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BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
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DOCKET SECTION

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COMPUTER RESERVATION SYSTEM :
REGULATIONS :
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Advance Notice of Proposed :
Rulemaking -- Notice No. 97-9 :
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Docket OST-97-2881 -26

**COMMENTS OF THE
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.**

The American Society of Travel Agents, Inc. ("ASTA") submits these comments in response to the captioned Notice.

I. INTRODUCTION AND STATEMENT OF POSITION.

In commencing this proceeding, the Department noted that much has changed since the CRS regulations were last reviewed, and that is certainly true. In early 1995, travel agent commissions were capped at \$50, eliminating the historic linkage between the price value of the service sold by travel agents and the compensation they received from the airlines. Just in the few months since the ANPRM was released, additional changes have rocked the system by which airline services are communicated and sold to the public. The major airlines have slashed commission rates for a second time, driving agency compensation below cost in most cases and

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forcing much of the industry to either charge consumers for agency services previously covered by the cost of the ticket or to shift their business away from air travel altogether. The airlines are aggressively trying to take market share from the travel agents through incentives and other devices. Sometimes consumers are led to spend more for air travel than would be necessary if they continued to rely upon travel agency services, the hallmark of which is full access to inventory and informed consumer choice.

In adopting these strategies, the airlines are counting heavily on another change, the recent explosion of commerce on the Internet. Almost all travel suppliers are testing the Internet as a new method of communicating and selling. Electronic ticketing has also established itself in a corner of the marketplace, serving the interests of many consumers, airlines and travel agents as well. Finally, airline participation in CRS systems is no longer uniform.

But while much has changed, with effects and implications not yet fully understood, much has also stayed the same. There remain only four CRS vendors serving as links between the travel agency community and the airlines. They continue to possess and assert market power with respect to the airlines and even more dominantly as against the travel agency industry. Travel agencies remain overwhelmingly small businesses and are no match for the marketing skills and power of the airline-owned systems on which they are dependent for information and ticketing capability for air services that comprise about 60 percent of their total travel sales.

As we said in the previous rulemaking, there simply is no possibility that the concentrated and interlocked CRS market can or will operate competitively without regulation. In adopting the original CRS regulations, the CAB found that "CRS owners have a substantial degree of power over price and output in the CRS industry" and that "they have the ability and incentive to exercise that power in ways that may interfere with air transport competition". ER-1385 at 6. While the winds of change are blowing hard, nothing has occurred to alter that finding since the CRS regulations first became effective. CRS services thus remain the essential facilities that they were found to be in 1984. Now, as then, "there are no real substitutes for CRS's from the travel agent's perspective" and "CRS's are in many respects not substitutes for one another". ER-1385 at 10.

The full service travel agent also remains the superior distribution system for the airlines and for the traveling public. As the Notice in 1991 stated, "the agency system is the most efficient means of distributing tickets".¹ That has not changed.² The evidence is overwhelming that the traveling public likes what travel agents do.³ Since the basic market conditions that compelled the regulation of CRS in 1984 are still present, the

¹ Notice 91-6 at 6.

² See "Competition in the Distribution of Travel Services," published by the American Society of Travel Agents, January, 1997, at 76-80. Portions of that study, hereafter referred to as "ASTA Competition Study," are being submitted to the docket for this proceeding to assist the Department in its analysis.

³ ASTA Competition Study at 4-11.

only way to assure continuation of efficient distribution of airline services is to re-adopt the proposed regulations with the modifications we will suggest.

It is especially important that the Department not try to leap-frog the market in the enthusiastic hope that the Internet and other technological changes of a related nature are going to provide, in the next five or so years, an effective replacement for the restraints and incentives to compete that are the essence of the CRS regulations. Even the most optimistic forecasts of the use of the Internet by consumers for travel purchasing show that only a small fraction of total travel buying will occur through the Internet by the year 2002. Moreover, while the industry seems reluctant to talk about it too much, the fact is that the Internet's granting of direct consumer access to airline inventory has caused some serious problems either not foreseen or perhaps too optimistically discarded. Large costs are being absorbed through duplicative, phony or erroneously created bookings by consumers using booking engines provided on the Internet.

