



Elena Kabalkina

MOSCOW ARBITRATION COURT

ARBITRAL AWARD

dated 23 December 2016 in the case N A40-59424/16-121-605

established:

by resolution of решением tender commission of the public joint-stock company "Aeroflot" (further to be referred to as (PJSC "Aeroflot") dated 26 December 2014 (protocol "01/2015 of valuation and comparison of applications for participation in the procedure) the "Santel" Limited Liability Company (further to be referred to as LLC "Santel") is acknowledged as supplier of jet fuel to fuel tanks of aircrafts of PJSC "Aeroflot" and partner air companies of PJSC «Aeroflot» at Sheremetyevo airport for the period from 1 January 2015 to 31 December 2015.

Along with LLC "Santel", LLC "RN-Aero" was also acknowledged as supplier of jet fuel to fuel tanks of aircrafts of PJSC "Aeroflot" and partner air companies of PJSC «Aeroflot» at Sheremetyevo airport.

With the purpose to secure its obligations LLC «Santel» on 30 December 2014 directed an application for provision to CJSC "TZK Sheremetyevo" of services of natural monopoly provider in airports, to the address of closed joint-stock company "TZK Sheremetyevo".

In its letter N 05-57 dated 15 January 2015 CJSC "TZK Sheremetyevo" refused to confirm the application returning it to LLC «Santel» with reference to its non-compliance to the [Decree](#) of the Government of the Russian Federation N 599 dated 22 July 2009 " On Principles to Ensure Access to Services Rendered by Natural Monopoly Providers at Airports" (further to be referred to as Rules of equal opportunity access) and [Order](#) of the Ministry of transport of Russia N 137 dated 21 June 2010 "About the approval of the commitment form on rendering services of subjects of natural monopolies at the airports, the form and the order of maintaining the register of requests for rendering services of subjects of natural monopolies at the airports" (further to be referred to as the Order of the Ministry of transport of Russia N 137).

On 3 February 2015 LLC «Santel» for the second time directed the application to the CJSC "TZK Sheremetyevo" (incoming reference number dated 03 February 2015, N 06-167), having it drawn up according to the sample of application from LLC "RN-Aero", which was earlier approved by the claimant.

Upon the result of review of LLC «Santel» appeal to the antimonopoly authority, dated 21 July 2015, the Federal antimonopoly service (further to be referred to FAS of Russia, antimonopoly authority, respondent) issued a warning notice to CJSC "TZK Sheremetyevo" (on necessity of cessation of the specified activities by concluding specified contracts with



LLC «Santel» in accordance with requirements of the legislation of the Russian Federation by 20 August 2015.).

In its letter N 05-1783 dated 20 August 2015 CJSC “TZK Sheremetyevo” sent a petition to FAS of Russia, soliciting to prolong the term of execution of the warning notice till 27 August of 2015, which was satisfied by antimonopoly authority.

In its letter N 05-1830 dated 27 August 2015 CJSC “TZK Sheremetyevo” stated the absence of technical possibility to satisfy the application of LLC «Santel».

Based upon the order of FAS of Russia N 888/15 dated 25 September 2015 proceedings were initiated and a commission was formed to review the case of violation of antimonopoly legislation.

By resolution of FAS of Russia dated 24 December 2015 in the case N 1-10-157/00-03-15 CJSC “TZK Sheremetyevo” was declared having violated the [clause 5 part 1 article 10](#) of the Federal law N 135-FZ dated 26 June 2006 "On protection of competition" (further to be referred to as the Law on protection of competition) by avoiding conclusion with LLC «Santel» of a contract for providing services of fueling aircrafts and a contract on storage of oil products (aviation fuel), which result or can result in barring, restricting or eliminating competition in the market of providing fueling to aircrafts with jet fuel and in the market of aviation fuel storage.

Considering its rights violated, CJSC “TZK Sheremetyevo” filed an appeal to Moscow Arbitration court with a claim to FAS of Russia in regard to invalidation of the named resolution.

LLC «Santel» and PJSC «Aeroflot» were brought into the proceedings as a non-party intervener.

By the resolution of Moscow Arbitration court dated 30 May 2016, which was upheld by the [ruling](#) of the Ninth Arbitration Court of Appeal of Moscow dated 6 September 2016, the asserted claims were dismissed.

In its cassation appeal the CJSC “TZK Sheremetyevo” requests to vacate judicial acts adopted in the case, assuming that the court has incorrectly applied the norms of substantive law, regulating legal relations in dispute.

