

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of

COMPUTER RESERVATIONS SYSTEMS
(CRS) REGULATIONS

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Docket OST-97-2881

SUPPLEMENTAL COMMENTS OF
CONTINENTAL AIRLINES, INC.

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INTRODUCTION

The Department has asked for supplemental comments on two fundamental questions: whether the decreasing airline ownership and control of traditional carrier-owned computer reservations systems (“CRSs” or “systems”) obviates the need for the CRS rules and whether the Department should regulate internet travel services. The short answer to both questions is no.

Continental¹ urges the Department to renew, with minor modifications, its CRS rules for traditional airline-owned, controlled or marketed CRSs used by travel agents because travel agents still book nearly 75% of ticket sales using the four

¹ Common names of companies are used.

systems offered in the United States,² and those systems continue the anti-consumer and anticompetitive abuses targeted by the Department's rules. In contrast, the embryonic on-line travel services sector must remain free of Department regulation because on-line travel distribution channels can provide unbiased, low cost, competitive alternatives for consumers to potentially level the playing field and finish the job CRS rules began.

Continental states as follows in support of its position:

I. THE CRS RULES SHOULD BE RETAINED FOR AT LEAST A THREE-YEAR TRANSITION PERIOD, AND AIRLINE MARKETERS SHOULD BE SUBJECT TO THE SAME RULES THAT APPLY TO AIRLINE OWNERS OF CRSs

A. The CRS Rules Are Still Needed

It is too soon to sunset the CRS rules. There are four CRSs which are used by travel agents in the United States, and all of those CRSs are still either owned or marketed by airlines, and one CRS, SABRE, claims 38% of the travel agency bookings worldwide and more than 50% of on-line travel agency bookings.³ As in 1992, when the Department last readopted the CRS rules, "CRSs used by travel agencies are so important because of the dominant role of travel agencies in the

² Bear Stearns, "Internet Travel" at 17 (April 2000) ("Bear Stearns").

³ Presentation of Eric J. Speck, SABRE Group President, Travel Marketing and Distribution, DLJ Conference, June 20, 2000 at 3.

marketing of airline services,”⁴ and “the vast majority of all airline tickets, nearly three-fourths, are sold by travel agencies.”⁵

While airline ownership of CRSs is decreasing, it has not disappeared. As the Department’s Supplemental Advance Notice of Proposed Rulemaking notes, Worldspan is still owned entirely by airlines and their affiliates, United owns 17% of Galileo, and Amadeus is controlled by three foreign airlines.⁶ Indeed, “every system still has ties with one or more airlines. American and Southwest market SABRE, and United provides some marketing support for Galileo.”⁷

Moreover, many of the anticompetitive abuses identified by the Department when it adopted and renewed the CRS rules continue today despite those rules. Although the CRS rules require each CRS to offer at least one unbiased display, that unbiased screen is typically buried under other displays that favor its airline-partners in travel agency CRSs, and creative CRS system owners and marketers have found numerous ways to inject bias into the travel agent sales channel using CRS systems. As a result, airlines controlling CRSs can still use those systems to distort airline competition and provide misleading information to consumers. For example, airlines owning or marketing CRS systems can reach agreements with

⁴ 57 Fed. Reg. 43780, 43782 (Sept. 22, 1992).

⁵ Bear Stearns at 17.

⁶ 65 Fed. Reg. at 45554, 45556. Continental no longer has an ownership interest in Amadeus.

⁷ 65 Fed. Reg. at 45554. Since Amadeus, Galileo, Sabre and Worldspan continue to be owned, controlled or marketed by airlines, the Department retains authority under Section 411 to regulate those systems.

travel agents which effectively require the travel agency to set its CRS computers to a biased display screen at every individual travel agent's desk, even though an unbiased display is also available in the CRS system if the individual agent were to take the time and make the extensive effort to search for it. Even if an agency is not required to place biased displays before its employees, many say it will choose to do so because of the influence of override commissions. Given the pressure on individual agency employees to maximize the number of sales made per hour, the likelihood that the employee will search for the unbiased display under such circumstances is virtually nil.