More fundamentally, the Department must remain alert to the danger that the Internet's promise may be subverted by the exercise of market power by huge firms that are new to the travel marketplace. Microsoft is the most well known, though perhaps not the only, example of such a firm, possessing a practical monopoly over the computer operating system market and engaging in practices that many observers believe to be a basic threat to consumer free access to the Internet and the competitive commerce that it could potentially provide or inspire. Indeed, the United States

Department of Justice is litigating now with Microsoft over the "integration" of the Microsoft Internet web browser with Windows 95 (and its successors).

For all that it promises, which is much, the Internet cannot be relied upon at this point as a solution to the economic power of the four major CRS companies who continue to dominate airline marketing. The CRS regulations must be continued, extended and strengthened further if consumer interests in a competitive air travel distribution system are to be protected.

ASTA's position at this stage of the debate summarizes this way:

- # The CRS rules remain essential because CRS vendors continue to have the power and incentive to use their systems to the detriment of competing carriers, subscribers, and the traveling public. Rules regarding display bias by airline-owned integrated systems should continue. Travel agents must continue to have the ability to tailor secondary displays to meet individual customer needs in the marketplace.
- # The CRS rules should apply to CRS-based booking and information systems used by consumers as well as carrier-owned systems used by travel agents so that all firms offering integrated displays of airline services sourced to airline-owned databases are forbidden to bias their displays. Individual airlines and DoT-approved alliances of airlines that offer their services on the Internet without integration would not be subject to the anti-biasing rules.
- # Because of volatile industry conditions and constant advancements in technology, agents should not be locked into longer term contracts that may place them at a competitive disadvantage because of market changes. CRS vendors should, therefore, be required to simultaneously offer subscribers one, two, and three year contracts. Each contract offering must be commercially reasonable in relation to each other. Additionally, to assure that travel agency owners understand what they are being offered, each contract proposal should include a schedule of costs for each component (i.e., hardware, software, access, communications, training, etc.).

- # All multi-year CRS contracts should include an annual review date. Sixty days prior to that review date, either the subscriber or the vendor should be able to require a good faith re-evaluation of the terms of the contract.
- # CRS vendors should be required to include in their subscriber contracts the terms under which subscribers may add or delete equipment and the maximum amount the vendor can charge the subscriber during any month.
- # CRS vendors should not be able to unreasonably prevent subscribers from using leased hardware to access third-party CRS and other database systems, as long as the subscriber fulfills its obligations under the terms of the contract and such use does not impair or otherwise harm the vendors' system.
- # CRS vendors should not be allowed to sell or otherwise share CRS marketing information tapes with owning carriers or other airline participants.
- # System owners should be barred from offering inducements to clients to book transactions through CRS systems they own.
- # CRS vendors should not be allowed to collect anticipated lost booking fees when seeking damages from a subscriber that terminates its contract prior to its stated expiration date.
- # The rules should not permit any participating carrier to compel a CRS system to terminate the ability of travel agents to make "passive bookings;" issues of this nature should be resolved between the individual airline and its agent without bringing the power of the CRS to bear against the agent.
- # Because of the volatility of the marketplace, the DOT should review the rules three years following adoption.

The details are set out below.

II. CRS RULES PREVENTING DISPLAY BIAS MUST BE CONTINUED.

Although the hopes of some may be that consumers of the future will all want to buy their tickets by phone and the Internet, the fact remains that today and for the

foreseeable future most airline travel will continue to be sold by travel agents. Despite commission caps and cuts, despite airline attempts to divert agency clients, and despite discriminatory and unfair pricing and other competitive practices, the public still overwhelmingly prefers to buy air travel through travel agents. For the year-to-date October, 1997, travel agency fares sold (net of taxes) were up overall 6 percent, including a 17 percent increase in international sales. Total air sales should exceed \$65 billion for the year 1997. With Internet deals and 800 numbers in abundance everywhere, the traveling public continues to prefer what travel agents do.

It is therefore inconceivable that the Department would now sanction a return to screen biasing by the CRS vendors. We will not burden the record on this issue further unless someone seriously suggests otherwise.

III. THE CRS RULES SHOULD APPLY TO CRS-BASED BOOKING AND INFORMATION SYSTEMS USED BY CONSUMERS.

By all accounts consumer use of travel booking engines will reach 7 to 9 billion dollars by the year 2002. While this amount is small relative to total travel agency production, it is still a large number involving many consumers. Most of these transactions will be initiated through computerized booking services that are, in reality, the functionality of one of the four CRS systems. Today there is no other practical way for an Internet travel retailer to acquire the information and processing power necessary to offer the entire worldwide network of airline services to the consumer.

