Betsy

Order 2002-3-12

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

Issued by the Department of Transportation
on the 15th day of March, 2002

SERVED March 15, 2002

Application of

ORBITZ, L.L.C.

for an exemption, to the extent necessary, pursuant to 49 U.S.C. §40109

Docket OST-01-11086

ORDER

By Order 2001-12-7, issued December 7, 2001, we granted Orbitz, L.L.C., an Internet travel agent, an exemption from 49 U.S.C. §41712 (Unfair and deceptive practices and unfair methods of competition) and 14 CFR §§399.80 (Unfair and deceptive practices of ticket agents) and 399.84 (Price advertising) to the extent necessary to allow it to list its service fees separately from airfares on its fare/itinerary displays. The exemption is conditioned on Orbitz's compliance with certain enumerated conditions to prevent deception to consumers. Subsequently, in a Notice issued December 19, the Office of Aviation Enforcement and Proceedings ("Enforcement Office") announced that it has revised its enforcement policy so that the exemption granted to Orbitz in Order 2001-12-7 now applies as a practical matter to all Internet travel agents. (Notice of the Office of Aviation Enforcement and Proceedings, *Revised Enforcement Policy on Deceptive Practices Regarding Service Fees Charged by Travel Agents in the Marketing and Sale of Airfares to the Public via the Internet*, December 19, 2001 ["Notice"]) Both the exemption and the revised enforcement policy are to remain in effect until the Department has had an opportunity to consider the disclosure of travel agent service fees more thoroughly through rulemaking.

On December 27, Travelocity.com L.P. filed a Petition for Reconsideration of Order 2001-12-7. Noting that the exemption represents a significant departure from long-standing enforcement policy, Travelocity maintains that it should apply to fuel surcharges as well as service fees. Travelocity also charges Orbitz with failing to comply with some of the exemption's conditions, and it asks for additional conditions. On January 4, 2002, RADIUS[SM]-The Global Travel Company ("Radius"), a travel management company whose shareholders are travel agents, filed Comments on the Notice. Radius maintains that the revised enforcement policy should apply to all travel agents, not just Internet travel agents. On January 7, Orbitz filed its Opposition to the Petition for Reconsideration. Orbitz supports the exemption, opposes the separate listing of fuel surcharges, opposes additional conditions, and denies that it has violated the terms of Order 2001-12-7.

For the reasons discussed below, we deny Travelocity's Petition for Reconsideration, and we decline to modify the revised enforcement policy.

Order 2001-12-7 and the Notice

In Order 2001-12-7, we found that Orbitz's practice of listing its service fees separately rather than as part of the airfares in fare displays on its website may amount to a violation of 49 U.S.C. §41712 and 14 CFR §§399.80 and 399.84. We also found, though, that granting Orbitz an exemption from these provisions to allow it to continue this practice is consistent with the public interest, because it gives consumers more information on which to base their purchase decisions, provided that Orbitz complies with the following conditions to prevent consumer deception:

(1) Orbitz must present the total price to the consumer of purchasing a ticket or tickets, including its service fee, wherever it presents an itinerary that may be purchased.

(2) Orbitz must place the following statement, prominently and in bold type, between its price matrix at the top of the fare/itinerary display page, which lists prices that do not include its service fee, and its display of flight itineraries, which under this exemption will list fares that do include its service fee:

> Prices above are per person and may not be purchased on Orbitz without applicable service fees.
>
> The words "service fees" must be linked to a pop-up page that clearly sets forth Orbitz's fee schedule.

(3) Orbitz must prominently disclose that it charges a service fee on the first page of its website and at a minimum provide a link to its pop-up explanation.

(4) Orbitz's service fees may not be *ad valorem* in nature.[1]

(5) The prices in Orbitz's fare matrix that do not include Orbitz's service fee must reflect the airlines' prices to Orbitz; all other fares displayed on Orbitz's website must either reflect the full price to be paid to Orbitz for a ticket or tickets, including any applicable service fee, or be adjacent to a full price that includes such fees.

(6) The Orbitz website must be in full compliance with these conditions within seven days of the date this Order is issued and remain so.