While the current CRS rules permit all airlines to participate in each system on non-discriminatory terms, because the Department has chosen not to regulate the pricing of CRS services each system can impose exorbitant booking fees on participants. Although CRS operating costs have decreased, SABRE has used its dominance to raise booking fees over the last 17 years by approximately 1400%. Other CRSs also charge high, unilaterally-imposed booking fees. These increased booking fees impact smaller, low-fare airlines as well as larger participants like Continental, and they inhibit price competition on fares sold through CRSs because they constitute a much larger percentage of a low-fare ticket than a full-fare ticket. The current rules permit CRSs to charge participating carriers for enhancements and services they do not need or want, thus subjecting participants to a new level of participation and mandatory high fees through their adhesion contracts with the CRSs which are authorized by the Department's rules.

Continental no longer owns any interest in a CRS and hence is not required to participate in all four CRSs. Nonetheless, Continental remains so dependent on the four CRS systems used by travel agents in this country that it must participate in each and therefore must pay extortionate fees assessed unilaterally by systems.

Continental has joined in the formation of Orbitz, a comprehensive internet site that will be providing unbiased information directly to consumers at a lower cost to participating carriers. Continental also participates in other internet distribution channels and has developed its own website. At present, however, 67% of Continental's tickets are still sold by travel agents using CRS systems, and SABRE alone controls 38% of worldwide travel agent sales.

Under these circumstances, it would be premature to sunset the CRS rules now. As Continental and others have recommended, the Department should readopt the CRS rules for a three-year period.⁸ At the end of that period, the Department should institute a proceeding to determine the impact of further changes in airline ownership and marketing of CRS systems, practices of those systems and the availability of alternative low cost and unbiased travel distribution channels.

B. There Is More Need Than Ever To Regulate CRS Marketers
As Well As Owners

Continental and numerous other airlines urged the Department two years ago to extend the mandatory participation and other CRS rules to airline marketers

⁸ Reply Comments of Continental, filed February 3, 1998, at 20-21.

of CRSs, and developments over the last two years have shown why such an extension is required. Airline ownership of CRSs is being replaced by airline marketing of CRSs. While SABRE has no airline owners today, it is marketed by both American and Southwest. While United's share in Galileo is decreasing, United markets Galileo. Airline marketers of CRSs have the same incentive as airline owners of CRSs to distort airline competition and provide misleading information to consumers. They also have incentives to disadvantage participating airline competitors by charging them exorbitant fees for bookings and data. The Department recognized three years ago that "the same incentive to downgrade participation in competing systems could well exist in an airline that is marketing a system."⁹ Indeed, Southwest has refused to participate in any system but SABRE, bolstering SABRE's dominance of CRS systems, and United has petitioned the Department to be freed from mandatory participation requirements as a CRS owner.¹⁰

With airline ownership of CRSs decreasing and airline marketing of CRSs increasing, it is more important than ever that the Department extend to airline marketers of CRSs the same responsibilities and prohibitions that apply to airline system owners under the CRS rules. Indeed, without such a rule, SABRE could escape regulation even though it is the largest of the four CRSs and commands 38% of the bookings from travel agents worldwide.

⁹ 62 Fed. Reg. 59797, November 5, 1997.

¹⁰ See Supplemental Comments of United, filed October 7, 1999.

The CRS rules are already applicable to “air carriers and foreign air carriers that themselves or through an affiliate own, control, operate, or market computerized reservation systems for travel agents in the United States.” (14 C.F.R. § 255.2) The mandatory participation rules and any other rules that apply to carriers which own at least five percent interest in a CRS used by travel agents should apply equally to American, Southwest, United and any other airline that markets a CRS in the United States, regardless of the amount of revenue generated by the marketing agreement or the purpose of the marketing agreement.¹¹ Parallel changes should be made to the definition of system so that the current four systems remain subject to the rules as long as they are owned, controlled or marketed in the U.S. by an airline or its affiliate.

C. The Department Has Authority To Regulate Airline Marketers and CRSs That Are Not Owned By Airlines

Under 49 U.S.C. § 41712, the Department has authority to determine whether “an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition” and to prohibit such activities. Section 41712 clearly permits the Department to regulate airline marketers of CRSs as well as airlines that own or control systems. As discussed above, all four CRSs are still owned, controlled or marketed by airlines and hence they are all still

¹¹ Continental recommends defining the term “system marketer” as follows:

System marketer means a carrier that promotes a computer reservations system to subscribers within the United States.

subject to regulation under the same statutory analysis that forms the basis for the current CRS rules.