Because most of these retailers identify themselves as travel agents and, in any event, the public will likely perceive them as simply Internet versions of travel agencies, the public will expect the same scope of inventory and neutrality of display that they get from so-called "traditional" travel agencies.⁴

The incentive clearly exists for any airline or alliance of airlines to try to buy display bias in its/their favor, and many Internet firms may be ready to respond to such offers. The public in such cases would not have the help of human travel agency personnel intervening between the biased display and the consumer's decision. The use of display bias over the Internet thus presents a more serious threat than display bias aimed at travel agencies, many of whom knew enough to resist the effects of the bias.

The history of traditional CRS services indicates that the opportunity to bias usually leads to the reality of bias. Prior to the CRS regulations banning bias, it was common for favorable screen positions to be sold to "co-hosts" of the CRS company who were involved usually in joint CRS marketing relationships with the CRS vendor and/or its owners. The Department should not wait until the problem of "co-hosting" blossoms on the Internet. Adoption of new regulations simply takes too long. The time to act on this issue is now. The rule should ban display bias by all firms that hold

⁴ We put "traditional" in quotes because in some circles the term has come to have a negative connotation. We intend none. The most zealous true believers in the future of commerce on the the Internet describe traditional busiensses with scorn, implying that the Internet dooms them all to extinction. This is not the place to argue that point. We highlight the term "traditional" simply to refer to the style of business that typically involves human beings interacting directly with other human beings, using technology as a tool to assist the service provided.

themselves out as travel agents or that purport or appear to be providing integrated displays of multi-airline services.

It is not necessary or appropriate, in ASTA's view, that such anti-bias rules apply to Internet sites representing a single or formally allied group of airlines (such as the Northwest-KLM alliance). In those situations the public has no reasonable expectancy of neutrality or completeness. The consumer expects a purely Delta Air Lines Internet site to sell Delta and not to provide equal information about Delta's competitors.

IV. NEW RULES REQUIRING SHORTER CONTRACT TERM OPTIONS ARE ESSENTIAL TO MAINTAIN COMPETITION AND CORRESPOND TO THE SPEED OF TECHNOLOGY CHANGE.

The present CRS rules impose a five-year term limit on CRS contracts. Whatever sense that may have made in the pre-Internet world, today technology and market changes are so swift that travel agencies require much more flexibility in adapting their technology infrastructures to meet consumer needs.

When the current rules were adopted in 1992, there was scant mention of airline marketing to "home computer users." Today the Internet and other technological changes are compelling the retooling of computer systems and the rethinking of marketing and business practices at a pace unimagined even three years ago. To deny travel agents the flexibility they require to continue adapting to this situation would be equivalent to a federal policy that effectively "picks the winner" in the competition for travel consumer favor in the future. Not only would such a policy be unfair to travel

agents, it would deprive the public of the sole source of comparison shopping on which they can count for neutrality.

If travel agents were equally equipped with the CRS vendors and their owners to negotiate for the flexibility they need, we would not seek a federal rule on the subject. But it is clear they are not so equipped. If the CRS rules are to continue being driven by consumer interests, as they should be, then the Department must be sure that the consumer's best hope in the marketplace is in a position to equip itself with the tools needed to serve those consumers properly.

The five year term rule, even accompanied by the requirement for an alternative offering of a three-year contract, has produced a market result with five year contracts being the norm. ASTA's data indicates that 83 percent of CRS contracts have a five year term.⁵ At any one time, about a third of all CRS contracts have roughly 2.5 years remaining in their term. A third have three to five years left.⁶

Most travel agencies now face competition from the Internet, reductions in their commission compensation to below-cost levels, and attempts by airline owners of CRS systems to divert their clients. These activities by the owners of the industry's central information and booking tool lead to reduced segment productivity and financial penalties on the agencies. Yet they are often stuck with adverse contracts from which they can escape only with the most dire financial consequences.

⁵ 1996 ASTA Agency Automation Survey, at p. 15. This data has been very consistent for the past three years.

⁶ Id. at p. 16.

