



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
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<p>Hotwire, Inc.</p> <p>Violations of 49 U.S.C. § 41712 and 14 CFR 399.84</p>	<p>Served October 4, 2002</p> <p>OST 2002-12273</p>
<p>Third-Party Complaint of American Trans Air, Inc., v. Hotwire, Inc.</p> <p>Pursuant to 14 CFR 302.404</p>	<p>OST 2002-12260</p>
<p>Third-Party Complaint of Frontier Airlines, Inc., v. Hotwire, Inc.</p> <p>Pursuant to 14 CFR 302.404</p>	<p>OST 2002-12333</p>

CONSENT ORDER AND
DISMISSAL OF FORMAL THIRD-PARTY COMPLAINTS

This consent order concerns airfare advertisements of Hotwire, Inc., ("Hotwire"), an Internet travel vendor, that were broadcast on radio stations in a number of major metropolitan areas. As alleged in formal complaints filed with the Department by Frontier Airlines and American Trans Air, and corroborated in subsequent investigations by the Enforcement Office, the advertisements

announced airfares in which only the destination city, not the point of origin, was identified. In addition, according to the two formal complaints, Hotwire's advertisements made unfairly disparaging references to the respective complainant airlines. This order finds that the advertising program adopted by Hotwire was deceptive in failing to describe fully the markets used in its comparison advertisements and, as a result, that these advertisements violated 14 CFR 399.80, the Department's rule setting forth its policies regarding unfair and deceptive practices and unfair methods of competition by ticket agents, and 49 U.S.C. 41712, the rule's related statutory provision. We have not found, however, sufficient support for the claim that the references to specific carriers were defamatory or unfairly derogatory in violation of the cited rule and statutory provision. This order, therefore, directs Hotwire to cease and desist from further violations of 14 CFR 399.80 and 49 U.S.C. § 41712, assesses a compromise civil penalty, and dismisses the complaints filed by American Trans Air and Frontier.

Formal Complaints of American Trans Air, Inc., and Frontier Airlines, Inc.

◆ *American Trans Air Complaint*

On May 6, 2002, American Trans Air filed a formal complaint against Hotwire under 14 CFR 302.404, the Department's procedural rule covering third-party enforcement complaints. The complaint alleges that the advertising format adopted by Hotwire, with its interviews of passersby at various public venues, is deceptive and misleading in two respects. First, ATA claims that the exchanges between a Hotwire interviewer and a member of the public gave the false impression, when broadcast, that the fares stated in the advertisement were from the location in which the advertisement was broadcast to the city mentioned in the interview. Listeners had no way of knowing from the advertisement, according to ATA, that the fares were from a point near the location where the interview was conducted to the destination mentioned in the advertisement, and not from city in which the advertisement was broadcast. The failure to state clearly the full itinerary of the advertised fares is, according to ATA, a violation of the requirements of 14 CFR 399.80(f).¹ Secondly, the disputed advertisement included language which referred to ATA as a "no-name" airline and contrasted it with "big name airlines" that you "know and trust." ATA claims these

¹ Section 399.80(f) of the Department's rules states that the Department, as a matter of policy, regards misrepresentations by a ticket agent of an air carrier's fares and charges as an unfair and deceptive practice and unfair method of competition.

references, as well as the fare comparisons, are false, misleading, and represent an unfair and deceptive trade practice in violation of the rule and section 41712.

Hotwire answered the complaint in a filing dated May 21, in which it claims that ATA misrepresents the kind of advertising conducted by Hotwire. The fares quoted by ATA in its complaint, Hotwire states, were misinterpreted by the carrier as Chicago-Boston fares, when in fact "there was no mention of Chicago or any other point of origin." (Answer at 4). The fares mentioned in the radio spot were actually based on a search of Los Angeles-Boston fares. Its radio advertisements, Hotwire emphasizes, are not fare advertisements as such, but promote a "combination of attributes including not only the fare but also the carrier on which the customer will fly and the purchasing experience on Hotwire." (Answer at 5). Finally, Hotwire claims that the aspersions that ATA reads into the text of the advertisements are illusory. Its advertisements, Hotwire states, engaged in acceptable comparisons which did not imply that ATA was unsafe or untrustworthy, but merely made affirmative statements regarding carriers available through Hotwire. Hotwire asserts that there were no explicitly derogatory comments questioning the safety or reliability of ATA.

