

Competition Tribunal

Tribunal de la  
Concurrence

TRIBUNAL DE LA CONCURRENCE		P R O D U I T
FILED	APR 13 1989 <i>ACB</i>	
REGISTRAR - REGISTRAIRE		
OTTAWA, ONT.		#468
CT - 88/1		

IN THE MATTER OF an application by the Director of Investigation and Research under subsection 92(1) of the Competition Act, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF a Limited Partnership formed to combine the operations of the Reservec and Pegasus computer reservation systems;

AND IN THE MATTER OF The Gemini Group Automated Distribution Systems Inc.

B E T W E E N:

The Director of Investigation and Research  
COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE Applicant

File No. CT-88/1 - and -  
 No. du dossier  
 Director *v* Air Canada et al. Air Canada  
 et Air Canada Services Inc.  
 Exhibit No 3 PWA Corporation  
 No. de la pièce Canadian Airlines International Ltd.  
 Filed on 25/04/89 Pacific Western Airlines Ltd.  
 Déposée le Canadian Pacific Air Lines, Limited  
 Registrar S. Hajaci 154793 Canada Ltd.  
 Greffier 153333 Canada Limited Partnership  
 The Gemini Group Automated Distribution Systems Inc.

Respondents

- and -

Consumers' Association of Canada  
American Airlines, Inc.  
Wardair Canada Inc.  
Attorney General of Manitoba  
Alliance of Canadian Travel Associations  
Bios Computing Corporation  
Air Atonabee Limited

Intervenors

CONSENT ORDER IMPACT STATEMENT  
FILED BY THE  
DIRECTOR OF INVESTIGATION AND RESEARCH

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**PART I - INTRODUCTION AND OVERVIEW OF THE SETTLEMENT**

1. The Director of Investigation & Research (the "Director") challenged the Gemini merger (the "Merger") in an application pursuant to section 64 of the Competition Act because, in his view, as then constituted, it substantially lessened competition in the computer reservation system ("CRS") industry in Canada.
2. It is not within the Director's power to seek dissolution of a merger in Canada unless he can demonstrate that it substantially lessens competition or is likely to have that effect. The Director recommends approval of this settlement on the basis that the combination of electronic links and CRS rules (the "Rules") together with the ancillary terms provided for in the proposed consent order (the "Order") eliminates the prospect of a substantial lessening of competition.
3. The settlement has a fundamental and positive impact on the Director's two principal concerns about the Merger. Firstly, the Director was concerned that the Merger created barriers to entry in the CRS and airline markets in that, without access to complete, accurate and timely information (the "Information") including last seat availability on Air Canada and Canadian flights, no other CRS could compete in Canada on a long-term basis and in that Gemini controlled access to the ticket distribution system. The Director further believed that Gemini had the power to impose contractual terms on its subscribers which would have had the effect of blocking entry by other CRS vendors. As well, absent an assurance that their flight data would be displayed in a

fair manner on Gemini, other airlines might well have been unable to compete effectively with Air Canada and Canadian in Canada in the long term.

4. These problems are solved in this settlement by a blend of structural and behavioural remedies. Barriers to entry in the CRS industry are substantially reduced by the requirement that Air Canada and Canadian provide direct access links to other CRS vendors. This ensures them access to last seat availability and the information about Air Canada and Canadian they need to compete. In addition, other terms in the Rules ensure that Gemini's subscriber contracts will not contain terms such as rollovers and liquidated damage clauses that would otherwise have operated as barriers to entry by competing CRSs. Finally, rules against display bias, similar to those in force in the United States, remedy the Director's concerns about Gemini functioning so as to deter entry or expansion in the airline market.
5. Secondly, the Director was concerned that the combination of Gemini's high market shares and its vertical integration with Air Canada and Canadian would have given it market power over travel agents, other airlines and other CRS vendors. The settlement addresses these concerns both with structural relief in the form of links and by incorporating behavioural rules and terms in the Order that effectively reduce the ability of Gemini to exercise its market power.
6. This settlement adopts means for dealing with CRS competitive issues that accord with those used elsewhere in the world. CRS Rules are in force in the United States and are being implemented in Europe. Electronic links are common among all major carriers in the United States.

