



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

**Issued by the Department of Transportation
on the 5th day of September, 2014**

**Third Party Complaint of
Benjamin Edelman**

v.

British Airways PLC

**Violations of 49 U.S.C. § 41712 and
14 CFR 399.84(a)**

Docket OST 2013-0025

Served September 5, 2014

CONSENT ORDER AND ORDER OF DISMISSAL

On February 6, 2013, Mr. Benjamin Edelman (the Complainant) filed a third-party complaint under 14 CFR 302.401 against British Airways PLC (British Airways), alleging that the carrier failed to properly disclose and provide adequate justification for carrier-imposed surcharges and to comply with the Department's "full fare" advertising rule on its On Business company travel website. The complaint further alleged that British Airways advertises around-the-world travel using the "oneworld" booking engine (<http://rtw.oneworld.com/>), owned by oneworld Management Company, Inc. (oMC), which consistently misrepresents carrier-imposed surcharges as government taxes and fees.¹ According to the complaint, by engaging in these practices, the carrier violated its contract of carriage and engaged in unfair and deceptive business practices in violation of 49 U.S.C. § 41712.

This order finds that certain fare displays, in the unique context of the oneworld website, violated 14 CFR 399.84(a), the Department's full fare advertising rule, and section 41712, and that British Airways is responsible for the display of its fares.² However, in light of

¹ The pleadings contain a variety of highly detailed charges and counter-charges. We have summarized the parties' primary contentions. Public comments have been filed in this matter; they are available for view in the docket.

² The Complainant also raised this issue in a companion complaint against Cathay Pacific Airways Limited (Cathay). See Docket DOT-OST-2013-0027. On August 29, 2013, the Department entered an order dismissing that complaint. The Department found that a violation of 14 CFR 399.84(a) took place when Cathay's agent, oMC, published fare displays that failed to adequately distinguish between taxes and

the fact that these violations have been addressed in Order No. 2013-8-23 and for similar reasons as discussed in that order, we conclude that a cease and desist order regarding those violations without the assessment of civil penalties is warranted. The other issues raised by the complainant do not warrant enforcement action. Accordingly, this order directs the carrier to cease and desist from further similar violations of the cited rule and statute and dismisses the complaint filed in this docket.

The Complaint

The Complainant states that British Airways' fuel surcharges do not comply with the Department's Office of Aviation Enforcement and Proceedings (Enforcement Office) guidance as the charges do not represent a reasonable estimate of per-passenger fuel costs above any plausible baseline. The Complainant alleges that British Airways' fuel surcharges appear to exceed the carrier's actual cost of fuel and provides his own calculations as evidence. The Complainant also states that British Airways was unable to substantiate the cost of its fuel surcharges and failed to provide this information when he contacted its staff.

The Complainant raises other issues as well. He alleges that British Airways fails to disclose carrier-imposed surcharges, taxes and fees on its On Business program website in a manner that is compliant with the Department's regulations. He also alleges that British Airways violated the Department's full-fare advertising rule through the misrepresentation by its agent, oMC, of carrier-imposed surcharges as government taxes and fees on the oneworld website.

The Complainant urges the Department to open an investigation regarding these matters; to order British Airways to refund to ticket purchasers all monies represented to ticket purchasers as "taxes" or government-imposed fees, but not actually remitted to governments, and all impermissible fuel surcharges; to impose civil penalties; to refer the matter to appropriate tax collection agencies; and to issue any necessary revised guidance or regulations to clarify that the practices described above are unfair and deceptive.

Answer of British Airways

In its answer of April 5, 2013, British Airways denies the allegations in the complaint, maintains that its fuel surcharge was set appropriately, and explains that fuel surcharges have never recouped its entire cost of fuel and indeed generally, have recouped far less than the increases in jet fuel costs to British Airways. British Airways challenges the Complainant's computations and assumptions with respect to the contention that its fuel surcharges were inappropriate and unsubstantiated. British Airways states that the Complainant overstates the carrier's fuel surcharges and understates its true cost of fuel. In addition, according to British Airways, the Complainant misstates other important

carrier-imposed surcharges. The Department further determined that civil penalties were not warranted under the circumstances. The oneworld website has been revised so that carrier-imposed surcharges are no longer displayed as taxes in the booking process.

variables, including passenger and cargo load factors, fuel consumption, seating density, and the price of jet fuel, which resulted in his miscalculation of British Airways' fuel surcharge and the cost of fuel on a given route. Finally, British Airways states that it has stopped using the term "fuel surcharge" on its website.