When the most recent commission cuts were announced, ASTA immediately called upon the CRS vendors to express a willingness to enter good faith evaluation and renegotiation of CRS contracts in situations where agency contracts were imposing penalties traceable to the commission cuts and agency responses to them. While no vendors said "no" outright to these requests, the jury is still out on the extent to which meaningful relief will be given. In any event, travel agencies should not be left exposed to these types of power squeezes in which their ability to survive depends on their relying on favors from the vendors to save their businesses. Shorter term contracts would level the playing field and permit agents to protect themselves to a greater extent against incursions by the CRS's owners.

ASTA proposes that the rules mandate each vendor to offer every subscriber a choice of a one, two or three year contract. Each component should be priced separately in the contract proposals, to facilitate agent understanding of what is being offered and to stimulate greater competition among vendors.

The most critical component of this contract regime, however, would be a requirement that the terms of the three alternative contracts be "commercially reasonable" in relation to each other. We understand the Department's reluctance to adopt rules that could potentially require the adjudication by it of what is reasonable in a particular context. We believe it most likely that once the proposed rules were in effect, the market would resolve the issues and there would be little or nothing for DoT to adjudicate.

The problem to which this rule is addressed is that in the current market, where five-year contracts can only be offered if three-year contracts are also proposed, the three-year offerings are often not commercially reasonable relative to the five-year deals. That is why the vast majority of final contracts are of five years duration. In our proposed regime, it would not be reasonable, for example, for a two-year contract to cost twice as much as a three-year proposal. Such a price relationship could not be based on the cost of money, the amortization of equipment or any factor other than the vendor's desire to induce the agency into accepting the longer-term contract.

The Department will, we hope, stay focused on the fact that the vendors who seek longer term contracts are owned by the firms whose policies and practices make it suicidal for travel agencies to be locked into long term contracts. In the last CRS rulemaking, ASTA supported strongly the use of productivity pricing for CRS contracts, in the expectation that, combined with the other rules it advocated (not all of which were adopted), agency contract pricing would come to resemble a competitive outcome. Instead, the decisions of the CRS's owner airlines to reduce agency compensation and to aggressively attack their customer base have placed many agents in a lose-lose posture as regards their CRS system.

Productivity pricing is used in 86 percent of agency CRS contracts.⁷ Prior to the most recent commission cut, failure to meet segment production thresholds resulted in financial penalties for at least 67 percent of agencies.⁸ More than half of agencies

⁷ 1996 ASTA Agency Automation Survey, at p. 19.

⁸ *Id.* at p. 26.

experienced penalties in fact and 17 percent experienced them more than 25 percent of the time.⁹ There are no data available yet for the post-September 1997 cuts, but there can be no question that the financial impact of reduced segment counts will be severe.

Virtually all industry experts have counseled travel agents to reduce their reliance on airline sales in the wake of the commission cuts. Aside from, or perhaps in addition to, charging service fees to their clients, this is the only logical business option for most small and medium-sized agencies. It is what the airlines want. Yet the agency community is stuck with long-term contracts that punish them every month that they fail to meet production thresholds established prior the commission cuts (and in many case even prior to the 1995 commission caps).

ASTA and others had advocated a maximum three-year term when the CAB was considering the original rules and, while adopting a five-year rule, the CAB said "we hope that a shorter term does become the industry standard". ER-1385 at 41. This has not happened so more aggressive action is required. ASTA's three-year cap on contract terms will increase the frequency with which CRS contracts become available for renegotiation and will thereby stimulate competition among the vendors. The three-year cap will not, however, change the useful life of the computer equipment. The shorter term therefore should not result in significant price increases to travel agents. Certainly the vendors will have less "security" in the stream of booking fees that they can expect to earn from a given contract, but this can be offset by other

⁹ Id. at p. 28.

services calculated to assure travel agent brand loyalty. With shorter terms the CRS systems will have greater incentives than they do now to assure brand loyalty.

Adoption of a three-year term will conform the American CRS rules to those being adopted by other countries and international organizations that, having examined CRS issues more recently than the United States, have concluded that more detailed regulation of CRS information services is essential. Both Canada and the European Civil Aviation Conference have, for example, adopted a maximum three-year term for subscriber contracts.