## PART II: DISCUSSION

### A. Barriers to Entry in CRS and Airline Markets

#### a) Structural Solutions - CRS Markets

7. The structural portion of the settlement is embodied in the provisions of paragraph 5 of the Order which require Air Canada and Canadian and their affiliates that share Air Canada and Canadian's designator codes ("Affiliates") to provide other CRSs with Information on their flights by providing access to that Information, on request, by means of electronic links. These links address the issue of last seat availability on Air Canada and Canadian and ensure that competing CRSs will be able to offer last seats to their travel agent subscribers. The inability of competing CRSs to obtain last seat availability was a substantial barrier to their entry and expansion. That barrier is removed by this settlement.
8. Specifically, Air Canada and Canadian have agreed to provide direct access links on a reciprocal basis to all other CRSs carrying on business in Canada commencing January 31, 1990 on the understanding that Sabre will be the first CRS to be offered a link. In addition, Air Canada and Canadian have agreed to provide competing CRS vendors with upgraded "look and book" links commencing June 30, 1991. The "look and book" links, which are not yet in general industry use, will enable travel agent subscribers of CRSs other than Gemini to book seats directly in the internal reservation systems of Air Canada and Canadian.

**b) Behavioural Solutions - CRS Markets**

9. Paragraph 1 of the Order is of primary importance to the settlement. It requires Air Canada and Canadian to provide all other CRSs operating in Canada with Information concerning their airline schedules, fares, fare rules and seat availability by class. This Information on Air Canada, Canadian and their respective Affiliates will be provided to other CRSs on the same basis and at the same time such Information is furnished to Gemini either directly or through carrier supported central agencies, such as the Air Tariff Publishing Company (ATP) and the Official Airline Guide (OAG). In particular, Air Canada and Canadian have agreed that, in no circumstances shall Information concerning any restricted or special classes of seats or fares be deliberately delayed or withheld from any other CRSs operating in Canada. As a result, all other CRSs carrying on business in Canada will have access to the same Information on Air Canada and Canadian, and their Affiliates, on a timely basis, that is available to Gemini. If the Merger was dissolved and Air Canada and Canadian were hosted in separate CRSs, there would be no legal requirement for them to provide such Information to their CRS competitors.
10. Paragraph 2 of the Order contains a second behavioural provision that ensures that Air Canada and Canadian will participate in other CRSs operating in Canada on commercially reasonable terms. Without this commitment as part of the settlement, they might not participate in other CRSs, which would disadvantage other CRSs by denying them the booking fee revenues from their sales of Air Canada and Canadian tickets. Without such

revenues, entry and expansion of CRSs in competition with Gemini would be very unlikely.

11. Thirdly, by reason of Section 6 of the Rules, Gemini's subscriber contracts will be limited to a three year term and will contain neither liquidated damage clauses nor rollover provisions. As a result, the contracts will not function as barriers to entry in themselves. Other CRS vendors will have the opportunity to convert Gemini subscribers to their CRSs.
12. Competing CRSs or those who may consider entering the Canadian market will have access to Information on Air Canada and Canadian flights, and those of their respective Affiliates, the assurance of booking fee revenues from Air Canada and Canadian and the opportunity to sign contracts with Gemini subscribers. These terms substantially reduce barriers to the entry or expansion of CRSs in competition with Gemini.

**c) Behavioural Solutions - Airline Markets**

13. The Director further alleged that carriers which competed with Air Canada and Canadian could be subjected to biased display or otherwise denied access to Gemini. If competing carriers' data was incorrectly displayed in Gemini or displayed late or not at all, those carriers' entry or expansion in the market could have been prevented. This problem is addressed by Section 4 of the Rules which includes detailed provisions concerning display bias and Section 5 of the Rules which requires access to Gemini for all carriers who agree to pay the non-discriminatory fee. This settlement term reduces the Director's concern about the effect of the Merger on the airline market.

**B. Market Power in CRS and Airline Markets**

**a) Behavioural Solutions - CRS Markets**

14. The Director has also alleged that Gemini has significant marketing advantages over its competitors because it is the only CRS vendor which could provide enhancements such as pre-reserved seating (now) and boarding passes (in the future) on Air Canada and Canadian flights. Paragraph 3 of the Order addresses this issue. Air Canada and Canadian have agreed to make pre-reserved seating and boarding pass capability available to other CRSs at the time they are made available to Gemini, provided a reciprocal capability is offered to Gemini by the airline owners of those other CRSs. At this time, but for the Order, Air Canada and Canadian have no obligation to make these enhancements available to other CRSs operating in Canada. In addition, by reason of paragraph 4 of the Order, Gemini will, subject to technological limitations, provide other carriers' enhancements to Gemini subscribers on commercially reasonable terms at the request of carriers who participate in Gemini.
  
