes provided by the vendors, comply with the Department's requirement, but are far from complete, leaving out key information such as whether a ticket was issued for a particular PNR and the ticket number. The availability of such information would make it substantially easier for participating carriers to isolate improper bookings.

⁸In a letter dated March 17, 1997, from the SABRE Group to the Department's General Counsel ("SABRE letter"), SABRE asserted that these practices have existed for years with the "knowledge if not tacit acceptance of the carriers." This statement is incorrect for several reasons. First, as noted in the text, under prior fee charging systems, carriers did not pay for these transactions until recently; and second, prior to the availability of the BIDT tapes and auditing software, participating carriers lacked the tools to identify and challenge these transactions.

flight, issue an improper upgrade, issue a ticket with an improper fare, prepare an itinerary, accounting record or invoice. Passive bookings disrupt inventory control and can delay flights by creating overbooking situations where legitimate passengers are inconvenienced and the airline is forced to pay denied boarding compensation to dislocated passengers. Preparation of invoices, accounting records and itineraries confer no benefit on a participating carrier and can be accomplished by other means through the CRS at no cost to the carrier. In addition, passive bookings are used to achieve or maintain productivity levels as discussed at pages 15-17.

2. HK passive segments - HK entries are intended for use only by the CRS system or air carriers to identify or send messages relating to previously confirmed segments in connection with non-booking activity such as seat assignment, special meals or issuance of boarding passes. The use of the HK code by agents is prohibited by IATA rules, yet the CRS vendors continue to allow use of this code by subscribers. HK entries are particularly pernicious because they can result in building a duplicate reservation in the participating carriers' reservation system and thus take additional seats out of inventory.
3. Group passives - enable agencies to enter up to 99 segments in a single passenger name record, which is a much less time-consuming method of building multiple segments. Group passives may generate significant productivity credits for agents

and substantial charges to America West when not used to book valid group travel. America West is charged for the 99 bookings although the agent never had customers interested in traveling on the airline. If the agent ultimately cancels the reservations, the carrier is also charged a cancellation fee.

4. High net cancellations (churning) - Churning typically occurs when either (i) a passenger is required to pay for a trip within a specific number of days after purchase or (ii) the CRS system is used by inexperienced or poorly trained agents to repeatedly price and quote fares through the booking process rather than the fare quote function. The agent, by cancelling and rebooking, can either delay the payment deadline or continue to search for a desired fare. However, under transactional pricing, the carrier pays for each CRS transaction. As a result of these practices, America West has experienced situations where the booking fees exceeded the fare for the trip.
5. Duplicate bookings - this involves a situation where a travel agency creates two or more identical passenger name records for the same passenger on the exact same flight on the same day in the same CRS system. Because duplicate bookings remove inventory from a flight, these bookings are often created by the travel agent to hold inventory from a high demand flight for future resale. In addition, these bookings tend to deplete inventory in the regular "Y" or first-class fare

categories and thus have a disproportionate negative effect on yields if the seat subsequently goes unsold.

6. Fictitious names - Agents sometimes enter certain names such as Mickey Mouse, Bill Clinton, Test, TBA, or A-B-C to hold seats that never result in the issuance of a ticket nor are related to any plan to travel by a passenger.

The audit software is programmed to reject a relatively small percentage of the bookings which may actually fall in these categories. For example, the software rejects all passive segments only from travel agencies whose passive segments account for at least 90 percent of the agency's total passenger segments. It also rejects duplicates only where the same name appears on the same flight, although duplicate bookings are often made on multiple flights.

Significantly, while participating carriers are paying enormous booking fees for improper passive bookings, American and United have immunized themselves from this problem on their own systems -- SABRE and Apollo. America West understands that travel agents cannot enter passive segments for American Airlines on SABRE using the same billing codes used to charge other carriers because SABRE also serves as American's internal reservation system. However, agents using SABRE can conduct equivalent transactions using a "YK" status code which is not available for agents to use for other participating carriers and may result in no charge to American. America West also understands that Apollo agents simply cannot make passive bookings for United. If this is correct, then America West submits that American and United

are receiving special favorable treatment which place SABRE and Apollo squarely in violation of the anti-discrimination requirements of § 255.6.