In response to the complaint regarding its On Business program, British Airways states that it is a commercial initiative for small to medium enterprises that is not available to the general public. According to British Airways, participation in the program is based on terms formally agreed to by small and medium-sized enterprises and the business must authorize any redemption of travel rewards. Finally with respect to the oneworld website, British Airways states that this issue has been resolved as the booking engine has been revised to comply with DOT requirements.

Reply of Complainant

Pursuant to the Agreed Motion of April 10, 2013, the Complainant filed a reply on April 19, 2013.³ In this reply, he argues that by failing to provide an affirmative justification of its fuel surcharge in its answer, British Airways is violating the Department's requirement that carriers be able to detail the basis of their surcharge estimation. The Complainant also provides revised calculations estimating British Airways' fuel charge on certain routes based on the carrier's answer. The Complainant believes his revised calculations demonstrate that the fuel surcharge is not a reasonable estimate of fuel cost above a plausible baseline. With regard to British Airways' statement that it revised the use of its terminology on its website from "fuel surcharges" to "carrier charges," the Complainant states that British Airways must still be able to identify what services are associated with the new "carrier charges" and its inability to do so is a violation of federal regulations.

In addition, the Complainant maintains that the British Airways' On Business program violates the Department's full-fare advertising rule regardless of the carrier's argument that it is a members-only business initiative. With regard to the oneworld website, the Complainant argues that British Airways should be held responsible for the inaccurate statements that its agent makes directly to consumers and that this issue is not resolved as British Airways has failed to provide refunds to affected passengers.

Sur-Reply of British Airways

Pursuant to the Agreed Motion of April 10, 2013, British Airways filed a responsive pleading on May 3, 2013. In its sur-reply, British Airways justifies its imposition of fuel surcharges due to the high cost of jet fuel and disputes the accuracy of the Complainant's methodology and analysis. British Airways also defends its use of the term "carrier charges" as reflective of widespread industry practice that is compliant with the Department's guidance. Finally, British Airways reiterates that its On Business website is not offered to the general public and British Airways also asserts that DOT has confirmed

³ Agreed Motion, April 10, 2013, Docket DOT-OST-2013-0025-0063, granted by DOT email dated April 11, 2013, Docket DOT-OST-2013-0025-0066.

that its consumer protection rules regarding disclosure of ancillary fee information are intended to protect the general public, not corporate travel offices.⁴

Applicable Law

Unfair or deceptive practices and unfair methods of competition are explicitly prohibited under 49 U.S.C. § 41712. The Department's full fare advertising rule, 14 CFR 399.84(a), provides in relevant part that the first price quote for air transportation must state the entire price to be paid by the customer, including all taxes, fees, and carrier charges. Charges included within that total price may be stated separately, but those charges must, *inter alia*, accurately reflect the actual costs of the services covered, and may not otherwise be false or misleading.

On February 21, 2012, the Enforcement Office issued guidance on the issue of labeling taxes and surcharges.⁵ The guidance states that it is an unfair and deceptive practice to include carrier-imposed surcharges and other fees not imposed by a government under the label of "taxes," or under the label "taxes and fees." The Enforcement Office reasons that such a practice "is likely to confuse consumers and deceive them into believing the government taxes and fees associated with their airfare are higher than they actually are." Carriers may, if they choose, use language such as "taxes and carrier-imposed fees" to collectively describe the charges that are separate from the base fare.

The Enforcement Office is aware that carriers sometimes add substantial fees and/or "fuel surcharges" to their ticket offerings. Carriers must fairly disclose those fees if they choose to separately state them in addition to including them in the total price. In the guidance discussed above, the Department stated that when a cost component is described as a fuel surcharge, that amount must reflect a reasonable estimate of the per-passenger fuel costs incurred by the carrier above some baseline calculation based on such factors as the length of the trip, varying costs of fuel, and number of flight segments involved.