15. The Director alleged that Gemini has a market advantage in that travel agents will have greater confidence that reservations made on Air Canada and Canadian through Gemini, as opposed to other CRSs, will not be lost. This confidence stems from their belief that reservations made on Gemini are made directly in the Air Canada and Canadian internal reservation systems. Paragraph 8 of the Order provides that Air Canada and Canadian will honour all reservations made on competing CRSs over the "look but not book" link in accordance with current industry practice. As well, competing CRSs will have the opportunity to upgrade to a "look and book" link in



June of 1991. On such a link, the reservations will, in fact, be made directly in the internal reservations system of Air Canada and Canadian.

**b) Behavioural Solutions - Airline Markets**

16. The Director believed that Air Canada and Canadian could use their airline market dominance to maintain or extend Gemini's market position by tying airline commissions payable to travel agents or other incentives to a travel agent's selection and use of Gemini. The Order also addresses this issue. The tying of airline commissions and other incentives to the use of a particular CRS is specifically prohibited by the per se provisions in section 6 of the Rules.
17. The Director foresaw that Gemini could also be used by Air Canada and Canadian as a vehicle to disadvantage their air carrier competitors by charging them very high fees for bookings made through Gemini. While the Order does not specifically address the amount of booking fees charged by Gemini to its participating carriers, they are protected from discriminatory pricing by Gemini. Paragraph 5 of the Order ensures that Gemini will charge all participating carriers the same rates.
18. Paragraph 11 of the Order prohibits Air Canada and Canadian from exchanging commercially sensitive information through the operations of Gemini. This paragraph addresses the Director's concern that Gemini could have been used as a vehicle to facilitate collusion.

**PART III: EFFECTS OF THE ORDER AND RULES ON  
COMPETITION**

**A. Improved Competition in the CRS Market**

19. By reason of the provision of direct access links and the imposition of effective rules to control the exercise of Gemini's market power, Sabre has the capability to become a more effective competitor to Gemini in Canada. Sabre is widely acknowledged to be a highly functional CRS with extensive resources. With timely and equal access to Canadian airline schedules, fares, fare rules and seat availability by class, with last seat availability on Air Canada and Canadian, with the ability to pre-reserve seats and issue boarding passes on Air Canada and Canadian, and with protection against tying, Sabre will be able to put competitive pressure on Gemini in a larger number of markets by competing on the basis of price, service and functionality.
20. By virtue of the settlement, European and American CRS vendors acquire the ability to obtain information on Canada's airlines and their Affiliates necessary for entry. The settlement therefore increases the likelihood that other CRS vendors will enter the Canadian market. Both potential and actual entry should serve to restrain Gemini's market power.
21. The Director was concerned that the Merger would eliminate the competition that had previously existed between Reservec and Pegasus in certain non-urban markets where Sabre was not present. The proposed settlement reduces this concern to the extent that it makes it possible for Sabre or other CRS vendors to

enter these markets as, for the reasons noted above, they will be in a position to offer travel agents a complete substitute product in place of Gemini.

22. In his application to the Competition Tribunal, the Director pleaded that the Merger would reduce or eliminate competition in the provision of CRS services and thereby deprive Canadians of the benefits associated with competition. Because, as a result of this settlement, all CRSs will have comparable data, competition between Gemini and other CRSs will focus on technological advances, functional enhancements, price and service.

**B. Improved Competition in the Airline Market**

23. With this settlement, air carriers that compete with Air Canada and Canadian will have the protection of the Rules against display bias and against direct or indirect denial of access to Gemini. With the new Apollo software and the Rules, Gemini will offer other carriers a dramatically improved display that would not have been available through Reservec. The rules against collusion and those which prevent discrimination in booking fees will protect the competitive position of other carriers by reducing the ability of Gemini to exercise market power.

**PART IV: OTHER CONSIDERATIONS**

24. The Order provides certainty and increases the prospect of improved competition in the marketplace at an early date. If litigation were to continue with its attendant appeals and uncertainty of outcome, the competitive business plans of the respondents and those of some intervenors would be frustrated and delayed. With this

settlement, both Gemini, Sabre and any other interested CRS vendors know now what information and features they may offer travel agents and consumers and the terms on which CRS will operate in this country.