In sum, America West has paid millions of dollars to the CRS vendors -- firms that are owned by America West's direct competitors -- for unnecessary and improper booking fees. In addition, the Company has lost additional millions from inventory spoilage and denied boarding compensation related to abusive bookings as well as the administrative and other costs associated with conducting the audits and seeking to resolve these issues with the vendors. The airline's goodwill also suffers directly with those passengers who are inconvenienced or unable to fly as a result of these practices. When these costs are multiplied across the industry over time, clearly, hundreds of millions of dollars are being transferred from participating carriers to the CRS vendors and their airline owners for which the participating carriers are receiving no benefit and which can be used by the airline owner to subsidize competition against participating carriers. America West conservatively estimates that approximately 7 to 10 percent of the vendor revenues are generated by abusive bookings.

B. The Market Structure Problem

The ability of CRS vendors to impose costs on America West and other participating carriers in connection with these abusive and improper booking practices is a direct by-product of the unique nature of the airline distribution system under which travel agents conduct transactions through CRS systems - essential facilities - which are controlled by airline

competitors.⁹ As noted in Alaska Airlines v. United Airlines, 948 F.2d 536, 538 (9th Cir. 1991), "[t]he CRS market's triangular structure makes the market unusually resistant to normal disciplinary mechanisms." Accordingly, this industry structure makes it virtually impossible for America West and other participating carriers to effectively control travel agent booking practices.

1. CRS Vendor Conduct - Productivity Incentives

CRS vendors must compete with each other to retain travel agent customers but need not engage in competition to retain airline customers since, as noted, carriers must participate in all systems or lose the vast majority of bookings.¹⁰ 1991 NPRM, *supra*, at 12595, 12601, 12617. Accordingly, the vendors have every economic incentive to be solicitous travel agents but no incentive to enable participating carriers to take reasonable measures to control distribution costs. To entice travel agent subscribers to a system CRS, vendors offer productivity incentives to the agency. The use of incentives means that the more segments an agency books through the system, the lower its payments are to the vendor. Indeed, the Department has found that as a result of competition for travel agent accounts, productivity

⁹The Department has found that the CRS is comparable to an essential facility, i.e. "it cannot be feasibly duplicated by a competitor [and] the competitors inability to use it will severely handicap its ability to compete." 57 Fed. Reg. 43790 (September 22, 1992), citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

¹⁰Indeed, as noted in fn.3, even Southwest Airlines, which was the only major carrier to operate without participating in a CRS, joined SABRE. According to SABRE, Southwest has also withheld payments for abusive bookings.

payments to subscribers result in many agencies not paying anything for CRS services and equipment. The Department has noted that some agencies may even be paid by the vendor to use its system and that vendors sometimes pay cash bonuses of as much as \$1 million to obtain or keep a subscriber. DOT, Airline Marketing Practices: Travel Agencies, Frequent Flyer Programs and Computer Reservation Services at 14, 23 (Feb. 1990). One vendor estimated that only 20 percent of its subscribers paid full price. *Id.* at p. 23. The Department has expressed this dynamic as follows: "if vendors are exercising market power to exact above normal profits, they appear to be doing so by targeting participating airlines rather than subscribers." 1988 Study at 112 (1988). CAB and Department studies have shown that CRS vendors obtain 60 to 70 percent of their revenues from booking fees. Indeed, CRS vendors have every incentive to increase the operating costs of participating carriers which are rivals of the CRS-owning airlines. By charging excessive booking fees, CRS vendors force participating carriers to raise prices to offset the economic waste resulting from abusive bookings which distort inventory control and lead to empty seats or bumped passengers.¹¹