II. INTERNET TRAVEL DISTRIBUTION CHANNELS SHOULD REMAIN UNREGULATED

A. While Internet Distribution Services For Consumers Have Expanded Dramatically Over The Past Two Years, They Are Still Evolving

Two years ago, Continental advocated requiring internet travel distribution websites (except those clearly branded as an individual airline's website) to give notice to consumers if they are not unbiased. Dramatic changes in the nature and variety of internet travel services and their developmental state persuade Continental that regulating internet distribution channels now would be premature and could thwart development of meaningful competition for the CRSs and low-cost alternatives for consumers.

While Continental remains concerned about the strength of, and significant bias in, SABRE's Travelocity.com (the largest internet travel provider in terms of gross bookings and unique users) and Expedia.com (the second largest internet travel provider), Continental believes that unbiased, low-cost Orbitz is on the verge of bringing effective competition to the four traditional CRSs and their internet partners, and hundreds of smaller, online travel websites ranging from SkyAuction.com (which specializes in selling air travel to the highest bidder) to LowestFare.com (which offers a lowest-fare search engine and real-time bookings for air travel) will offer travel information and booking capability to consumers. These pro-competitive forces are on the brink of providing to consumers and

participating travel suppliers the unbiased displays and lower booking fees that have not been achieved under the CRS rules. The Department should monitor these positive, pro-competitive developments over the next three years and then commence another rulemaking to examine the status of CRSs and the internet.

B. Online Distribution Channels Must Remain Free If They Are To Provide Meaningful, Unbiased, Low-Cost Alternatives To The Traditional, Dominant CRS Distribution Channels

New internet services are scrambling to meet consumer requirements for both broad access to travel service information and specialized information for particular consumers or types of consumers. For their part, airlines are seeking to maximize their exposure to consumers through cost-effective means to maximize their sales and minimize their expenses. To meet that objective, airlines are participating in all kinds of internet distribution channels.

Continental and other airlines formed Orbitz to ensure at least one totally unbiased, comprehensive internet site will be available for consumers. Unlike the largest internet providers, Orbitz will offer only non-biased displays, and Orbitz will be open to all airlines willing to participate in Orbitz. Creation of a non-biased internet distribution channel readily available directly to consumers and of real competition for CRS system vendors is essential to reducing prices to consumers and distribution costs to airlines. According to Orbitz's own press release, Orbitz is not yet operational.¹² It plans beta testing beginning later this year, and final

¹² Orbitz Press Release, "Orbitz Announces New Travel Partners, Launch Timetable" (Sept. 8, 2000).

rollout is not expected until mid-2001. If Orbitz and entities like it succeed, market forces should compel other distribution channels to eliminate or reduce the bias in their displays and services and to reduce their prices for distribution of airline services.

The Department's rules have not eliminated biased screens from CRSs or prevented CRSs from charging extortionate booking fees. Orbitz and other internet distribution channels which offer only a truly-unbiased display and charge participating carriers affordable booking fees should be able to accomplish through market forces what DOT's regulations have not yet produced: elimination of biased displays and a reduction in the booking fees charged to participating airlines. For this reason, internet providers should not be subjected to any regulation that would put them at a competitive disadvantage vis à vis the dominant CRSs or other distribution channels.¹³

C. Government Policies Oppose Regulation of Internet Distribution

When President Clinton and Vice President Gore announced the issuance of the government's Framework for Global Electronic Commerce in July 1997, they said the internet should be a "global free-trade zone" where "government makes every effort . . . not to stand in the way, to do no harm." (Chicago Sun-Times, July 2, 1997 at 24 (Final Edition)) Among the core principles in that policy

¹³ Indeed, the announcement of Orbitz has led CRS-owned internet providers to seek ways to further extend their CRS dominance into the internet arena. For example, SABRE, which previously consolidated Preview Travel into Travelocity.com, is now acquiring GetThere.com.

statement is: "Parties should be able to enter into legitimate agreements to buy and sell products and services across the internet with minimal government involvement or intervention. Unnecessary regulation of commercial activities will distort development of the electronic marketplace by decreasing the supply and raising the cost of products and services for consumers the world over. Business models must evolve rapidly to keep pace with the break-neck speed of change in the technology; government attempts to regulate are likely to be outmoded by the time they are finally enacted." Accordingly, "governments should refrain from imposing new and unnecessary regulations, bureaucratic procedures or taxes and tariffs on commercial activities that take place via the internet." ("Framework for Global Electronic Commerce," Policy Paper Issued by President Clinton and Vice President Gore, Washington, D.C., July 1, 1997 at 3) Support for keeping the internet free of regulatory inhibitions is bi-partisan,¹⁴ and Republican leaders in Congress have