Order 2001-12-7 at 4-5. The conditions in the revised enforcement policy are analogous to the first five of the order's conditions. The Notice also set forth the disclosure requirements for non-Internet travel agents that charge service fees:

> In addition, under 14 CFR §399.84, travel agents who do not sell air transportation over the Internet must continue either (1) to include any service fees they charge in their airline fare quotes to consumers or (2) to quote the fare, the service fee, and the total price, presenting all three elements together. Although the former approach clearly complies with §399.84, the Enforcement Office favors the latter approach, as it provides consumers with

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[1] In the order, we found that Orbitz's displays were in compliance with conditions (3) and (4) when it initiated its service fee practice in early December.

more complete information on which to base their purchase decisions.

Notice at 2-3, note 1.

Travelocity's Petition for Reconsideration

Travelocity maintains that through the exemption granted to Orbitz in Order 2001-12-7, the Department has abruptly changed direction in its interpretation of 49 U.S.C. §41712 and 14 CFR §§399.80 and 399.84. Travelocity does not necessarily dispute the change, provided that the Department adopts the same approach toward disclosure of airlines' fuel surcharges that it has now anounced for Internet travel agents' service fees. In support of its position, Travelocity notes that before issuing Order 2001-12-7, the Department consistently maintained "that service fees and fuel surcharges should be treated the same for purposes of enforcement of the Fare Advertising Regulations," and it provides several examples. Petition for Reconsideration at 3-5. Travelocity therefore "requests clarification and confirmation that [Order 2001-12-7], and the rationale set forth therein and in the Department's Notice of December 19, 2001, will be applied evenly to all online agents regarding service fees and fuel surcharges." Petition at 5.

Travelocity also charges Orbitz with failing to comply with all of the conditions of Order 2001-12-7. Travelocity alleges that Orbitz has an arrangement with Comet Systems whereby the latter's software diverts consumers' communications with Travelocity or Expedia and directs them instead to Orbitz. According to Travelocity, the first screens that affected consumers see (1) lack the mandated disclaimers that the displayed fares may not be purchased on Orbitz without applicable service fees, (2) also lack the required link to a pop-up page that clearly sets forth Orbitz's fee schedule, and (3) contain no prominent disclosure that Orbitz charges service fees at all. Beyond Orbitz's arrangement with Comet Systems, Travelocity charges Orbitz with failing to comply with Order 2001-12-7's third condition. It also asks the Department to require Orbitz to disclose on the first page of its website that "each and every airfare offered by Orbitz, including web-only specials, is available for less on the airline's website." Petition at 6-7 (emphasis in original). Finally, Travelocity asks the Department to require Orbitz to remove a reference to two pricing studies that date from before Orbitz began charging service fees from its website.

Radius's Comments

Radius expresses concern over possibly disparate treatment of Internet and non-Internet travel agents and asserts that if the Department does not mean to accord the same treatment to all travel agents, it opposes both the exemption and the revised enforcement policy. According to Radius, the conditions set forth in both documents will not prevent consumer deception. Radius reads the Notice as allowing the following:

> **[Internet] Travel Agent Information:**
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> Fare for travel between Baltimore-San Diego.
> Fare - $230 each way. **$460 roundtrip**
> There may be a fee with this.
>
> **[Non-Internet] Travel [Agent] Information:**
>
> Fare for travel between Baltimore-San Diego.
> Fare - $230 each way. $460 roundtrip, $20 service fee
> TOTAL TICKET PRICE - **$480**

Comments of RADIUS℠-The Global Travel Company, January 4, 2002, at 6. Denying that a link to service fee information on an Internet travel agent's home page will inform consumers adequtely, Radius contends that this disparity will lead consumers to the mistaken belief that they will pay less if they deal with an Internet travel agent even when the latter does charge a service fee. As a result, Radius maintains, non-Internet travel agents, which have recently seen their revenues decline due to a number of factors, will lose even more revenues. This in turn will harm consumers, as agency closures will leave the public with fewer sources of comprehensive and objective advice, personal attention, and practical assistance. Radius takes the position that the Department must either allow all travel agents to list service fees separately and provide fare information in the same manner or rescind the exemption and revert to the original enforcement policy pending completion of a final rulemaking proceeding. Radius also asks the Department to require that ticket stock have a separate line for travel agents' service fees.