2. Travel Agent Conduct

¹¹See Thomas G. Krattenmaker and Steven Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 187, 209 (1986) (raising rivals' cost may give the excluding firm various options in exercising its acquired power). The CRS situation is very similar to the issues In re Toys R Us, Inc. Dkt. No. 9278, 73 ATRR 328 (Order issued September 30, 1997) in which the ALJ found under §5 of the FTC act which is identical to 49 U.S.C. §41712, that Toys R Us, which is not a monopolist, uses its market power to extract agreements from toy suppliers to sell toys to its rivals in more expensive combination packages which impedes the growth of rival toy retailers and results in consumers paying higher prices.

Coupled with the vendors' lack of incentives to take any action to aid participating carriers, travel agents have their own business reasons to engage in CRS booking practices which are unrelated to the best interest of any individual carrier. Thus, the Department has found that when choosing a CRS for their use, travel agents have no incentive to select a system that passes lower booking fees on to carriers and that non-CRS-owning airlines have no way to influence potential passengers to patronize travel agents that generate lower bookings fees. 1988 DOT Study, *supra*, at 90, 1991 NPRM, *supra*, at 12617. Specifically, agents have strong financial incentives to reduce their costs by maximizing the productivity rewards provided by the CRS vendor based on increased CRS usage. Every dollar saved on CRS costs goes to the agency's bottom line profit. Moreover, an agent is extremely motivated to cater to the desires of their own clients to prevent them from taking their business elsewhere. Thus, using the CRS to cancel and re-book trips to delay a customer's need to pay for a ticket, creating duplicate bookings or speculative bookings to insure seat availability, issuing tickets with an improper fare or for flights that are already full, or generating an invoice or itinerary are services that many agents feel compelled to provide to remain competitive with other agents in the area. The cost of this CRS activity is paid for by the participating carrier which receives no benefit from these

transactions.¹² In addition to harming the participating airline, other travellers suffer direct consumer injury from this conduct.

C. Self-Help is Ineffective to End Booking Fee Problems

America West has tried to take actions on its own to reduce the problems of abusive bookings. For example, America West has invested in technology and software which makes it unnecessary for a travel agent to use a passive booking for any legitimate purpose involving an America West passenger. Although America West has promoted these systems with travel agents, the agents continue to use passive bookings excessively. America West subsequently approached the CRS vendors and requested that the vendors not make passive bookings available to subscribers for America West. While America West understands that technically this can be easily done, all the CRS vendors have refused this request. The vendors have never explained why they will not agree to this request. However, SABRE has suggested the airline should purchase yet more services to monitor passive bookings so that the airline can take action against the agents.¹³ This approach is exactly what one would expect from a company with substantial market power and a goal of raising its rivals' costs rather than truly serving its customers' needs. Indeed, the Department of Justice, in its filing on the Parity Rule, Docket 96-1145,

¹²For example SABRE's agreement with America West provides at paragraph 2.7 that "Participating Carrier will accept for transportation any passenger carrying a ticket, which bears an 'OK' status and has been issued through SABRE even though no record of this reservation may exist in the carrier's own reservation system."

¹³See SABRE letter at 9.

specifically noted the failure of the CRS vendors to respond to participating carrier complaints about passive and fictitious bookings DOJ noted that these charges may account for as much as 20 percent of some carriers' booking costs.

When the vendors refused to turn off passive segments, America West took additional steps directly with travel agents to attempt to reduce passive bookings. This labor-intensive process included working with individual travel agencies to reduce passive bookings and more recently to initiate a procedure to debit travel agents for the CRS costs of passive bookings and to refuse commissions on passive bookings. This is not a desirable approach for America West or other carriers because it generates unnecessary tensions with the travel agent community. Specifically, America West's tickets are sold by approximately 38,000 travel agencies which are linked to various CRSs. The carrier is highly dependent on travel agent sales. Approximately 40 percent of America West's travel agent bookings are made through SABRE and 30 percent through Galileo (Apollo). System One and Worldspan each account for approximately 15 percent of travel agent distribution. These travel agencies are also the agents for all of America West's competitors. Trying to reduce CRS costs using what agents might view as punitive actions could result in agents steering customers to other airlines. Thus, America West must either continue to pay excessive and unnecessary fees or risk travel agent retaliation. Even a small diversion of bookings from thousands of agents could have a substantial impact on America West's profitability. Obviously, whatever strategy a participating carrier chooses to

approach this problem could benefit the CRS-owner airlines because, as noted above, individual agents will continue to use the CRSs to advantage their customers.