¹⁴ The Republican eContract 2000 says, "the global high-tech revolution has been derived from private sector creativity, innovation, and competition rather than government direction" and pledges "to continue our legislative and oversight efforts to remove the barriers to future innovation, competition, and growth" by, among other things, "reining in excessive regulation from federal agencies." As Rep. Richard K. Armey has described it, "In our eContract, we promise to stick to the principle that freedom, not government intervention, is the answer to maintaining and expanding that growth." (Congressional Record, H 3060, May 16, 2000)

also stressed the importance of allowing the internet to develop unfettered by government regulation.¹⁵

Given this strong government policy against interfering with the development of internet commerce through government regulation, the Department should not undertake regulation of internet travel sales. The unique circumstances which justified regulation of CRSs simply do not apply to internet distribution of travel services. Four CRSs were virtually the sole source of information for travel agencies, and travel agencies were the source for well over 75% of airline ticket sales. In contrast, numerous internet sources for air travel information are available directly to consumers and to travel agents and other intermediaries as well. The internet has brought discount travel services out of the underground and into the homes of consumers.

Although travel agencies held themselves out as providers of neutral information to consumers, biased CRS systems were influencing travel agency sales. Moreover, consumers never saw the CRSs themselves, and were unable to see biases contained in the systems. On the internet, consumers know that each airline's own website is not unbiased, and they will be able to learn which non-airline sites offer the best prices and services. Since biased sites will never reliably

¹⁵ The Department should not even be considering regulation of sales of a clearly beneficial product -- air transportation -- over the internet at a time when the House has rejected attempts to ban internet gambling and the Senate tabled a proposal to ban unlicensed gun dealers from selling guns over the internet. There is far less reason to regulate internet travel sites.

offer the best prices and services, consumers should be able to identify the least-biased sites, and sites will ultimately compete for consumers by offering less bias. Although the primary CRS-affiliated sites offered presently are biased, if new competitors are allowed to flourish unimpeded by regulation the marketplace should resolve any bias issues. At the same time, certain consumers – such as employees of corporations with corporate travel agreements with suppliers and consumers with brand loyalty from frequent-flyer/hotel/car rental program participation – will seek out biased sites which suit their needs. Under these circumstances, any effort to regulate internet sales of air transportation would violate the Administration's stated policy to refrain from imposing new and unnecessary regulation on the internet.

Just as retailers offer high-price goods on Fifth Avenue and discount goods in outlet malls as well as high-price and discount goods through different distribution channels on the internet, airlines should remain free to participate in the plethora of internet distribution channels becoming available as providers develop special sites for vacationers, price-sensitive consumers, business travelers, college students, female travelers, ethnic groups, bidders seeking auctions and numerous other specific groups of travelers. Since airlines are participating in many specialized internet sites and also participating in a comprehensive, un-biased site through Orbitz, consumers will be presented with a myriad of options for seeking air fares and services as well as other travel products through the internet. As the Framework for Global Electronic Commerce recognizes, government's role is to stay out of the way and do no harm as the internet travel sites develop.

D. Even Considering Regulation Of Online Distribution Channels
Would Be Premature

Even if regulation of internet air travel distribution systems were worth considering, doing so now would be premature. Despite its remarkable growth during the past two years, internet travel distribution remains in its infancy and is used primarily as a research tool for consumers. According to a study conducted by Forrester Research and reported by Bear Stearns, on-line travel bookings will represent only 10% of the total travel bookings and 11.1% of the airline bookings by 2003.¹⁶ The internet has been embraced as a research tool for travel information, but it “has not yet fully developed its potential for on-line commerce in the travel space.”¹⁷ Indeed, “[l]ike most of the e-commerce world, the on-line travel space is still in its embryonic stage.”¹⁸ The Department did not propose the original CRS rules until American and United had been marketing computers to travel agents with information on flights, fares and seat ability for eight years, CRSs had “become virtually essential for information” and 90 percent of travel agent sales were made through CRS systems.¹⁹

It is impossible to predict today how the internet travel sector will look even one year from now. Internet distribution channels today include a wide range of products: branded websites operated by each of the major airlines and other

¹⁶ Bear Stearns, Internet Travel at 9. 29 (April 2000).

¹⁷ Bear Stearns at 18.

¹⁸ Bear Stearns at 3.