25. The Order also provides certainty in that, as in all contested litigation, there is a risk that the Director would not have been granted the dissolution order he sought. There are two sides to each case. The Respondents denied the Director's allegations of market power in both the CRS and airline markets and they have raised defence issues supported by independent expert evidence concerning substantial efficiencies. They have asked the Competition Tribunal to consider Pegasus as a failing firm with no prospect of profitability, and have argued that the Merger is necessary to create a CRS with economies of scale necessary to compete in international markets.
26. In addition, Canadian argues that the Merger has pro-competitive effects in airline markets. Firstly, the Pegasus link to Reservec substantially improves the distribution of Canadian's flight information in Canada and positions Canadian and its affiliates as more effective competitors for Air Canada. Secondly, the Merger eliminates the incentive for display bias as between Air Canada and Canadian.

#### **PART V: THE POSITION OF INTERVENORS**

27. This statement does not purport to speak for the intervenors. Rather, the intention is to provide the Director's assessment of the impact of the settlement on those of the intervenors he judges to be directly affected by the settlement.

**American Airlines Inc**

28. Sabre has operated in Canada since 1983. By 1988, it had achieved a national market share ranging between 12.4% based on travel agent locations and 20.2% based on segments booked. Sabre's growth was based largely on the superior functionality of its product and occurred without links to Air Canada and Canadian. The Director had been concerned that, by reason of the Merger and Gemini's subsequent acquisition of improved software, there would be no effective competitor remaining in the Canadian CRS market. Sabre would have lost its advantage of superior functionality and might have been unable to maintain its present market share or precluded from expanding due to Gemini's market power. However, this settlement addresses the Director's concern by providing Sabre with both last seat availability and access to Information.
29. Following the settlement, Sabre should be able to put competitive pressure on Gemini in that it will have the links which will give it last seat availability and credibility with travel agents. The Rules against tying and biased display should control any market power Gemini might try to assert by reason of its airline affiliations.

**Air Atonabee Limited**

30. City Express is hosted in Reservec. As a result of the settlement, it will benefit from the rules against non-discriminatory booking fees. It will also benefit from the rules against bias. In addition, the Apollo system will offer an integrated display for Toronto's two airports and, in so doing, it remedies one of the most serious problems presently faced by City Express in

Reservec. Finally, this settlement makes Sabre or another CRS vendor a viable hosting alternative for City Express.

**Consumers' Association of Canada**

31. This settlement affects consumers indirectly by fostering competition between CRS vendors in the provision of CRS services to travel agents. Consumers will benefit from increased travel choices and expanded travel information by reason of CRS competition. In particular, by reason of Section 4 of the Rules which provides for an unbiased display, consumers will have a better opportunity to see the flights offered by carriers who compete with Air Canada and Canadian and, by reason of the links, will benefit from last seat availability if the travel agent they select uses Sabre.

**Alliance of Canadian Travel Associations**

32. As a result of this settlement, better CRS alternatives will be made available to travel agents than would have existed both before the Merger and with the Merger. Before the Merger, travel agents had to choose between the following CRS options and often had to maintain two CRSs in order to effectively serve their customers.

- Reservec, with last seat availability on Air Canada and its affiliates but not on Canadian and its affiliates and inferior functionality to Sabre
- Sabre, with better functionality than either Reservec or Pegasus but without access to last seat availability on any Canadian carriers

- Pegasus, with last seat availability on Canadian and its affiliates only and not Air Canada and its affiliates and inferior functionality to Sabre.

33. With the Merger, travel agents would have had to choose between the following options and many would have required two systems to serve their customers, at least in the short term.

- Sabre, with better functionality than Gemini but without access to last seat availability, complete, timely and accurate information on the major Canadian carriers
- Gemini, with last seat availability on Air Canada and its affiliates, on Canadian and its affiliates, and on Wardair and ultimately with improved functionality

34. As a result of the settlement and with Gemini's acquisition of Apollo software, travel agents will now be able to choose between the following CRSs and will be able to serve their customers with only one system, thereby reducing their costs.

