



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

Issued by the Department of Transportation
On the Seventh day of November, 2013

American Airlines, Inc.

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

Docket OST 2013-0004

Served November 7, 2013

CONSENT ORDER

This order concerns violations by American Airlines, Inc., (American) of the full-fare advertising rule, 14 CFR 399.84(a), and the statutory prohibition against unfair and deceptive practices, 49 U.S.C. § 41712. It directs American to cease and desist from future similar violations and assesses the carrier \$20,000 in civil penalties.

Applicable Law

On April 25, 2011, the Department issued a set of rules designed to enhance protections for air travel consumers that, among other things, required airlines to comply with the Department's full-fare advertising rule as written. The Department's revised full-fare advertising rule, 14 CFR 399.84(a), which became effective on January 26, 2012, prohibits any advertising or solicitation for passenger air transportation, an air tour, or an air tour component that does not state the entire price to be paid by the consumer. The full-fare advertising rule mandates that the price advertised for passenger air transportation include all government-imposed taxes and fees and all mandatory airline- and ticket agent-imposed fees. Violations of 14 CFR 399.84 constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712. To assist in applying the new full-fare rule, on May 17, 2012, the Office of Aviation Enforcement and Proceedings

(Enforcement Office) issued guidance on the use of the term “free” in air fare advertisements.¹

In relevant part, the May 2012 guidance states that a fare may not be advertised as “free” unless it is truly free of all government-imposed taxes and fees collected by the carrier, as well as any mandatory carrier-imposed charges. The guidance specifically addressed the issue of how carriers may advertise fares where the consumer pays only taxes and government fees. Such fares are not truly “free” to the consumer, even though they are free of carrier charges. The Enforcement Office noted that carriers could advertise a fare as “free of carrier charges,” or “without carrier charges,” provided that taxes and government fees are properly disclosed, and there are, in fact, no carrier charges.

By emphasizing the phrase “free of carrier charges,” the Enforcement Office intended to convey that the word “free” (either standing alone or with qualifiers such as footnotes or asterisks) did not adequately convey to consumers that a fare was not truly “free.” In contrast, an advertisement stating that a fare is “free of carrier charges” does prominently convey this message. If the advertisement states that a fare is “free of carrier charges,” then the nature and amount of the taxes and fees to be paid may be disclosed in the body of the advertisement through an asterisk next to the phrase and text elsewhere in the advertisement as described in the September 2003 guidance (see footnote 1).

The Enforcement Office views any failure to adhere to the May 2012 guidance with respect to the use of the term “free” in advertisements to constitute a violation of section 399.84 and an unfair and deceptive trade practice and an unfair method of competition in violation of 49 U.S.C. 41712.

Facts

In January and February 2013, American conducted an advertising campaign to promote its service to ski resort destinations. On February 7, 2013, American conducted an email ad campaign that included a link to an advertisement with a headline stating, “Our biggest ski sale of the season. Save hundreds on flight + ski resort packages, plus kids can fly free!*” In fine print at the bottom of the page, American described the terms and conditions applicable to the packages. In that fine print, American disclosed that the fare

¹ In a September 4, 2003, notice, “Disclosure of Additional Fares, Charges, and Restrictions on Air Fares in Advertisements, Including ‘Free’ Airfares,” published when carriers were still permitted to break out certain taxes and fees from advertised fares, the Enforcement Office also provided guidance regarding advertising “free” fares. The notice stated, in relevant part, that “the existence of conditions related to ‘free’ tickets should be noted prominently and proximately to the offer of a free ticket, at a minimum through the use of an asterisk or other symbol that directs the reader’s attention to the information explaining the conditions in easily readable print elsewhere in the advertisement.” At that time, since most airfare advertisements did not include taxes and government-imposed fees in the fare, the nature and amount of those charges was permitted to be disclosed along with other fare restrictions by an asterisk next to the fare that referred to text elsewhere in the advertisement. However, in the context of the new full-fare rule, which requires that taxes and fees be included in advertised fares, it would be unfair and deceptive not to prominently disclose that a “free” fare is only free of carrier charges if that is the case.

was “without carrier charges,” and described the taxes and fees that the consumer would have to pay for a child to travel.

In a second advertisement sent to its AAVacations email subscribers, American included a banner headline stating “Ski trips up to \$450 off,” with the words “even cooler: kids fly free!⁽¹⁾” In smaller font, a footnote in the advertisement stated, “without carrier charges; conditions apply.” In fine print at the bottom of the page, American described the terms and conditions applicable to the packages. In that fine print, American disclosed that the fare was “without carrier charges,” and described the taxes and fees that the consumer would have to pay for a child’s airfare.

These two advertisements failed to comply with the May 2012 guidance and full-fare rule because they failed to adequately convey that the fare was not truly free. Specifically, the body of each advertisement failed to state that the fare was only free of carrier charges.