Finally, the need for regulatory action is heightened by the fact that participating carriers currently appear to have no right to avoid charges for abusive bookings that even the vendors might deem improper. The vendors' position, as reflected in the SABRE letter, is that participating carriers must pay all charges as billed for all segments entered by travel agents or face termination, and that a vendor's only duty with respect to an agent with a history of recognized abusive conduct is "to assist Participating Carrier by initiating appropriate, timely and reasonable remedial measures." However, it is clear from the letter that SABRE has never found an agent with a history of abusive conduct. America West's experience in seeking to resolve booking fee issues with SABRE and Galileo is that it is virtually impossible to meet the evidentiary standard for substantiating rejected fees as imposed by the vendors, and that the vendors have no intention of seriously investigating the allegations of abusive booking practices by agents based on the data presented to them.

Thus, it is apparent that given the unique structure of airline distribution systems and the market power of the CRS vendors to dictate terms to the participating carriers, carrier self-help is not an adequate solution to booking fee problems which the CAB, DOJ and the Department recognize have existed for over a decade.

D. The Internet Problem

In addition to the current problems with travel agent bookings, participating carriers are now being charged by the vendors for Internet bookings made through their CRSs. Virtually all developing Internet booking sites simply provide a gateway to one of the CRSs. Some of these systems are designed for travel agents, but others provide access for individual consumers. For example, Travelocity, with over a million subscribers, is linked to SABRE.¹⁴ The other major Internet sites include, Microsoft's Expedia, a gateway to Worldspan and Excite Travel, Preview Travel, ITN Travel and Yahoo Flifo, all of which are gateways to Apollo. The CRS controls what individuals will be able to do on these reservation systems and charges participating carriers for bookings made on the system.

Although there have been predictions that the Internet would reduce reliance on CRSs, the opposite is occurring. While most airlines now have their own Internet sites, most customers go to the multicarrier listings which access a CRS. Thus, the CRSs actually control the most popular Internet sites and, just as with traditional travel agent bookings, participating carriers are being charged if Internet users make speculative or duplicative bookings or churn a reservation by cancelling for non-payment and rebooking. America West believes that many consumers make reservations for the same trip on multiple Internet sites and then pay only for one resulting in significant new, unproductive charges against the participating carrier.

¹⁴Travelocity is a travel agency, and therefore, in addition to the booking fees paid by participating carriers, SABRE is also receiving commissions on the Internet ticket sales.

Obviously, participating carriers have no principal-agent relation with consumers on the web and those consumers presumably have no idea that an airline is being charged a fee for their use of the system. As a result of the continuing market power of the CRS vendors which is extending to the Internet, an enormous potential exists for CRS vendors to impose even more costs on participating carriers.

IV. PROPOSED RELIEF

The Department is the only agency which can prevent continued CRS vendor abuse of their market power. In upholding the CAB's original CRS rules, the U.S. Court of Appeals for the Seventh Circuit recognized that the agency has broad discretion to determine, based on "common sense and experience," whether particular practices of air carriers constitute "unfair methods of competition" or are otherwise "unfair or deceptive" within the meaning of §41712. United Airlines, Inc. v. Civil Aeronautics Board, 766 F.2d 1107, 1112-1113 (7th Cir. 1985). See also Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 364 (1965).

Under the FTC Act, which was the model for §41712, an unfair act or practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefit to consumers or to competitors." 15 U.S.C. § 45(n), (1994).