- Sabre, with comparable functionality, last seat availability, complete, timely and accurate information on Air Canada, and Canadian
- Gemini, with last seat availability on Air Canada and Canadian and their Affiliates, and on Wardair and ultimately with improved functionality

- potentially any other CRS which decides to enter Canada and obtains a link to Air Canada and Canadian by reason of this settlement

## **PART VI: ENFORCEMENT OF THE SETTLEMENT**

35. The Director in this case has insisted that the settlement be incorporated in an order of the Competition Tribunal to ensure that the settlement terms, in relation to this complex and rapidly changing industry, are enforceable beyond the three year limitation period for merger review found in section 97 of the Competition Act.
36. The settlement must be enforceable if it is to have practical effect in the marketplace. As much as possible, the Director has sought to make the settlement self-enforcing by the parties. To that end, he contemplates the following enforcement mechanisms. They foresee the Director being in a position to seek orders for contempt from the Tribunal against Air Canada or Canadian in the event there are breaches of the Order and foresee Air Canada and Canadian and others litigating or arbitrating their disputes about the links and the Rules.

### **The Rules**

37. Paragraph 12 of the Order provides that the Rules form part of the Order and will bind Air Canada, Canadian and Gemini from the date of the Order. If they are breached, the Director may bring contempt proceedings before the Competition Tribunal or may seek other remedies, as appropriate under the Competition Act,



including a variation of the Order or dissolution of the Merger.

38. The Order provides in paragraph 5(e) that the Rules will form part of all Links Contracts and will be binding on the parties to the Links Contracts at the date of execution of such contracts. Accordingly, although Sabre and other CRS vendors are not bound by the Rules by reason of the Consent Order, they will be so bound on execution of the Links Contracts.
39. The Order further provides in paragraph 6 that breaches of the Rules by any party to the Links Contracts are actionable in any Canadian Superior Court of competent jurisdiction or, with agreement of the parties, through binding arbitration.

### **The Links**

40. The links are a fundamental feature of the settlement. Accordingly, paragraph 5(c) of the Order provides that all links are to be in continuous operation except with the consent of the parties or due to technical failure. As well, paragraph 6 of the Order and section 12(a) of the Rules provide that Air Canada and Canadian and other parties to Links Contracts must seek an order of the Tribunal if they wish to discontinue their operation of the links.
41. Paragraph 5(e) of the Order provides for arbitration proceedings if the parties cannot agree to the terms of Links Contracts and ensures that parties cannot use the negotiation of Links Contracts to delay implementation of the links. Links must be operational notwithstanding disputes during negotiations.

42. In addition, if links are not operational on the agreed dates, the Director may seek an order from the Competition Tribunal enforcing the Order, or may take other proceedings under the Competition Act as described in paragraph 37 hereof.

**General Enforcement**

43. The balance of the Order will be enforceable at the instance of the Director pursuant to the Competition Act, as mentioned in paragraph 37 or, in appropriate circumstances, by way of contempt proceedings.
44. To be effective, the terms of the Order and accompanying Rules must be disseminated to travel agents. To accomplish that end:
- a) Paragraph 13 of the Order provides that Gemini is to distribute the Order and Rules to all Gemini subscribers within 60 days of the Order and the President of Gemini is to report to the Director confirming the distribution.
  - b) Section 13 of the Rules provides that the CRS Rules are to be distributed by system vendors to all travel agents before subscriber contracts are signed or renewed and the Chief Executive Officer of the system vendor is to provide the Director with a letter confirming compliance with this Rule.
  - c) Paragraph 14 of the Order provides that, within 60 days of the Order, Air Canada and Canadian are to advise all travel agents who sell their products that airline promotions and incentives

to travel agents are not conditional on the use of a particular CRS.

- d) Section 14 of the Rules provides that once each year all owning carriers are to send a statement in the terms outlined in (c) above to all travel agents who sell their products.
  
- e) Section 15 of the Rules provides that once each year an officer of an owning carrier is to provide a report to the Director of Investigation and Research confirming that his or her respective airlines and CRS vendor have abided by the CRS Rules in the prior year. The report is to include a schedule showing any periods in which any direct access links between the databases of owning carriers and system vendors were non-operational and providing an explanation for any such non-operation.

## **PART VII: CONCLUSION**

45. For the reasons presented herein, the Director recommends the settlement and asks the Competition Tribunal to approve the Order.

Respectfully Submitted:

Calvin S. Goldman, Q.C.  
Director of Investigation & Research

April 13, 1989