In a reply of June 3, ATA developed at greater length its arguments that Hotwire's advertising practices have violated Department rules as well as Title 49. The interview advertisements, ATA asserts, are deliberately edited to exclude origin points so that a given advertisement, mentioning a single destination, can be aired at several locations and the advertisements are targeted at markets in which discount carriers, which are not among Hotwire's carrier-owners, are active. Moreover, ATA states, the advertising campaign, perhaps for reasons of expense, airs a particular advertisement for several weeks, while the inventory of fares available on Hotwire is subject to frequent changes and a particular fare is generally available on the site for only a few hours or at most a few days. To cite the same transitory fare quote in an advertisement broadcast over several weeks is, ATA claims, patently deceptive. ATA argues that the advisory comment at the end of Hotwire's radio advertisements that fares change frequently does not sufficiently disclose the short-lived availability of the fares offered. Citing Department and other legal precedent, ATA asserts that the likelihood that an advertisement is deceptive should be viewed from the standpoint of its probable reception among ordinary consumers.² Audiences of

² ATA quotes *Continental Airlines, Inc., Prohibited Advertising Practices*, Order 88-8-3: "In reviewing an advertisement, we must look at it as a whole and what its plain impact on an ordinary consumer is in order to determine if it is unfair or deceptive," citing *Country Tweeds, Inc., v. FTC*, 326 F.2d 144, 148 (2d Cir., 1964).

Hotwire's radio advertisements would reasonably assume, ATA claims, that the advertised fares referred to travel originating in the city where the broadcast was made.

ATA also points to a Department enforcement case, *American Airlines, Inc., Advertising Violations*, Order 91-9-45, in which the Department took enforcement action against an advertising program sponsored by American which the Department found to be misleading and deceptive. In advertisements appearing in the *Wall Street Journal* and *USA Today*, publications of national circulation, the carrier advertised fares which it claimed were available for travel from the East Coast of the U.S. to twelve European destinations, but failed to mention that only three of the European destinations were available at the advertised fare and that all travel had to originate at Raleigh-Durham or Miami. The advertisement did not advise that travelers originating at an East Coast location other than Raleigh-Durham or Miami would have to pay a separate airfare for transportation to one of those gateways in order to take advantage of the offer. Moreover, according to ATA, Hotwire's advertising practices in fact may be far more harmful than American's since broadcasts of the interview advertisements continued for several weeks longer than the publication of the offending American advertisement.

The Hotwire advertising program, ATA alleges, also violates both 14 CFR 399.80 (c) and (d) by falsely representing the quality and nature of services offered by ATA; violates 14 CFR 399.80(f) by misrepresenting the airfares of several airlines, including ATA; and violates 14 CFR 399.84, which requires that in all airfare advertisements the stated price represent the full price, by advertising stale fares that were no longer available. Finally, the complainant asserts that these violations of 14 CFR Part 399, under Department precedent, are also violations of the statutory requirements of 49 U.S.C. 41712, which prohibits unfair and deceptive trade practices and unfair methods of competition.

Hotwire's response to the ATA reply, the final pleading in the docket, denies that it edited the interviews to misrepresent fares available on Hotwire, denies targeting low-fare carriers, and continues to emphasize that it does not advertise "airfares" as such, but is attempting through its interview advertisements to provide an illustration of savings that may be available to prospective passengers who search for fares on Hotwire and other travel sites. Hotwire claims that it is advertising the site and its unique search technique and inventory of fares, but not specific fares.

◆ *Frontier Complaint*

In a third-party complaint filed June 17, 2002, Frontier Airlines alleges violations similar to those set out in ATA's complaint.³ Hotwire's advertising technique, according to Frontier, leads consumers to believe that Hotwire fares quoted on the air are actually available at the time of broadcast, and relate to travel between the broadcast location and the destination mentioned in the advertisements. In fact, according to Frontier, the fare searches undertaken in the prerecorded interviews do not refer to a specific origin point and may be several days or weeks old. The use of stale fares and the failure to indicate the market or route to which the fares apply, Frontier asserts, is in violation of 14 CFR 399.80(c) and (f). Raising an objection similar to that raised by ATA, Frontier claims that in the context of the interviews Frontier is portrayed as less "reliable" and "trustworthy" than Hotwire's consortium of carriers. Frontier alleges that such a characterization is false and in violation of 14 CFR 399.80(d). Both Hotwire's deceptive fare advertising and its misrepresentation of Frontier's safety record are, Frontier claims, violations of 49 U.S.C. § 41712, in addition to the cited regulatory provisions.

