

**IN THE MATTER OF THE JURISDICTION OF NEVADA AND THE JURISDICTION OF
PENNSYLVANIA APPEALS OF THE FINDINGS OF THE IFTA DISPUTE
RESOLUTION COMMITTEE
DOCKET NO. IF200803-001NV**

FINDINGS ON APPEALS AND ORDER

BY A MAJORITY OF THE IFTA, INC., BOARD OF TRUSTEES:

Note: Seven Board of Trustee Members participated in this appeal and are unanimous in the findings and order herein. One member was recused as she was a member of the Dispute Resolution Committee when the dispute was heard. Another member was unable to be present for the Board’s deliberations and therefore was not involved in the decision rendered.

The IFTA Articles of Agreement (Agreement) provide that the IFTA Dispute Resolution Process may be used to resolve compliance disputes between member jurisdictions. Per the IFTA Dispute Resolution Process, the IFTA Dispute Resolution Committee (DRC) has the authority to hear a dispute and issue Findings on Complaint. The IFTA Dispute Resolution Process also allows any party to the dispute to appeal the findings and order of the DRC to the IFTA, Inc., Board of Trustees (Board).

The DRC conducted a hearing on October 21, 2008, and issued its Findings on Complaint on December 19, 2008, which document is incorporated herein by reference. The Jurisdiction of Pennsylvania filed its Motion for Appeal on January 21, 2009, asserting that the DRC erred in its Findings A and B and in its order. The Jurisdiction of Nevada filed its Motion for Appeal on January 22, 2009, asserting that the DRC erred in its Finding C and in its order. The Board accepted both Motions for Appeal on March 10, 2009.

The Members of the Board that are signatories to these Findings on Appeals reviewed the original record on April 23rd and 24th of 2009. The review did not include a de novo review of the evidence submitted to the DRC. The purpose of the review was to determine if the DRC Findings on Complaint included unsustainable errors with respect to interpretation of the Agreement, DRC authority, or DRC jurisdiction.

**PENNSYLVANIA MOTION FOR APPEAL
AS TO ISSUES A AND B**

The finding of the DRC:

As to Issue A):

The Complainant demonstrated that “reasonable cause” existed for a re-audit of the licensee and the re-audit should have been allowed by the Respondent.

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1 Pennsylvania contends that the DRC erred in finding Nevada demonstrated reasonable
2 cause for the following reasons:

- 3
- 4 1. The DRC erred in basing its finding of reasonable cause on differences between
5 the first and second audits alone.
- 6 2. The DRC erred in basing its finding of reasonable cause on arguments which
7 were not raised in Nevada's Complaint filings.
- 8 3. The DRC erred in applying its own standard of reasonable cause to the facts.
- 9 4. "Reasonable cause" is a high standard because a re-audit is an extreme
10 measure affecting all jurisdictions.
- 11 5. The DRC erred in finding Nevada had reasonable cause by allowing a jurisdiction
12 27-months to find one point that may have been sufficient to justify reasonable
13 cause.
- 14

15 *The Board finds that the DRC did not err in its finding of reasonable cause.*
16 *During the hearing of October 21, 2008, extensive testimony and*
17 *questioning was offered regarding the question of reasonable cause. The*
18 *DRC's Findings on Complaint outlines the disparity of the three error rates*
19 *to illustrate its point. Page 7 of the Findings on Complaint indicates*
20 *"[d]ocumentation presented to the DRC provided sufficient evidence to*
21 *question the development and application of Nevada's distance error rates.*
22 *To illustrate, the result of the prior audit..." Webster's defines "illustrate" as*
23 *"to give an example or instance". On page 8 the DRC's Findings on*
24 *Complaint indicate that "the DRC has evaluated all documents submitted*
25 *and the testimony given during the October 21, 2008 hearing and has*
26 *determined that the Complainant did show there was a material level of*
27 *doubt regarding the Nevada distance adjustments that were calculated by*
28 *the Respondent in the FedEx audit." There is no evidence indicating that*
29 *the DRC's finding of reasonable cause was solely based on differences*
30 *between the first and second audits or based solely on arguments which*
31 *were not raised in Nevada's Complaint filings.*

32

33 *As to Pennsylvania's contention that the DRC erred in applying its own*
34 *standard of reasonable cause to the facts, the Board finds that the DRC did*
35 *not apply its own standard of reasonable cause but rather used the*
36 *commonly understood meaning of reasonable cause to make its finding.*

37

38 Pennsylvania asserts that "reasonable cause" is a high standard because a re-audit is
39 an extreme measure affecting all jurisdictions.