¹⁹ EDR-466C and 4-5, 49 Fed. Reg. 11644 (March 27, 1984).

airlines; CRS-owned consumer sites like SABRE's Travelocity.com and Galileo's TheTrip.com; non-CRS-owned websites like Expedia.com, American Express and hundreds of small travel agencies which have licensed a booking engine to create a web presence; and airline-invested sites like Orbitz, Priceline.com, College Travel Network and Biz Travel.com. Each type of website has its own economic model and access to different incentives for attracting consumers. For example, CRS-owned sites earn both commissions and booking fees from suppliers, which permits them to exploit cross-subsidization to gain a competitive advantage over other sites.

The Department should leave the internet free from regulation during the next three years of growth and then examine existing air travel and distribution channels to determine what further action, if any, is appropriate. Internet sales are in their infancy, and no one knows which types of internet distribution models will survive over the near term. Moreover, Orbitz is on the brink of providing a marketplace solution that has the potential to provide discipline to both traditional CRSs and the developing internet travel sector. With a real prospect of a marketplace solution to evils which the Department's CRS rules have attempted to eliminate over the past 16 years, it would be foolish to impose rules on the fledgling internet sector now.

E. Regulation Of The Internet Now Could Have Harmful Unintended Consequences

Crafting rules for the still-evolving internet travel sector could have harmful unintended consequences. Regulating internet distribution channels now could inhibit the full development of creative internet sites, including Orbitz, which

promise huge cost-savings benefits to consumers and airlines alike as well as effective competition for the dominant CRSs. The internet has the ability to inject new competition that could improve the practices of the CRS industry and CRS-affiliated online agencies with respect to booking fees and display bias. The Department should not impose any rules which could, however inadvertently, deter internet providers from accomplishing this critical pro-competitive and pro-consumer task.

III. CRSs SHOULD BE PROHIBITED FROM REQUIRING PARTICIPATION IN INTERNET PRODUCTS

The Department's July 24 notice referenced Delta's request that the Department forbid CRS systems from tying participation in system services provided to on-line travel agencies and other websites with an airline's participation in the system services provided to traditional travel agencies. Continental continues to agree with Delta that such tying must be outlawed.²⁰ CRS-operated internet sites are the emerging version of airline-owned CRSs. Like airlines which use their control positions to introduce bias into the displays offered by the CRSs which they own or market and to charge participating carriers exorbitant fees, CRS-operated internet sites like Travelocity.com can and do use their dominant CRS positions to cross-subsidize their internet services with revenues from unilaterally-imposed booking fees. CRSs should not be permitted to extort additional fees from participating airlines under adhesion contracts that require them to further

²⁰ See Continental Reply Comments, filed February 3, 1998, at 12-14.

subsidize the system's internet products. The CRS rules should prohibit CRS/participant contract terms that do not give participating carriers the freedom to decide whether they want to pay for each CRS's internet products.

IV. THE DEPARTMENT SHOULD INCREASE ITS ENFORCEMENT EFFORTS

The Department should augment its CRS enforcement staff and increase its efforts to enforce the CRS rules. Although the prohibitions and requirements of the existing rules are clear, the Department has not devoted sufficient resources to investigating complaints and initiating its own investigations of anticompetitive activities of systems and the airlines that own, market or control them. In particular, the Department should investigate and take action against the long-ignored anti-competitive practice of tying of airline discount fares and other incentives (override commissions, waiver of fare rules, free tickets, priority wait-list and similar favors) to use of a particular CRS system. As long as the Department fails to act on complaints filed in a timely manner against systems and their airline partners, they will be encouraged to continue their anticompetitive activities.²¹

Continental renews its support for Northwest's proposal to require the Department to take final action within 90 days of receiving a formal complaint or petition for a rulemaking related to the CRS rules and recommends again that the Department provide for expedited action on certain complaints by adopting an

²¹ See, e.g., Complaint of Lyn-Lea Travel Corp. v. American and SABRE, Docket OST-98-3963, filed June 19, 1998.

arbitration dispute resolution mechanism to resolve transaction fee, display, subscriber contract and other CRS disputes.²²

CONCLUSION

The Department should renew the CRS rules, clarify that all of their provisions apply to airlines that market CRSs in the U.S. and leave internet distribution channels free of regulation so they can grow into competitive alternatives to the traditional CRSs. Three years after final rulemaking, the Department should institute a proceeding to determine what, if any, action is appropriate at that time.

Respectfully submitted,

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²² Continental Reply Comments at 14, 15 (February 3, 1998).