Current CRS booking fee practices fall squarely within that definition. As noted earlier, the Department has recognized that it has the authority to regulate issues related to booking fees. In 1992, the Department hoped that limited changes to the CRS rules would create competition

but, in the meantime, essentially gave the vendors carte blanche power to impose any fee structure on participating carriers. The vendors have exercised that right to an extreme degree. The costs imposed on participating carriers and ultimately the traveling public through higher booking fees, inventory spoilage and overbooking, demonstrate a collective substantial consumer injury that supports the need for affirmative action. See American Financial Services Ass'n v. FTC, 767 F.2d 957, 971 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986). In addition, these vendor practices do not create a new product or efficiencies that are not otherwise achievable. Broadcast Music, Inc. v. CBS, 449 U.S. 1 (1979).

A. Booking Fee Limitation

America West proposes that § 255.6 be amended by adding a new paragraph (e) which would provide:

No system may impose a fee for system-related services based upon transactions performed or usage by subscribers or Internet users on a computer reservation system, except a fee for actual passenger travel as reflected by participating carrier boarding records.

This proposed rule is amply justified under the Department's § 41712 authority to eliminate unfair practices or methods of competition that are inimical to the public interest. The current pricing systems, which charge carriers based on the entry by travel agents of various active and passive codes which have no necessary relationship to any benefit to the carriers, injures competition, harms consumers and cannot be justified by any economic or public policy argument. Rather, the use of market power by the vendors to impose this fee structure, coupled with their use of subscriber productivity incentives unrelated to passenger travel, makes these

pricing practices particularly burdensome on the participating carriers. The rapid growth of Internet booking will exacerbate this problem.

The following points strongly support the rule. First, the proposed rule is a straightforward solution to many of the problems created by the vendors' current pricing strategies. In addition, the proposed rule does not require the Department to regulate the level of fees imposed nor does it require the Department to engage in a complex regulatory analysis of CRS transactions which concerned the Department in 1992. 1992 Final Rule, *supra*, at 43818. Third, it is a payment arrangement which would be a likely outcome in a competitive environment where terms of the participation agreement would be negotiated between the vendor and the carrier. If competition existed among CRS vendors seeking participating carriers, those carriers would insist on a pricing system under which they paid for value received, which makes it possible to budget CRS costs from month to month and which reduces or eliminates the need to waste money and staff resources auditing CRS transactions. Payments linked to actual passenger travel meet these criteria. Finally, this approach limits the potential impact of individuals generating enormous CRS charges for various Internet transactions and assures that the participating carrier only pays for transactions that result in actual travel.

B. Authorize Termination of Passive Segment Functionality

Section 255.6 should be amended by adding a new paragraph (f) which would provide:

A participating carrier may notify a system that it does not authorize the system to accept passive bookings from subscribers and the system shall thereupon terminate this capability with respect to that carrier. For the purposes of this subsection, *passive booking* shall mean the creation of or change in a passenger name record (PNR) which is not transmitted to the participating carrier's internal reservation system.

This rule would provide a significant benefit to participating carriers regardless of any other rules imposed by the Department with respect to booking fees and practices. Termination of passive bookings would eliminate much of the overbooking problem and abuse resulting from the use of improper fares or upgrades. The proposed rule is pro-competitive like the Department's proposal to abolish the parity clause requirements in participation agreements so that carriers can choose the services they wish to purchase. In a competitive environment, it is impossible to imagine a scenario under which a carrier would agree to an arrangement where agents have a capability which it does not want them to have, pays the CRS vendor for the agents' uncontrolled use of that capability and thereby requires the carrier to confront agents by creating an internal program to attempt to recoup these charges from the agents.

The rule is further justified if American Airlines and United Airlines, the principle competitors of virtually all domestic participating carriers, do not pay for the equivalent of passive bookings on, respectively, SABRE and Apollo, the dominant CRSs in an apparent direct violation of §255.6. In view of this situation, it is imperative that at a minimum, no participating carrier should be charged for passive bookings on SABRE and Apollo.