Additional evidence in the case is attached to cassation appeal.

Having discussed the motion on submission of evidence documents to materials of the case, court of the cassation instance does not find grounds to satisfy it, since the [Article 286](#) of the Arbitration procedural code of the Russian Federation does not stipulate a possibility of the court of the cassation instance to collect and investigate evidence, in connection with which submitted documents were returned to the claimant during the court session.

No responses to the cassation appeal were received from persons, participating in the case.



In the session of cassation instance the representative of CJSC “TZK Sheremetyevo” affirmed arguments of cassation appeal. Representatives of FAS of Russia and PJSC «Aeroflot» objected against its satisfaction.

Representative of LLC «Santel» failed to appear to the session of the court of cassation instance.

Having checked materials of the case, having discussed cassation appeals, having heard representatives of persons, participating in the case, who were present at the court hearing, the court of cassation instance does not find any grounds to vacate challenged judicial acts.

According to [part 1 article 198](#) of the Arbitration procedural code of the Russian Federation, citizens, organizations and other persons shall have the right to file to the arbitration court applications for recognizing as invalidated the non-normative legal acts and as unlawful the decisions and the actions (inaction) of the bodies, exercising public powers and of official persons, if they believe that the disputed non-normative legal act, the decision and the action (inaction) do not correspond to the law or to another legal normative act and infringe upon their rights and lawful interests in the sphere of business and other economic activity, that they unlawfully impose upon them any kind of duties and create other obstacles to the performance of the business and other economic activity..

By implication of the specified [norm](#), the necessary condition for recognition of non-normative legal act, actions (inaction) as invalid is simultaneous non-compliance of the challenged act, action (inaction) with the law or another normative act and violation of rights and legal interests of the organization in the sphere of business or other economic activity.

[The Law](#) on protection of competition regulates relations, connected with protection of competition, including the prevention and suppression of monopolistic activities and unfair competition, in which Russian and foreign legal persons, state and local self-governance authorities are engaged.

According to [clause 5 part 1 article 10](#) of the Law on protection of competition, the actions (omission to act) of an economic unit occupying a dominant position, including those which are not economically or technologically substantiated, refusal to make a contract with some purchasers (customers) or evasion of it, if it is possible to produce or supply the appropriate commodity, which result or can result in barring, restricting or eliminating competition and (or) infringe upon the interests of other persons.

In virtue of [part 1 Article 4](#) of the Federal law N 147-FZ dated 17 August 1995 "On natural monopolies" (further to be referred to as the Law on natural monopolies), services in airports relate to the sphere of activity of natural monopoly providers.

The [Decree](#) of the Government of the Russian Federation N 293 dated 23 April 2008 "On the state regulation and control of prices (tariffs, fees) for services of natural monopolies' entities at transport terminals, ports, airports and for services of using the infrastructure of internal water ways" services of provision of fueling aircrafts with jet fuel and service of provision of aviation fuel are included in the list of services provided by natural monopolies' entities in airports.



[Part 1 article 8](#) of the Law on natural monopolies stipulates that The subjects of natural monopolies shall have no right to refuse to conclude contracts with particular consumers for the production (sale) of goods which are regulated in keeping with the corresponding Federal [Law](#), provided that the subject of a natural monopoly has the possibility of producing (selling) such goods.

According to [clause 31](#) of the Rules of equal opportunity access, the provision of fuel for aircrafts in airports shall be implemented in accordance with contracts, stipulating provision of fueling aircrafts with jet fuel and storage of jet fuel, concluded on the basis of consumers' requests.

In virtue of [clause 33](#) of the Rules of equal opportunity access, operators, in case of availability of requests from consumers, which are air carriers and (or) operations and (or) suppliers of jet fuel (who concluded contracts for supply of jet fuel with air carriers or operators), and if there is a technical possibility at the airport (in the part of aircraft fuel provision infrastructure facilities) shall conclude contracts for provision of complex of services or of a separate service (in accordance with the application) of provision of jet fuel, including storage of jet fuel in volumes, necessary for performance of carrier activity according to slots, confirmed by consumers, with consideration of length of routes, volumes of storage of minimum balance of jet fuel in the airport, as well as fueling of aircrafts with use of aircraft fuel provision infrastructure facilities in the airport.

According to [clause 5](#) of the Rules of equal opportunity access, the person, who intends to conclude a service contract (further to be referred to as the claimant) , shall direct a written request for provision of services in airports to the main operator (operator). Form of the request and content of information, to be specified in the request shall be approved by the Ministry of transport of the Russian Federation.