These contract provisions affect the traveling public. When an airline dominates air transportation in a hub or region, that airline's affiliated CRS system will likewise almost always dominate the market. By and large, agents will want the CRS of the dominant carrier because having it permits them to offer the best information and services to their clients. When, however, the dominant airline withdraws from the airline market, it leaves behind a captive distribution system and uses it to extract booking fees from the carrier or carriers that remain in the market. The agents are not free to change their information base in response to such changes in the market. Thus, for example, when American Airlines left the Memphis hub to Northwest Airlines, the local travel agency community was forced to continue booking Northwest through the Sabre CRS.

ASTA expects the new rules it is proposing will help thwart regional domination of CRS and air transportation markets, as well as generally facilitating the entry and exit of airlines from markets without penalizing travel agents and consumers. This is a

subject of considerable current policy debate in the industry and within the government. While Congressional solutions to slot allocation, predatory pricing and similar issues are being considered, the Department can strike a powerful blow for competition that flows directly into consumer benefits by freeing travel agents of the yoke of long-term CRS contracts.

In the present marketplace the turnover of technology has reached unprecedented and unpredictable speeds. Travel agencies are under enormous pressure from competitors (particularly the CRS-owning airlines) and their clients to keep pace with the changes. It is likely that very soon an agent without pervasive Internet knowledge and skills will be unable to compete effectively for clients. Not only must computer hardware and software be upgraded, but the agency's ability to utilize non-CRS databases must be 'up with the market' or the agency will lose ground to more sophisticated competitors.

The problem is not that agencies are mostly small business and can't keep up. History shows these small businesses are usually very fleet afoot and highly adaptable if they are not locked into rigid contractual arrangements that deprive them of their inherent flexibility. ASTA's proposed regime for contract terms would assure agents the choice of more flexible arrangements while denying the vendors the option to impose unreasonable penalties designed to thwart those choices. If the Department wants to use its regulations to stimulate market forces, this proposal is one of the most important moves it can make. In an open market characterized by extremely rapid technological innovation, technology contracts would more closely resemble pure

software licenses and allow buyers to reconfigure very rapidly in response to paradigm changes. If travel agencies have that ability, they will remain meaningful sources of comparison shopping with neutral and expert advice for consumers. If, on the other hand, the Department allows the airlines, through the CRS vendors they own, to lock the agency community into punishing long-term contracts that negate their competitive response, the traveling public will end up with less information, fewer choices and will pay higher prices.

V. ALL MULTI-YEAR CRS CONTRACTS SHOULD INCLUDE AN ANNUAL OPPORTUNITY FOR RE-EVALUATION OF THE TERMS OF THE AGREEMENT.

In addition to requiring the offering of an array of short-term contract opportunities, the rules should provide that, in the case of longer-term choices, there should be an opportunity for either side to the contract to compel a good faith re-evaluation of the adequacy of the agreement on its anniversary. This does not mean that an agent could always simply force renegotiation of the contract if the agent felt it was imprudent to have agreed to it. It would simply require either side to sit down with the other in an examination of the assumptions and conditions that existed when the contract was entered and at the time of review, thereby permitting either side to raise with the other the reasons it feels changes in the deal are warranted.

Neither party could be compelled by this review provision to enter a new agreement prior to the end of the term of the old one. What it would prevent is the response "there is nothing to talk about."

The rationale for this proposal is similar to the multi-year offering rule proposed in section IV above. It will foster conditions in which the party with the least bargaining power will have some basis for being heard and perhaps additional grounds for flexibility in adapting to rapidly changing market circumstances which are unforeseeable and uncontrollable because, in many cases, they are in the hands of the owners of the other party to the contract.

VI. SUBSCRIBER CONTRACTS SHOULD STATE THE TERMS UNDER WHICH SUBSCRIBERS MAY ADD OR DELETE EQUIPMENT AND THE MAXIMUM AMOUNT THE VENDOR CAN CHARGE THE SUBSCRIBER DURING ANY MONTH.

Typical CRS contracts are lengthy documents full of complicated legal language and one-sided clauses granting rights to the vendor and/or the airlines and restricting the rights of the travel agency. Long experience in assisting members with the interpretation and application of these contracts indicates to ASTA that travel agents often do not understand some of the key terms of these contracts. There is no reason to add to the advantage that CRS vendors typically have in dealing with small business travel agency owners by allowing this particular condition to continue. Regulations requiring the explicit disclosure of certain key terms would assist the competitive process that is sought to be emulated or inspired by the rules in the first place.