The Enforcement Office considers practices that do not comply with this guidance to be violations of 14 CFR 399.84(a) and to be unfair and deceptive practices in violation of 49 U.S.C. § 41712.

Analysis and Disposition

The Enforcement Office has considered Mr. Edelman's complaint, as well as the other pleadings filed by both parties, and believes that British Airways has violated 14 CFR 399.84(a) with respect to misrepresentations of its agent, oMC, on the oneworld booking

⁴ Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passengers Protections (EAPP#2), Q. 14, pg. 29 (Aug. 19, 2011, revised on June 15, 2012) *available at* http://www.dot.gov/sites/dot.gov/files/docs/EAPP_2_FAQ.pdf.

⁵ Additional Guidance on Airfare/Air Tour Price Advertisements (February 21, 2012), *available at* <http://www.dot.gov/individuals/air-consumer/additional-guidance-airfare-and-air-tour-price-advertisements>.

engine. In relevant part, section 399.84(a) provides that a carrier may separately state the components of a fare, but those statements may not be false and misleading. We believe that the displays on the oMC site, as they existed prior to February 18, 2013, were in violation of the provisions of 14 CFR 399.84(a) as further discussed in the Enforcement Office's industry guidance of February 21, 2012. The Enforcement Office and British Airways have reached a negotiated settlement of this matter under which the carrier, without admitting the violations asserted above, consents to the issuance of this order to cease and desist from future similar violations of 14 CFR 399.84(a) and 49 U.S.C. § 41712. However, as oMC promptly corrected the misleading displays of taxes and surcharges by February 18, 2013, within two weeks of the filing of Mr. Edelman's complaint against British Airways, we find that civil penalties are not warranted for these violations.

With regard to Mr. Edelman's complaint about British Airways' fuel surcharges, on July 22, 2013, the Enforcement Office asked the carrier to provide affirmative justification of the fuel surcharge amounts for the routes Mr. Edelman refers to in his complaint. The Enforcement Office also requested that British Airways provide an explanation for its calculations of the fuel surcharge revenue and actual fuel expenses regarding the two itineraries Mr. Edelman lists in his April 19, 2013 submission. British Airways provided the Enforcement Office with the requested information in a letter dated August 26, 2013, with a request for confidential treatment.⁶ We have carefully considered British Airways' response and the data that the carrier provided. We have concluded that the evidence does not support a finding that British Airways violated 14 CFR 399.84(a) by misrepresenting its actual fuel costs. Further, British Airways has ceased characterizing its surcharges as fuel surcharges and now describes them as "carrier charges."

Finally, British Airways' On Business company travel program involves small and medium-sized business enterprises that choose to accept the program's Terms and Conditions on a contractual basis and is not available to the general public. As a matter of enforcement policy, the Enforcement Office has not enforced the full fare advertising rule in connection with private corporate booking tools, such as the one at issue here, because they are not available to the general public, they involve private contractual arrangements, and the contracting parties are deemed to have notice and have accepted the carrier's terms and conditions.

This order is issued under the authority contained in 49 CFR Part 1.

⁶ British Airways stated that the letter contained "commercially sensitive information" and requested that the letter "be withheld from public disclosure and accorded confidentiality protection to the full extent provided by all applicable laws and regulations, including 14 CFR 302." The Enforcement Office has reviewed the information British Airways provided in its August 26, 2013, letter, and has granted British Airways' request to withhold it from disclosure due to the commercially sensitive information it contains.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that British Airways PLC is responsible for the violation of 14 CFR 399.84(a) that occurred when its agent, oneworld Management Company, Inc. (oMC), published fare displays that failed to accurately separate taxes and government fees from carrier-imposed fees and surcharges;
3. We find that the conduct described in paragraph 2 constitutes an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712;
4. We order British Airways PLC and its successors and assignees, to cease and desist from similar violations of 14 CFR 399.84(a) and 49 U.S.C. § 41712 as described in ordering paragraphs 2 and 3, above; and
5. We dismiss the complaint filed in Docket DOT-OST-2013-0025. This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

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(SEAL)

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For British Airways PLC

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