To the Frontier complaint, Hotwire presents many of the same defenses it offered in responding to ATA. Since it is advertising the experience and technique of searching fares via Hotwire, Hotwire claims its advertising program is not fare advertising in any conventional sense. It is not advertising and does not claim to advertise current fares, Hotwire asserts, and therefore its advertising format is not in violation of the requirements of 399.80(c) or (d). With respect to Frontier's claim that the advertisements depict the carrier as "untrustworthy" or "unreliable," the internet vendor replies that the transcript of the advertisement indicates that none of those terms were used and the only statements which might be construed as derogatory to Frontier specifically were that Frontier was not a "major" carrier and the interviewee's statement that he would be "more comfortable" traveling on a major carrier. Neither of these statements, Hotwire asserts, misrepresents the airline nor violates the fair advertising strictures of section 399.80. Hotwire, in addition, explains that the settlement agreement that it had negotiated with Frontier, which had led the carrier to withdraw its original complaint, called for Hotwire to desist from any advertising which mentioned Frontier by name. Although the Internet vendor made every effort to comply, a

³ Frontier originally filed its complaint on May 14, 2002, then withdrew it a few days later after reaching what it believed was a settlement of the matter with Hotwire. In response to an alleged breach of the settlement, Frontier reinstated its complaint in a filing of June 17.

radio station in Denver inadvertently broadcast an advertisement mentioning Frontier, despite receiving notice from Hotwire to discontinue the advertising program.

In response, Frontier filed a reply on July 19 which reiterates many of the claims made in its complaint. Frontier strongly disputes the Hotwire claim that its interview advertisements are not fare advertisements, and not subject to sections 399.80 and 399.84. The broadcast interviews, Frontier argues, can only be viewed as fare advertisements which should reveal the markets to which they apply, for when a consumer names a destination in a Hotwire interview but not the origin of a prospective trip, it is reasonable to assume that the origin is the place in which the advertisement is broadcast. The Hotwire advertisements should comply with the cited regulatory provisions, Frontier asserts, with full disclosure of the markets to which the advertised fares applied. Nor should the aborted settlement agreement be accepted as a defense, Frontier contends, since the issue raised in the complaint is the deceptive nature of the advertising and neither the carrier nor the Department can be assured that advertisements similar to that inadvertently aired in Denver have not been broadcast elsewhere.

DECISION

Clearly, the advertisements at issue here are airfare advertisements subject to 49 U.S.C. § 41712 and the Department's applicable rules and related enforcement case precedent. While we acknowledge that Hotwire has been fully cooperative in our investigation, we believe that enforcement action is warranted in this instance. Hotwire, as a travel agent, is subject to the policy guidelines of section 399.80. By omitting a full description of the markets in which its advertised fares were available, specifically by failing to state the origin point of prospective itineraries in its advertisements, Hotwire created the false impression that the fares it advertised were available in the cities in which its advertisements were broadcast when that, in fact, was not the case. Accordingly, Hotwire engaged in a deceptive practice and an unfair method of competition in violation of 49 U.S.C. § 41712 and 14 CFR 399.80 (c) and (f). This order directs Hotwire to cease and desist from future similar violations and to pay a compromise civil penalty.

In response to information requests from the Enforcement Office, Hotwire advised that its advertising program was designed to appeal to travelers with some flexibility in their departure times who could in return receive substantial discounts through Hotwire. The format of its advertisements relied on a series of live interviews of passersby in selected public locations which were recorded and

these interviews, once edited, became the broadcast commercials. In its interviews, the Hotwire representative, according to Hotwire's information responses to the Enforcement Office, would solicit individuals to take the "Hotwire Travel Challenge" in which the member of the public would name a city he or she would consider as a travel destination and the Hotwire interviewer would then, via a laptop computer, look for fares to that point available through Hotwire and through its principal Internet competitors. These interviews were taped in Santa Monica, California, and New York City, and the fares selected were for travel from these points to the destinations suggested by the individuals being interviewed. The advertisements based on these interviews were then broadcast in several markets outside the New York or Los Angeles metropolitan areas from late 2001 through July 2002. However, the advertisements gave no indication to audiences in the broadcast markets that the departure points for the advertised fares were the cities in which the interviews were conducted, not the cities in which the advertisements were aired.

The Department's rule on unfair and deceptive practices of ticket agents, 14 CFR 399.80, enumerates among other practices, "misrepresentations as to . . . points served, route to be flown [in air service]" (399.80(c)) and "misrepresentations as to fares and charges for air transportation or services in connection therewith." (399.80 (f)). The recent radio advertisements of Hotwire, by failing to indicate clearly the origin and destination points of markets used in its comparison of fares, were deceptive and violated the cited rule and 49 U.S.C. § 41712, which prohibits unfair and deceptive trade practices and unfair methods of competition. Since the advertisements referred to a specific destination and quoted a fare to that destination, listeners would reasonably assume that fare was for travel from their location to the stated destination. In a case apposite to Hotwire's advertisements (Order 91-9-45, *supra*), American Airlines's advertisements of East Coast fares to Europe in 1991, the Department found that the carrier's failure to indicate clearly the departure point for its European fares was deceptive and in violation of Department advertising rules. Similarly, we affirm here that in an advertisement stating an airfare, if the fare is not applicable from the location in which the fare is published or broadcast, there should be an explicit mention of the markets to which the fare applies in order to comply with the requirements of 14 CFR 399.80 (c) and (f) and 49 U.S.C. § 41712. On the other hand, we also see nothing inherently unlawful in advertising fares, as Hotwire has, that consumers have received in the recent past but which may not be currently available, so long as the advertisements clearly indicate that fact. However, the Enforcement Office believes that the disclosure in the Hotwire advertisements was inadequate and Hotwire has agreed that in future

advertisements the dates the advertised fares were available will be specifically disclosed.