40

41 *The Board finds that this line of reasoning does not identify any error of fact,*
42 *error of reasoning, or error of law showing the DRC erred in its finding.*

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1 The finding of the DRC:
2

3 As to Issue B):
4

5 Since the Complainant notified both the Respondent and the licensee that it had
6 reasonable cause to conduct a re-audit, but was denied the opportunity for a re-audit by
7 the Respondent, the Respondent is not in compliance with Sections R1360.200 and
8 R1360.300 of the IFTA Articles of Agreement.
9

10 Pennsylvania contends that it is an error of law and reasoning to find Pennsylvania to
11 be out of compliance twenty-seven months after Nevada filed its original claim of
12 reasonable cause, based solely on an argument raised and definition articulated for the
13 first time on October 21, 2008.
14

15 *The Board finds that the DRC did not err by finding Pennsylvania out of compliance*
16 *with Sections R1360.200 and R1360.300 of the IFTA Articles of Agreement. The*
17 *Board finds the DRC did not base its ruling solely on an argument raised and*
18 *definition first articulated on October 21, 2008. The DRC did not establish a new*
19 *definition, but rather, used the commonly understood meaning of reasonable cause*
20 *to make its finding.*
21

22 *However, the DRC's finding does result in one unsustainable error. Despite finding*
23 *Pennsylvania out of compliance, the DRC finding does not require any remedial*
24 *conduct on the part of Pennsylvania to bring it into compliance. Finding a*
25 *jurisdiction to be out of compliance while not providing the remedial conduct*
26 *necessary to return to compliance is untenable.*
27

28 *Pennsylvania's refusal to cooperate with Nevada's attempts to perform a re-audit*
29 *was a direct violation of R1360.300, and led to Nevada's, the DRC's, and the*
30 *Board's inability to make an assessment concerning the validity of Pennsylvania's*
31 *original audit findings. The Board finds that by refusing to cooperate with the re-*
32 *audit, Pennsylvania adversely affected Nevada's opportunity to effectively dispute*
33 *Pennsylvania's audit findings. The Board also finds that if Nevada had conducted*
34 *a re-audit, and the results of the re-audit had fully supported Nevada's claim in the*
35 *amount of \$131,928.33, Nevada would have incurred substantial costs, fees and*
36 *expenses in conducting the re-audit. Accordingly, even if Nevada had been able to*
37 *fully establish the claim of \$131,928.33, Nevada's net recovery would have been*
38 *substantially less than that amount, after factoring in the costs, fees and expenses.*
39 *Therefore, the Board hereby finds that Pennsylvania can restore itself to proper*
40 *compliance with the Agreement by paying Nevada the sum of \$66,000 within 60*
41 *days of this order. Pennsylvania will remain out of compliance with the Agreement,*
42 *and will be subject to the penalty provisions of the Dispute Resolution Process until*
43 *such payment is made.*

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**PENNSYLVANIA MOTION FOR APPEAL
AS TO ADDITIONAL ARGUMENTS**

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4 Pennsylvania asserts that the DRC erred in failing to rule upon Pennsylvania’s
5 argument that the DRC lacked jurisdiction to settle the dispute between the parties.
6

7 *The Board finds that the DRC did rule upon Pennsylvania’s argument that the DRC*
8 *lacked jurisdiction to settle the dispute between the parties. The DRC issued a*
9 *document dated July 24, 2008, outlining the DRC’s decisions on preliminary*
10 *procedural and substantive matters. Among the items addressed was the*
11 *argument that the DRC lacked jurisdiction to settle the dispute between the parties.*
12 *The DRC’s decision on this matter is as follows:*
13

14 Article 1555.100 of the Agreement defines the Dispute Resolution Process
15 (DRP). IFTA Ballot 7-1995 established this DRP. The DRP was initially ratified
16 by the Membership in July 1996, effective July 1, 1997. The DRP has been
17 revised and ratified by the Membership in July 2004, July 2005, and July 2006.
18 Pursuant to Article Six, Section 7 of the Bylaws of IFTA, Inc., there is
19 established a Dispute Resolution Committee (DRC). The purpose of the DRC
20 is to facilitate dispute resolutions (as defined in Article 1555.100 of the
21 Agreement) in a fair, impartial, efficient and expeditious manner. In accordance
22 with the governing documents of the Agreement, the DRP, and the charter of
23 the DRC (as approved in April 2005), the DRC has determined that it has
24 jurisdiction to hear cases brought before the DRC provided the complaint has
25 met the criteria set forth in DRP Section (II) (A) (1) and Section (II) (A) (3).
26 Since the DRC has determined that the provisions of DRP Sections (II) (A) (1)
27 and (3) have been met the issue of “jurisdiction” has already been decided.
28 The DRC has determined it has jurisdiction over this case and will proceed
29 accordingly.
30

31 *The documentation reviewed by the Board in considering Pennsylvania’s appeal,*
32 *including the transcript of the hearing conducted on October 21, 2008, does not*
33 *reflect that Pennsylvania pursued its jurisdictional challenge after the DRC’s ruling*
34 *on July 24, 2008. In light of the ruling of July 24, 2008, and the absence of*
35 *evidence disputing that ruling the Board finds that the DRC did not fail to rule upon*
36 *Pennsylvania’s argument that the DRC lacked jurisdiction to settle the dispute*
37 *between the parties.*
38

39 Pennsylvania asserts that the DRC erred in failing to rule upon Pennsylvania’s defense
40 based on the doctrine of laches.
41

42 *The Board finds that Pennsylvania did not present evidence to substantiate this*
43 *claim during the hearing. As such the issue was not properly brought before the*

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1 *DRC and the DRC did not err in not ruling upon this defense. A review of the*
2 *record shows no evidence to support a defense based on the doctrine of laches.*

3
4 Pennsylvania contends that the DRC erred in failing to rule on Pennsylvania’s argument
5 that Nevada filed its Complaint in bad faith.

