

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Director of Investigation and Research under Section 64(1) of the Competition Act R.S.C. 1970, c. C-23 as amended;

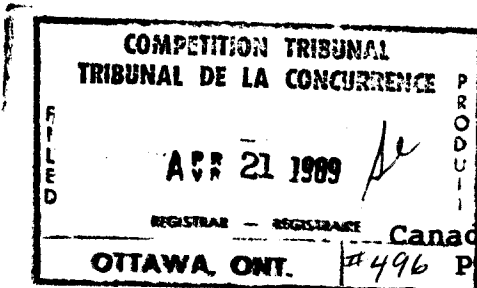
AND IN THE MATTER OF a Limited Partnership formed to combine the operations of the Reservec and Pegasus computer reservation systems;

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

Applicant



- and -

Air Canada
 Air Canada Services Inc.
 PWA Corporation
 Canadian Airlines International Ltd.
 Pacific Western Airlines Ltd.
 Canadian Pacific Air Lines, Limited
 154793 Canada Ltd.
 153333 Canada Limited Partnership
 The Gemini Group Automated Distribution Systems Inc.

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

Respondents

- and -

F. No. CT-88/1
 No. du dossier Director v Air Canada et al
 et 5
 Exhibit No. 5
 No. de la pièce 25/04/89
 Filed on 25/04/89
 Déposée le S. Rajacic
 Registrar
 Greffier

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

AFFIDAVIT OF MARGARET E. GUERIN-CALVERT

REPORT OF MARGARET E. GUERIN-CALVERT

Exhibit "A"
April 21, 1989

The purpose of this report is to address whether the draft Consent Order and CRS Rules result in a situation where the Gemini merger does not result in a substantial lessening of competition in airline and CRS markets in Canada. My evaluation of this issue is based on my review of the terms of the Consent Order and the Rules, the economic analysis in my previously-filed reports, my experience with the history and result of CRS competition and regulation in the U.S., and a review of other information in this proceeding. It is my opinion, based on these facts and experience, that the combined package of the Consent Order and the specific CRS Rules with the specifically-delineated enforcement provisions in both the CRS Rules and the Consent Order will result in a situation where the Gemini merger does not substantially lessen competition in airline and CRS markets.

The Consent Order and CRS Rules accomplish this through specific requirements and prohibitions on the part of Air Canada, Canadian, and Gemini (as well as other parties in the CRS industry), which are enforceable directly through the Consent Order or through private contract remedies by injured parties. There are several key elements of the Consent Order and CRS Rules; each are addressed below.

Firstly, the Consent Order requires that Air Canada and Canadian participate fully in all Canadian CRSs and that operational direct access links be provided on specified, certain dates to all CRSs requesting such links. These links - supplemented with provisions on travel agent contract terms, prohibitions on tying of airline service (such as access to discount seats) or commissions, and the requirement that fees be paid by Air Canada and Canadian for bookings made over the links - open up Canadian CRS markets in the near term and in the future to entry and competition from other CRS vendors.

The direct access links and related rules provide for the potential for CRS entry into each Canadian CRS market. Whether such entry occurs depends on the marketing response of all other CRS vendors, including SABRE. Creating the prospect for entry and hence competition provides the mechanism by which Gemini's market power in CRS can be undermined.

The Consent Order and the CRS Rules take the additional step of either requiring or prohibiting certain actions, which as I addressed in my previous reports and as has been addressed in the U.S. by other parties, could make direct access links ineffective as a means to promote entry and competition in CRS markets. Among the most important of these new provisions are the requirements that the links be operational at all times, that Air Canada and Canadian provide other vendors with the same quality, timeliness and breadth of information and service that they provide to Gemini, that all travel agents (in major metropolitan or smaller metropolitan centers) are provided with the realistic opportunity to convert to a system other than Gemini, and that agents who choose other systems cannot be discriminated against in access to Air Canada and Canadian services. The opportunity for conversion is provided by the direct access links and supplemental provisions which provide CRS vendors such as SABRE, Datas II, PARS, SystemOne or European systems, with last seat availability and related information on Canadian and Air Canada, which they currently lack and require to enter and expand beyond major metropolitan areas and by direct prohibitions on long term, exclusive contracts with rollover provisions or practices and liquidated damages clauses.