Orbitz's Opposition

Orbitz takes issue with Travelocity's contention that airlines' fuel surcharges and travel agents' service fees are analogous and therefore should be treated the same way, and it denies that Order 2001-12-7 and the Notice suggest any willingness on the Department's part to allow the separate listing of fuel

surcharges. Orbitz maintains that an airline's fuel surcharge must be included in any airfare quote because it is "an inherent and unavoidable part of the cost of air transportation," as the Department has made clear "through a long series of consent orders." Opposition to Petition for Reconsideration, January 7, 2002, at 3. A travel agent's service fee, in contrast, does not accrue to any airline. Agents' fees and the quality of the services they offer both vary, unlike an airline's fuel surcharge for a given itinerary, so a consumer might pay a different service fee or no fee at all to buy the same air transportation, depending on the retailer he or she chooses. Orbitz argues that separate disclosure of travel agents' fees is not only not deceptive but affirmatively informative. It observes that Travelocity has not even argued much less shown how listing fuel surcharges separately might similarly benefit consumers.

Orbitz opposes the additional conditions proposed by Travelocity. First, Orbitz argues that requiring it to disclose on the first page of its web site that "each and every airfare offered by Orbitz, including web-only specials, is available for less on airline websites" would be inconsistent with the Department's conclusion in Order 2000-10-23 that travel agents are not required to inform consumers that lower fares may be available elsewhere, as they are not responsible for knowing about fares that they are not authorized to sell. Additionally, comparable disclosure would be required of all on-line travel agents that charge service fees, whether for tickets on all carriers or only on selected ones.

Second, Orbitz opposes Travelocity's request that we require it to delete a reference on its website to two pricing studies. Orbitz denies that its service fees undercut these studies' findings that it does a superior job of finding lower airfares, and it denies that its mention of these studies misleads or confuses consumers about its service fee.

As for Travelocity's allegations that it has not complied with all of the conditions of Order 2001-12-7, Orbitz argues that they are misplaced in a petition for reconsideration and that any compliance concerns should be handled through normal enforcement processes. Orbitz nevertheless proceeds to address these allegations. It denies that Comet's software intercepts transmissions from Travelocity to consumers, asserts that only consumers who have chosen to use Comet's services see the latter's pop-up screens, and denies that these screens are part of Orbitz's web site for purposes of the order's conditions. Orbitz also asserts that Comet has changed its software to disclose Orbitz's fees and is updating the software it has already distributed to disclose the fees as well. In response to Travelocity's allegation that it is not complying with the order's third condition, Orbitz states that its

first-page disclosure remains the same as it was when the Department issued Order 2001-12-7, in which it found that Orbitz was already in compliance with this condition.

Disposition

We deny Travelocity's Petition for Reconsideration in all particulars, and we decline to take the action requested by Radius.

First, we decline to revise our consistent and long-standing policy on the disclosure of airline fuel surcharges. Nothing in either Order 2001-12-7 or the Notice can legitimately be read as suggesting any willingness or intent on our part to stop requiring all sellers of air transportation to include any applicable fuel surcharge in any price advertised or quoted to consumers for air transportation. As we stated in the order, our rules generally require that any price advertised or quoted for air transportation be "the entire price to be paid by the customer . . . ." The Department has carved out a limited exception in its enforcement policy that allows "taxes and fees collected by . . . sellers of air transportation, such as passenger facility charges (PFCs) and departure taxes, to be stated separately . . . so long as the charges are approved or levied by a government entity, and are not *ad valorem* in nature, are collected on a per-passenger basis, and their existence and amount are clearly indicated . . . so that the consumer can determine the full price to be paid." Order 2001-12-7 at 2-3, quoting Order 2001-12-1 at 1-2.[2] We have consistently prohibited the separate listing of airline fuel surcharges as deceptive to consumers, because these surcharges are not government-imposed, per-passenger fees that the carrier collects and remits to the government entity, nor are they analogous to such fees.