We are not asking the Department to prescribe the exact words of the agreements in any particular respect. This proposal would only require that somewhere in the contract document there would be an explicit indication that, for

example, the agent could remove one CRT terminal without penalty during the term of the agreement. Similarly, if, as is typical, there is a productivity threshold, the contract would have to specify in dollars the maximum charge per month, after application of contractual penalties for failure to meet the standards.

VII. CRS VENDORS SHOULD NOT BE ABLE TO UNREASONABLY PREVENT SUBSCRIBERS FROM USING LEASED HARDWARE TO ACCESS THIRD-PARTY CRS AND OTHER SYSTEMS.

During the last round of regulatory review, ASTA was a leading proponent of the rules requiring the CRS vendors to remove artificial restrictions on the interconnection of third-party hardware and software. We supported the rules proposed by the Department then, with one proposal for an additional rule. We argued that the third-party rules and the rule on multi-access through a single terminal should open the door to the development of additional systems for use by travel agents in providing the best and latest information to their clients, but that this could only be done economically if the agent could use existing CRS equipment to access the systems. Making it more efficient for agents to provide automated information from non-CRS sources, and creating an inducement for third parties to offer such information, would directly benefit consumers by increasing their ability to efficiently locate relevant travel information from a single source -- the industry travel agent.

The Department largely adopted ASTA's views on this subject. We believe the market has responded as expected and the problems we predicted have also occurred. In the most recent survey of this aspect of the market, less than a third of agencies

reported use of third-party applications in their office.¹⁰ And only 3.4 percent of agencies reported using more than one CRS in their office.¹¹ As of mid-1996, travel agency use of third-party systems such as the Internet, were also reduced. Only 38 percent of agencies subscribed to a consumer on-line service or Internet access provider.¹² Among the smallest agencies, with air sales under \$2 million, the share using such services was even lower.¹³ The good news is that of the group not now on the Net, a healthy majority are now considering or are actually developing a home page. Since the commission cuts of 1997, that number is undoubtedly higher.

Vendor policies in combination with current Part 255 leave travel agencies subject to yet another set of forces that deter efficiency. The personal computer is clearly the hardware of choice today for using CRS functions. PC's are by their nature multi-use devices, capable of running a large variety of programs simultaneously in the Windows environment. If the vendors are permitted, as they are now, to prevent the use of a leased PC to access another CRS or other competing system, agencies will be forced to duplicate hardware to use the resources consumers expect and depend on. This in turn impairs the agencies' ability to compete with the CRS' owners.

The only solution to this exercise of power by the CRS's and their airline owners is to adopt a rule that prevents vendors from unreasonably cutting off the use of leased

¹⁰ 1996 ASTA Agency Automation Survey, at p. 45.

¹¹ *Id.* at p. 14.

¹² *Id.* at p. 53.

¹³ *Id.* at p. 54.

hardware to access third-party systems, including other CRS's. Of course, such a rule must have the proviso that it applies only as long as the subscriber fulfills its obligations under the terms of the contract and that such concurrent use does not impair or otherwise harm the vendor's system.

VIII. CRS VENDORS SHOULD NOT BE ALLOWED TO SELL OR OTHERWISE SHARE CRS MARKETING INFORMATION TAPES WITH OWNING CARRIERS OR OTHER AIRLINE PARTICIPANTS.

The competitive situation has changed dramatically since the CRS review in 1992. Competition between the airline owners of the CRS's and travel agencies has reached unprecedented intensity. The once-popular refrain that airlines were afraid of travel agent retaliation is ancient history. Airlines are using every device they can to attack the travel agency client base. Many major airlines do not mention travel agencies in their advertising, discriminate against them in Internet commission policies, openly solicit their corporate clients, and punish them for issuing certain low fare combinations (such as back-to-back tickets) while their own employees routinely issue them. Those same airlines own the Airlines Reporting Corporation which controls how agents do business and settle accounts with the airlines. ARC is now considering a plan, created without agency input, to "accredit" customers, not as agents (which they already do), but as customers. To cap it off, the Federal District Court in Dallas has just issued an opinion that relies on the federal preemption language of the Airline