We have not, on the other hand, found sufficient basis to support the claims of ATA and Frontier that Hotwire's advertising program conveyed remarks that were unlawfully derogatory under Department rules with respect to either carrier. In reviewing the transcripts of the recorded interviews, it is clear that the member of the public interviewed is the one making the claim that he or she does not "know" the complainant carrier, in the case of ATA (Complaint of ATA, attachment), or in the case of Frontier, would feel more "comfortable" flying on a major carrier (Amended Complaint of Frontier, p. 6, document not paginated). The Hotwire interviewer makes the claim that with sales through Hotwire the traveler will fly on an airline which "you know and you trust." In both advertisement scripts, the interviewer begins by claiming that on Hotwire travelers can "fly a big name airline for a no-name airline price." In none of the Hotwire interviews, however, is either ATA or Frontier the subject of explicit claims that they are "unsafe" or "untrustworthy." To the extent that pejorative inferences can be drawn from the Hotwire advertisements, they seem to us to be subjective and tacit. As a result, we believe that the advertisements, with respect to characterizations of the quality and kind of service available on ATA and Frontier, do not violate section 399.80 (c) or (d) and do not constitute unfair and deceptive trade practices or unfair methods of competition within the meaning of section 41712.⁴

In mitigation, Hotwire states that the practice of omitting the origin city was a good faith effort on its part to conform the advertising of its unique opaque service to the Department's laws and regulations, which were originally drafted for carriers and traditional ticket agents. Hotwire states that it wanted to illustrate the kind of savings possible for flexible travelers, without leaving the impression that any particular fare would be available in the future. Indeed, according to the company, nearly as often as not, the prevailing fare from the city in which the advertisement was recorded was higher than the prevailing fare from the city in which the advertisement was broadcast. Hotwire points out that it has already committed to include the date of search in all advertisements of sample fares, along with more specific disclaimers of future availability. In a further effort to add clarity, Hotwire states that it will add origin city information as well. Hotwire notes that the Department has acknowledged Hotwire's full cooperation in this investigation which results from Hotwire's commitment to

⁴ We note, however, that the complainants are free to pursue any such claims in an appropriate court of law. (See, e.g., section 43(a) of Lanham Act (15 U.S.C. § 1125(a).)

comply with its legal responsibilities and its commitment to provide consumers a clear and complete picture of the benefits of the Hotwire service.

We have carefully considered all the evidence in this matter, including Hotwire's explanation, and we believe that enforcement action is warranted in this instance. Hotwire, in order to avoid litigation and without admitting or denying the alleged violations, agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR 399.80 in print advertisements and to an assessment of \$50,000 in compromise of potential civil penalties, of which one half will be payable within 15 days of the date of this order. The remainder will be suspended for one year, at which time it will be forgiven provided that Hotwire has engaged in no similar violations of the Department's advertising rules in the interim. In the event that such similar violations do occur, the entire balance of the assessed civil penalty shall be due and payable immediately. This compromise assessment is appropriate in view of the nature and extent of the violations in question and serves the public interest. This settlement, moreover, represents a deterrent to future noncompliance with the Department's advertising regulations and section 41712 by Hotwire, as well as by other sellers of air transportation.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

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 Hotwire, Inc., violated 14 CFR 399.80 (c) and (f) by advertising fares in a series of radio advertisements which failed to state the origin and destination point of the markets to which the fares applied, as described above;
3. We also find that by engaging in the conduct described in paragraph 2, above, Hotwire, Inc., violated 49 U.S.C. § 41712;
4. Hotwire, Inc., its successors, affiliates, and assigns, are ordered to cease and desist from further similar violations of 14 CFR 399.80 and 49 U.S.C. § 41712;

5. We dismiss the complaints filed by American Trans Air, Inc., (OST 2002-12260) and Frontier Airlines, Inc. (OST 2002-12333);

6. Hotwire, Inc., is assessed \$50,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above, of which \$25,000 shall be due and payable within 15 days of the service date of this order. The remainder of the penalty shall be suspended for one year following the service date of this order and then forgiven, provided that Hotwire complies with the payment terms of this order, as well as its cease and desist provisions, during the suspension period; if it fails to do so, the entire unpaid balance of the penalty shall become due and payable immediately, and Hotwire may be subject to further enforcement action; and

7. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall also subject Hotwire, Inc., to an assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order.

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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