In a third advertisement issued through its NetSAAver weekly email, American stated: “It’s the black diamond of ski sales: Save hundreds plus learn how kids can fly free with a ski package!⁽¹⁾” The footnote in this advertisement stated that “conditions apply,” directed the consumer to American’s web site for details, and provided a link. This advertisement failed to properly disclose, or even mention, that to obtain the ostensibly “free” airfare, a consumer had to pay taxes and fees.

By failing to adequately convey that its “Kids Fly Free” fares were not truly “free,” American failed to state the entire price to be paid by the consumer to the air carrier as required by 14 CFR 399.84(a). By violating section 399.84(a), American also committed an unfair and deceptive practice in violation of 49 U.S.C. § 41712.

Mitigation

In mitigation, American states that only a total of 15 “Kids Fly Free” travel packages were purchased, and neither it nor the Department can correlate any of those purchases to the three particular advertisements that are the subject of this consent order. American further states that the maximum of potential taxes and government fees associated with each of the 15 travel packages purchased is less than \$50. Given the lack of evidence of consumer reliance on the allegedly improper advertisements at issue, and the minimal amount of taxes involved, American’s position is that enforcement action is unwarranted.

Additionally, American points out that the May 17, 2012, Department-issued guidance relating to “free” fare advertising did not expressly provide that carriers must state “free of carrier charges” or “without carrier charges” in any specific place in the advertisement with any minimum level of prominence. According to the carrier, it is only in this Consent Order, issued more than a year after the May 17, 2012, Guidance, that the Department has stated what it meant to convey in its May 17, 2012, guidance document where it states that the Enforcement Office “intended to convey that the word ‘free’ (either standing alone or with qualifiers such as footnotes or asterisks) did not adequately convey to consumers that a fare was not truly ‘free.’” For the first time, American argues, the DOT is saying in this Consent Order that only disclosure that free means free

of carrier charges in the body of the ad will satisfy the DOT 2012 Guidance. See Consent Order, footnote 1, and also page 3.

It is American's view that, if as a result of the January 2012 effective date of 14 CFR 399.84, followed by the issuance of the 2012 Guidance the Department stated that the reference to "free of carrier charges" or similar phrases was required in the body of any solicitation and not in the detailed terms of the offer, even if made prominent by use of an asterisk, then the industry would have been on notice of the Department's position and taken steps to comply in future promotions. According to American, fundamental considerations of fairness and due process are not being observed when the Department has to restate in a consent order what its original intent was when issuing industry guidance and then applying its clarifying view of the rule on a retroactive basis in the context of individual carrier enforcement action.

American strongly believes that the first two advertisements noted above in fact meet the guidance material that the Department had made available to carriers as of the date the subject advertisements were published, and that the Department's decision to impose a civil penalty in this case, based on criteria the Department has articulated for the first time only in this Consent Order itself, is not appropriate. As to the third advertisement, American believes that the link to the promotion website page where the details of the promotion were set out met the letter and spirit of the Department's disclosure policy. American admits no violation of either 14 CFR 399.84 or 49 U.S.C. 41712. However, in the interests of settling this matter without engaging in protracted litigation, American has agreed to this compromise settlement.

Decision

The Department takes compliance with the consumer protection provisions of Federal aviation statutes and regulations very seriously. The Enforcement Office has carefully considered the information provided by American but continues to believe that enforcement action is warranted. Notwithstanding American's quibbling about the clarity of the Enforcement Office's 2012 guidance, the carrier boldly and prominently advertised fares as "free" when they were not, a clear violation of section 399.84(a) and section 41712. The Enforcement Office and American have reached a settlement of this matter in order to avoid litigation. American consents to the issuance of an order to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR 399.84(a) and to the assessment of \$20,000 in compromise of potential penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent to future noncompliance with the Department's advertising requirements.

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

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 American Airlines, Inc., violated 14 CFR 399.84(a) by advertising a price for air transportation without stating the entire price to be paid by the consumer to the air carrier;
3. We find that by engaging in the conduct described in ordering paragraph 2, above, American Airlines, Inc., engaged in an unfair and deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712;
4. We order American Airlines, Inc., and its successors and assignees to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR 399.84(a). Failure to comply with this cease and desist provision shall subject American Airlines, Inc., and its successors and assignees to further enforcement action;
5. We assess American Airlines, Inc., \$20,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of this total penalty amount, \$10,000 shall be due and payable within thirty (30) days of the date of the issuance of this order. The remaining portion of the civil penalty amount, \$10,000, shall become due and payable immediately if, within one year of the date of issuance of this order, American Airlines, Inc., violates this order's cease and desist provisions or fails to comply with the order's payment provisions, in which case American Airlines, Inc., may be subject to additional enforcement action for violation of this order; and
6. Payment shall be made through Pay.gov to the account of the U.S. Treasury in accordance with the instructions contained in the Attachment to this order. Failure to pay any portion of the penalty as ordered shall subject American Airlines, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act.

This order will become a final order of the Department ten days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

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Assistant General Counsel for
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