Deregulation Act to effectively wipe out most state law remedies that travel agencies had against airlines and CRS vendors for breach of contract and similar causes.¹⁴

In these circumstances there is grave competitive danger to permitting CRS vendors to share the details of agency operations with carriers whose business is not covered by the data. It is now time to impose new rules to restrain vendors from selling agent-generated information to other airlines, and, consequently, restrain the ability of each airline to learn the composition of each agent's sales performance, airline-by-airline and market-by-market. The situation has worsened since we raised the point in the prior CRS review. We are informed that the vendors now sell the agents' actual keystroke sequences used in investigating and making a booking. A purchasing airline can thus determine how often an agency requests details on another carrier and in what circumstances. It is most unlikely that an information exchange regime like this would be sustained under the antitrust laws if it were simply the product of private agreements to trade sales data. We are not aware of, and no one has ever cited, any other industry in which real-time sales data in this level of detail is routinely exchanged by competing sellers. Both Canada and ECAC have recognized this problem and have allowed distribution of aggregated, non-carrier specific sales information, while prohibiting distribution of carrier-specific agent data to carriers not participating in the transportation reflected in that data. See Canada Rule 12 and ECAC Code Section 9.

¹⁴ Lyn-Lea Travel Corp. d/b/a First Class International Travel Management v. American Airlines, Inc., Memorandum Opinion and Order, Docket CA3:96-CV-2068-BC, (N.D. Texas December 2, 1997).

The Department, like the CAB before it, has assumed that restrictions on the sale of CRS data would result in only the affiliated airlines of the CRS system having access to the information. This is based on the belief that there is no effective way to prevent a vendor from extracting full marketing information about agents from its own CRS. While it may be true that vendor access to its system's segment data cannot be prevented, such access can surely be deterred and can be punished when it is discovered. A direct prohibition on the extraction of sales data related to carriers other than the CRS vendor could be quite effective, if the Department makes clear that the penalty for cheating will be severe and the Department expressly permits other carriers and travel agents to bring private suits to enforce the rule. The market would learn pretty quickly if Delta, for example, were using Worldspan data about sales on other carriers.

The situation is quite different with respect to the distribution of the data to the travel agent that generated it. Here the vendors are extremely parsimonious. The airlines get more sales information under the current rules than do the travel agents themselves. The airlines get information on all agents with respect to all carriers, whereas the individual agent has only his own data from his ARC sales report with which to bargain. The agent's access to this data has become even more important now that productivity-based pricing of CRS contracts has emerged. ASTA supports such pricing because it makes business sense for both parties, but travel agents will be at a continuing disadvantage against the much larger vendors unless the Department forces the vendors to provide travel agents with information about the sales generated

by the agent. Such a requirement does not present the same competitive problems as carrier-to-carrier dissemination does, because under our proposal the travel agent would get only the segment data for his own sales, not those of any other travel agent. The agent would then be armed with information to help him bargain more effectively with the vendors, with the result that vendors will be forced to be more competitive with each other in their dealings with travel agents. The proposed rules to implement the foregoing would read as follows:

"No system shall provide to any airline, whether or not affiliated with the system, any data from the system reflecting transactions generated by travel agents on any other airline except as required to provide connecting air transportation. Every vendor shall provide without charge to each travel agent booking through its system a monthly report of segments booked and/or ticketed by supplier, including non-airline bookings."

"Violations of this Part shall be remediable by private actions for damages and/or equitable relief brought in any court of competent jurisdiction by the aggrieved party."

IX. SYSTEM OWNERS SHOULD BE BARRED FROM OFFERING INDUCEMENTS TO CLIENTS TO BOOK TRANSACTIONS THROUGH CRS SYSTEMS THEY OWN.

Among the arsenal of active competitive weapons against travel agents now in use by CRS-owning airlines is the conditioning of a fare discount (whether to provide one and/or how much it should be) to a corporate customer on the use of the CRS owned by that airline to make the bookings. Part 255 already contains three rules dealing with related issues. They prevent system owners from requiring the use of its system by an agent for any particular sale or as a condition for the receipt of any

commission for the sale of its services, and they prevent CRS vendors from pricing CRS's to agents based upon the identity of carriers whose flights are sold by the agent.