The proposed rules supplement the U.S. CRS rules in the very areas of concern which I addressed in my earlier reports, namely, (1) "...even with optimally designed rules, there is likely to be the need for oversight and monitoring of

compliance,..." and (2) "... (A)t best, rules attempt to control market power - they, generally, are not designed or effective at eliminating market power."

The first issue - compliance with the Order and CRS Rules - has been provided for to a significant extent by private market monitoring and enforcement, arbitration, and clear requirements for action by parties. The draft Consent Order and proposed Rules specifically incorporate requirements and prohibitions that deal with the key means by which rules can be evaded that have arisen in the U.S.

The second statement - that rules, alone, tend not to eliminate market power but rather to limit its exercise - remains my position. The settlement, however, provides for much more than rules. The Consent Order provides for direct access links - supplemented by other terms and rules to ensure that the links are provided and are operational and fully supported. The Consent Order and related rules thus sever the link between airline data and related services and CRS services, which is the primary source of Gemini's market power. Thus, the Consent Order and Rules provide for the opportunity for a change in the structure of the Canadian CRS industry, through entry and competition from other CRS vendors.

In these respects, I believe this settlement has benefitted greatly from its timing five years after the U.S. CRS rules. The settlement by attempting to set clear requirements for certain actions and prohibition on other actions minimizes the need for monitoring and enforcement by either private or public oversight. Specific reliance on private mechanisms is new to this settlement and is, generally, absent in the U.S. CRS rules. Moreover, in the almost five years since the November 1984 implementation of the CAB rules, there has been the opportunity to learn - by practical experience - all of the ways

in which the "spirit" of the Rules could be evaded and market power preserved or exercised.

The fact that the proposed CRS Rules go beyond the U.S. CRS rules 1. in several important respects has several specific benefits. The prohibition on liquidated damages clauses, the 3 year term of contract and the prohibitions on rollover practices eliminate several problems that appear to have affected the number and likelihood of conversions in the U.S. The inclusion of these terms substantially increases the ability of agents to take advantage of the entry potential that is created by the direct access links.

In addition to severing the airline-CRS link, the Consent Order and CRS Rules provide a second - and essential - set of prohibitions and requirements to limit Gemini's exercise of market power. The settlement, thereby, provides for two types of relief - entry and competition from other CRSs (which would not occur with the merger) and definitive prohibitions on the exercise of market power. Several of these additional requirements deserve specific attention:

- (1) Airlines must be provided access to Gemini's services on nondiscriminatory terms; this is especially important in those markets where Gemini currently controls much of the distribution system;

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1. The U.S. rules currently do not provide for the required performance of links, do not prohibit liquidated damages clauses based on booking fees (which were not in widespread use before 1984) and do not require U.S. airlines to participate in other CRS systems.

- (2) Travel agents' access to override commissions or access to services cannot be conditioned on their CRS choice; this prohibition addresses concerns that Air Canada and Canadian could tie access to airline services or commissions to the travel agent's use of Gemini;

- (3) Air Canada and Canadian are prohibited from using Gemini as a means to exchange commercially sensitive information (e.g. sales contracts, sales forecasts, pricing policy, marketing data, etc.) that could make collusion on airline prices easier; this prohibition addresses the concern raised in my earlier reports that the Gemini merger created a mechanism whereby such information could be transmitted from Air Canada to Gemini to Canadian and vice versa. The Consent Order clearly states that no airline or CRS personnel may engage in such an exchange of information.

CONCLUSION:

For the reasons set out above, it is my conclusion that all of the specific terms and conditions of the Consent Order and the CRS Rules are necessary for effective relief from the substantial lessening of competition caused by the Gemini merger and the specific terms and conditions, as I understand them, provide this effective relief by promoting structural entry and competition in CRS markets and directly limiting Gemini's exercise of market power.