C. Prohibition of Abusive Bookings and Arbitration of Disputes

If the Department adopted the proposed rule listed in A, then the following rule would not be required since participating carriers would no longer be charged for abusive bookings which are unrelated to a known passenger's intent to travel. The proposed rule is being included here as a second-best alternative that could at least provide some relief to participating carriers. Under this alternative, §255.6 would be amended by adding the following:

1. A system may charge fees only for subscriber transactions that relate to a known passenger's intent to travel as demonstrated by the issuance of a ticket to an identifiable person and a participating

carrier may withhold fees for transactions for which no ticket is issued or which was not validly issued.

2. No system may terminate a carrier's participation in the system for withholding payment of such fees if the carrier has taken the following actions: (a) advised the system of the amount disputed and the basis for the dispute; (b) paid the disputed funds into a segregated account; (c) offered to arbitrate the dispute before an independent arbitrator acceptable to the carrier and the vendor.
3. Amend 255.6(d) to add after the last word: "and date of issuance of ticket and ticket number."

In the 1992 rulemaking, the Department considered but ultimately did not impose rules which would have allowed carriers to withhold payments if they did not receive adequate information to analyze CRS charges and to request arbitration of disputes arising under the CRS rules. At the time, the Department found these provisions unnecessary because it imposed a rule defining the booking information which the vendors were required to provide the carriers and because there had been few complaints filed with the Department alleging violations of the CRS rules. As discussed in this petition, the BIDT tapes do not supply sufficient information for participating carriers to assess whether many charges are legitimate, and these carriers are powerless to contest any payment.

This proposed rule would circumscribe the transactions for which booking fees could be charged to those where value to the participating carrier is demonstrated by the issuance of a ticket. Since under this proposed rule vendors could still charge for fraudulent tickets issued, e.g. fictitious individuals or with improper fares, participating carriers must have a dispute resolution system that enables them to contest charges without the threat of termination or the imposition of enormous court costs. The proposed arbitration requirement establishes a procedure a carrier could use to resolve these disputes which could be invoked by new entrant

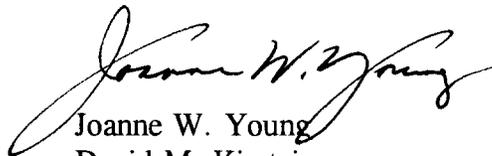
or small carriers without fear of termination or payment of substantial legal fees to litigate a fee issue. The inclusion of arbitration clauses is commonplace in commercial contracts where the parties have some bargaining leverage and would be a provision participating carriers would likely seek if they could negotiate the terms of a participation agreement.

V. CONCLUSION

Since 1992 when the Department last reviewed the CRS rules, CRS vendors have developed transactional pricing practices designed to obtain maximum booking fees from participating carriers. These pricing schemes constitute unfair methods of competition which are used in an unfair and anticompetitive manner to cause substantial harm to participating carriers and consumers. To promote competition, non-owner participating carriers must have the opportunity to reduce their distribution costs and pass those cost savings on to travelers. The market power of the CRS vendors, which allows them to impose these transactional pricing schemes and refuse to assist participating carriers to resolve these problems, makes cost control by carriers in this area virtually impossible. The public interest requires that the Department act now and, in light of the matters discussed in this Petition, take affirmative steps to control vendor booking fee practices. The proposed rules will help discipline the vendors and thereby greatly benefit the traveling public.

WHEREFORE, America West Airlines, Inc. respectfully requests the Department immediately request comments on this Petition leading to the issuance of an NPRM to revise Part 255 of its Economic Regulations to limit CRS booking fees to charges for actual travel and to require vendors to terminate the right of agents to create passive bookings at the request of a participating carrier.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joanne W. Young". The signature is fluid and cursive, with a large initial "J" and "Y".

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