



Reference: *Air Canada v. Commissioner of Competition*, 2000 Comp. Trib. 24

File no.: CT2000004

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IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an application by Air Canada pursuant to subsection 104.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

B E T W E E N:

Air Canada

(applicant)

and

The Commissioner of Competition

(respondent)

and

I.M.P. Group Ltd. (CanJet Airlines)

(affected party)

Dates of hearing: 20001116 to 20001117

Member: Simpson J. (presiding)

Date of order: 20001124

Order signed by: Sandra J. Simpson



ORDER

[1] UPON APPLICATION by Air Canada pursuant to section 104.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”), for an order setting aside a temporary order made by the Commissioner of Competition (the “Commissioner”) on October 12, 2000 and extended by further order of the Commissioner dated October 31, 2000 (together the “Order”);

[2] AND UPON hearing counsel for all parties on November 16 and 17, 2000, in Ottawa, Ontario;

[3] AND UPON determining the following:

(a) that the Competition Tribunal has jurisdiction under section 104.1(7) to determine whether the Order is valid and whether the harm described in section 104.1(1)(b)(ii) existed when the Order was first made or is likely to exist at the present time;

(b) that the Order is valid because the Commissioner started an inquiry pursuant to section 10(1)(a) of the Act on September 28, 2000, and expressed in the Order his opinion that Air Canada’s conduct could constitute an anti-competitive act. Further, this was an opinion which was open to the Commissioner on the evidence before him;

(c) that, on an application under section 104.1(7) of the Act, the Tribunal is not to consider the correctness or reasonableness of the Commissioner’s opinion about whether Air Canada’s conduct could constitute an anti-competitive act. Its consideration is limited to the question of whether the opinion is patently unreasonable. As well, the Tribunal is not to examine the merits of the Commissioner’s decision to continue an inquiry started pursuant to section 10(1)(a) of the Act after receiving a six resident complaint under section 9(1) of the Act. The Tribunal need only be satisfied of the existence of an inquiry;

(d) that there is no requirement in section 104.1(3) that the grounds for the Order be stated in the Order. Accordingly, the anti-competitive act which, in the Commissioner’s opinion could have occurred, need not be specified in the Order. To be valid, the Order must only describe the conduct which, in the Commissioner’s opinion, could constitute an anti-competitive act;

(e) that the term “likely” in section 104.1(1) and (7) is to be given its plain meaning of “probable” or “more probable than not”;

(f) that the harm identified in section 104.1(1) and (7) must, in this application, relate to Air Canada’s offering of the L14EASTS fares;

(g) that, in this case, the Tribunal is not satisfied that the harm described in section 104.1(1)(b)(ii) existed at the time the Order was made on October 12, 2000. However, the Tribunal is satisfied that the harm described in section 104.1(1)(b)(ii) is now likely to exist;

(h) that the prohibition in the Order which prevents Air Canada from offering “any similar fares” is imprecise and therefore unenforceable;

[4] NOW THEREFORE for reasons which will be issued shortly, this Tribunal orders:

(a) that the Commissioner's order of October 12, 2000, as extended by his further order of October 31, 2000, is hereby varied, pursuant to section 104.1(7)(a) of the Act, to delete the reference to "any similar fares", but is otherwise confirmed for a period which is to expire at midnight Eastern Standard Time on December 31, 2000;

(b) That I.M.P. Group Limited (CanJet Airlines) is hereby added as a party.

DATED at Vancouver, B.C. this 24th day of November, 2000.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

Air Canada

Katherine L. Kay
Eliot N. Kolers
Lawson A.W. Hunter

For the respondent:

The Commissioner of Competition

Brian J. Saunders
Donald J. Rennie
Donna Blois

For the affected party:

I.M.P. Group Ltd. (CanJet Airlines)

Neil Finkelstein
Brian N. Radnoff
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