6
7 *The Board finds that Pennsylvania did not present evidence to substantiate this*
8 *claim during the hearing. As such the issue was not properly brought before the*
9 *DRC and the DRC did not err in not ruling upon this defense. A review of the*
10 *record shows no evidence to support a claim that Nevada filed its Complaint in bad*
11 *faith.*

**NEVADA MOTION FOR APPEAL
AS TO ISSUE C**

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16 The finding of the DRC:

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18 *As to Issue C):*

19
20 *There are no provisions in the IFTA governing documents that would allow the DRC to*
21 *grant this type of monetary relief to the Complainant.*

22
23 Nevada appealed Issue C of the DRC Findings on Complaint and asserted that the
24 DRC, under its charter, has unlimited authority to resolve disputes; that the remedy
25 must have a legal basis and must compensate for the harm; and that Nevada is entitled
26 to the same relief received by Nebraska in the Nebraska-Wisconsin case as decided by
27 the IFTA Board in 2001.

28
29 *The Board agrees with the DRC Finding that the DRC does not have the authority*
30 *to grant the type (emphasis added) of monetary relief requested by Nevada. In the*
31 *absence of evidence substantiating the \$131,928.33 claim, it would be*
32 *inappropriate to grant such relief.*

33
34 *The DRC Finding does not indicate that the DRC lacks the authority to grant*
35 *monetary relief. The Finding merely indicates that the DRC does not have the*
36 *authority to grant the type of relief requested by the Complainant.*

37
38 *The Board agrees with Nevada’s contention that the DRC has broad authority to*
39 *resolve disputes. Section B of the Dispute Resolution Process indicates “[t]he*
40 *Committee has full discretion regarding any matter pending before it unless*
41 *otherwise provided in these procedures.” As such, the Board finds that the*
42 *Agreement and Dispute Resolution Process provides authority to the DRC to grant*
43 *monetary relief to an aggrieved party when the facts and circumstances warrant.*

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**NEVADA MOTION FOR APPEAL
PENNSYLVANIA MOTION FOR APPEAL
AS TO THE DRC ORDER**

The DRC ordered:

It is hereby ordered that the Respondent cooperate fully with the Complainant in conducting a re-audit of the licensee. Such re-audit shall be commenced no later than sixty (60) days from receipt of this Order. The re-audit shall be completed no later than one year from the receipt of this order. The order shall be set aside if it is appealed to the IFTA Board of Trustees and the appeal is accepted by the Board or a settlement is reached and the Complaint is withdrawn. Under provisions of the Dispute Resolution Process, a jurisdiction that does not comply with a decision of the DRC is subject to the penalties set forth in Section III of that Process.

Both the jurisdictions of Pennsylvania and Nevada assert and agree that the DRC erred in ordering a re-audit because a re-audit cannot legally be conducted and a re-audit would penalize the carrier and other jurisdictions not a party to the dispute.

The Board agrees with the Complainant and Respondent that the DRC erred in ordering a re-audit due to the expiration of the statute of limitations and other legal considerations. Both parties and the Board agree that a valid re-audit cannot be conducted.

ORDER OF THE BOARD

THE BOARD HEREBY ORDERS Pennsylvania to pay Nevada, as previously indicated on page 3 of the findings, \$66,000 within 60 days of this order. Pennsylvania will remain out of compliance with the Agreement, and will be subject to the penalty provisions of the Dispute Resolution Process, until the amount is paid to the jurisdiction of Nevada.

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1 **ISSUED THIS 4th DAY OF June , 2009.**
2

3 **FOR THE MAJORITY (ONE RECUSAL, ONE UNABLE TO PARTICIPATE):**
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8 **_____
Scott Greenawalt, First Vice President**
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13 **_____
Scott Bryer, Second Vice President**
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Andrew Foster**
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Rena Hussey**
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Sheila Rowen**
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Doug Shepherd**
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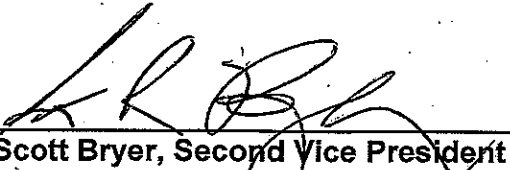
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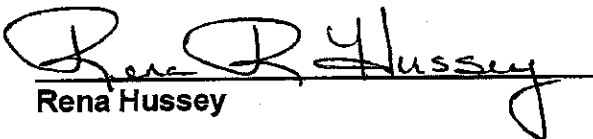
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