The practice of conditioning corporate discounts on the identity of the CRS used for the bookings violates the spirit if not the letter of these principles and should be banned outright in this rulemaking. These practices are simply another example of the use of CRS market power indirectly by the owners to prejudice travel agencies. Travel agencies cannot make competitive responses to these deals when the CRS's do not permit them to use a single leased CRS terminal to access multiple CRS systems.

X. CRS VENDORS SHOULD NOT BE ALLOWED TO COLLECT ANTICIPATED LOST BOOKING FEES WHEN SEEKING DAMAGES FROM A SUBSCRIBER THAT TERMINATES ITS CONTRACT PRIOR TO ITS STATED EXPIRATION DATE.

Whatever may have been true about the foreseeability of future booking activity prior to February, 1995, it is certainly true today that no one in travel retailing can count on any prior practice remaining in effect for long. To permit the CRS's to include estimated future booking activity in damages for premature termination of a contract escalates the penalty for the termination to the intolerable level. As discussed in Section IX above, the airlines are now bringing pressure, through client incentives, on travel agencies to switch CRS affiliations, while the CRSs are punishing agents when they switch by demanding as an element of damages the "lost booking fees" that the CRS claims it would have earned if the contract continued to normal termination.

The Department should put an end to this whipsawing of agents by the CRSs and their owners by adopting a rule that prevents CRSs from claiming future streams of booking fees as an element of damages. Such damages in today's environment are entirely speculative and should be banned.

XI. THE RULES SHOULD NOT PERMIT ANY PARTICIPATING CARRIER TO COMPEL A CRS SYSTEM TO TERMINATE THE ABILITY OF TRAVEL AGENTS TO MAKE "PASSIVE BOOKINGS."

America West has asked the Department to add a rule that permits any participating carrier to enlist the power of the CRS vendor in enforcing the carrier's policies against travel agencies. This is singularly inappropriate.

The major CRSs and their airline owners currently provide no reasonable alternative to travel agent use of passive bookings. To provide consumers with flight details of purchases using wholesalers, consolidators, cruise lines, and tour operators, travel agents, over the past two decades, have used passive air segments to create itineraries and invoices. Now, since the carriers are being charged by the CRSs for passive bookings, there has been a movement by the carriers to limit or eliminate their use. However, only one CRS, System One/Amadeus, provides travel agents with a reasonable alternative, the non-billable air segment "GN". WORLDSPAN provides a marginal alternative with their enhanced "TVL" segment, but many agents have complained that the format is difficult for consumers to read on itineraries and invoices. The two major CRSs refuse to develop any reasonable alternative to passives, forcing

travel agents to hand-type air itineraries in non-air segments, creating up to 50 or 60 additional key strokes per flight segment. In addition to being inefficient and costly, the additional keying of air data creates unnecessary data integrity issues for the travel agent and the consumer.

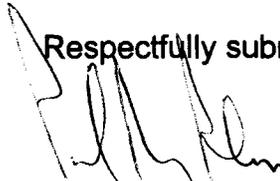
Until the CRSs have developed reasonable alternatives to passives, this issue should be resolved between the individual carrier and its agent without bringing the power of the CRS to bear against the agent. Prior to the crisis engendered by the last round of commission cuts, ASTA was working with many airlines and CRSs to find solutions to the issues raised by passive bookings. An industry solution is far superior to one imposed by government fiat at the request of one or a few airlines.

XII. THE DOT SHOULD REVIEW THE RULES THREE YEARS FOLLOWING ADOPTION.

As noted at several point above, the pace of technological and other change in the travel industry has reached unprecedented pace and revolutionary content. The CRS rules are designed to stimulate and/or simulate competitive forces in an environment where the market power of the airlines and the CRS vendors would otherwise overwhelm them. Just as it is appropriate to require shorter term contracts, it is important that the rules be reviewed more frequently than in the past. Such short term review not only will reduce the risk that anticompetitive forces have not been adequately anticipated or controlled, but it will also permit the Department to evaluate whether all of the regulations are still necessary in light of changes in the marketplace

being driven by technology. Considering the length of time required for even an expedited review of such a large and complex subject (this rulemaking will not likely end until the current rules have had a life of at least six years), it is appropriate to nominally plan to review the situation in three rather than five years from the effective date of the new rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Paul M. Ruden', written over a dotted line.

Paul M. Ruden
Attorney for the American
Society of Travel Agents, Inc.

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