The Order of the Ministry of transport of the Russian Federation N 137 dated 21 June 2010 approves [forms](#) of requests for provision of services by natural monopolies' entities in airports.

Refusing to satisfy the stated claims, courts came to a conclusion that the challenged judgment complies with requirements of applicable legislation and does not violate the rights and legal interests of the claimant in the sphere of business or other economic activity.

At that the courts established that the [Order of Federal Tariffs Service N 46-т](#) dated 15 February 2010 CJSC "TZK Sheremetyevo", carrying out activity in the sphere of services in airports, is included in the registry of natural monopolies in transport, in section II "Airport services" with registration number 50/2/11.

Thus, at the moment of return of applications to LLC «Santel» CJSC "TZK Sheremetyevo" had a status of natural monopolies' entity.

By returning applications to LLC «Santel» CJSC "TZK Sheremetyevo" made a reference to non-compliance with requirements of [clauses 31, 33](#) of the Rules of equal opportunity access, which specify, that provision of aircrafts with fuel in airports shall be performed in accordance with contracts, providing for fueling of aircrafts and storage of jet fuel, concluded on the basis of consumers' requests..



As it is established by courts, the LLC «Santel» application had a copy of contract N AФТ-01, concluded with PJSC «Aeroflot» attached to it, according to conditions of which in the part of mutual settlement, it remains valid till complete performance and is deemed prolonged for the next calendar year, unless, not later than 10 days before termination of its validity term neither of the parties states the refusal to prolong the contract.

PJSC «Aeroflot» notified CJSC “TZK Sheremetyevo” on the validity of contract N AФТ-01.

Having ascertained the specified circumstances, as well as the fact of availability of technical possibility, the courts have reasonably concluded that the refusal CJSC “TZK Sheremetyevo” to accept applications of LLC «Santel» was unlawful.

Courts have also taken into account the absence of uniform requirements from CJSC “TZK Sheremetyevo” in relation to the content and form of submitted applications for provision of services of natural monopolies’ entities in airports.

Judgments of courts are based upon the evidence available in materials of the case and comply with provisions of applicable legislation.

The court of cassation instance has no grounds for different assessment of judgments of the court.

Taking into consideration the foregoing, the court of cassation instance believes the judgment of courts in regard to absence of grounds for satisfaction of stated claims is justified.

In its cassation appeal the company brings up an argument about violation by courts of norms of procedural law, since court of the first instance did not satisfy the motion for continuance for the purpose to present evidence in the case, and the court of appeal instance refused to include the evidence in the case – a specialist opinion, which evidences that the company does not have a natural monopoly status.

The stated argument is subject to dismissal, since it does not evidence adoption of incorrect judicial act by the courts.

In consideration of the given dispute the courts have established, that [by the Decree](#) of the Federal Service of Tariffs N 46-τ dated 15 February 2010 the CJSC “TZK Sheremetyevo”, performing activity in the sphere of services in airports, is included in the registry of natural monopolies’ entities in transport, in section II “Airport services” under registration number 50/2/11.

Other arguments of cassation appeal indicate disagreement with judgments of courts, made on the basis of assessment of evidence, submitted in materials of the case.

Merits of consideration of case in the court of cassation instance are limited by checking the correctness of the application of the norms of substantive law and of the norms of procedural law by courts of the first and appeal instances with consideration of arguments of cassation appeal, as well as verifying whether the conclusion on the application of the legal norm correspond to the circumstances of the case they have established and to the proofs contained in the case ([parts 1 and 3 article 286](#) of the Arbitration procedural code of the Russian Federation).



In virtue of the [article 286](#) of the Arbitration procedural code of the Russian Federation, the competence of the court of cassation instance does not include reassessment of evidence, submitted to the court and judgments made based thereupon.

Since the norms of substantive law, that regulate legal relations in dispute were applied by the court correctly, no procedural errors were made, the court of cassation instance does not find any grounds for cancelation or alteration of judicial acts, adopted in the case.

Under such conditions the challenged judicial acts shall be affirmed and the cassation appeal shall be dismissed.

Guided by [articles 284, 286 - 289](#) of the Arbitration procedural code of the Russian Federation, the court

ruled:

to affirm the decision of the Moscow Arbitration court dated 30 May 2016 and the [ruling](#) of the Ninth Arbitration Court of Appeal of Moscow dated 6 September 2016 in the case N A40-59424/16-121-605 and to dismiss the cassation appeal of CJSC “TZK Sheremetyevo”.