Before Orbitz requested an exemption from our requirements, the Enforcement Office also prohibited the separate listing of travel agent service fees even though they do differ from airline fuel surcharges in two significant respects. One, they do not accrue to any airline. Two, while an airline fuel surcharge is unavoidable and invariable, a travel agent service fee is not: for the same air transportation, the consumer may pay a lower fee, a higher fee, or no fee at all depending on the seller he or she selects. It is this latter factor that persuaded us that disclosure of travel agent service fees could benefit consumers. *See* Order 2001-12-7 at 3-5. As Orbitz observes, Travelocity has

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[2] The latter order, issued less than a week before Order 2001-12-7, is a consent order finding separate listing of airline fuel surcharges to be in violation of our advertising requirements.

not shown that allowing the separate listing of airline fuel surcharges would benefit consumers as well.

Second, Travelocity's allegations that Orbitz is not complying with all of Order 2001-12-7 are not grounds for reconsideration of that order. If well-founded, they may be grounds for enforcement action. We understand that the Enforcement Office is in the process of investigating these and other allegations against Orbitz. The allegations involving Comet Systems' software in particular and whether the Department should regulate this type of third-party software in general can be considered when we address travel agent service fees in a rulemaking proceeding.[3]

Third, we will not adopt the additional conditions Travelocity requests. If we were to require Orbitz to disclose on the first page of its website that each airfare, including web-only specials, is available for less on the airline's website, we would have to require all Internet travel agents that impose service fees to make a similar disclosure. We do not believe this to be necessary to protect consumers as long as any Internet travel agent that charges service fees for any air transportation complies with the conditions in the Enforcement Office's Notice. We also will not require Orbitz to delete its reference to two pricing studies, because we do not find that it is likely to confuse consumers about Orbitz's service fees or about the total price they will pay if they buy air transportation from Orbitz.

Fourth, we will take no action regarding the revised enforcement policy, as we believe the concerns expressed by Radius to be unfounded. From the consumer's perspective, the disclosure requirements that Order 2001-12-7 and the Notice set for Internet and non-Internet travel agents are comparable. Radius's examples reflect a misreading of these requirements. Internet travel agents may not quote a one-way fare and a round-trip fare and then merely disclose that "there may be a fee with this," as Radius suggests. Rather, an Internet travel agent that wants to list its service fees separately has two choices. It may quote a fare and the service fee and the total ticket price, as in Radius's example for non-Internet travel agents. In the alternative, it may have a page on which it both lists prices that do not include its fees and displays prices with its fees. Such a page must include a prominent statement in bold type, placed between the list and the display, that informs consumers that the fares are per person and may not be purchased without applicable service fees, and the phrase "service fees" must be linked to a pop-up page

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[3] We currently intend to begin our consideration of travel agent service fees in our CRS rulemaking proceeding in Docket OST-1997-2881.

that discloses the agent's fee schedule, including the dollar amounts. Radius provides no support for its contention that this disclosure will not inform consumers adequately or that it will give rise to a false impression that dealing with non-Internet travel agents is more expensive.

Finally, we deny Radius's request that we require that ticket stock have a separate line for travel agent service fees. This request exceeds the scope of Order 2001-12-7 and the Notice, and Radius has not supported it with any evidence that listing the agent's service fee on the ticket is necessary to prevent consumer deception. Neither our rules nor our revised enforcement policy require any travel agent to break out its service fees separately when quoting prices for air transportation; the revised policy merely permits separate disclosure under the enumerated conditions. As a practical matter, disclosing a travel agent's service fee on the ticket would not give the consumer any new information: under our rules, disclosure of the total price must take place before the consumer agrees to buy any air transportation, which in turn precedes the consumer's receipt of any ticket.[4]

ACCORDINGLY,

1. We deny the petition of Travelocity.com L.P. for reconsideration of Order 2001-12-7, and

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[4] Also, it is our understanding that most tickets issued by travel agents come with an itinerary that states the price of the air transportation and discloses the agent's service fee.

2. We will serve a copy of this order on Orbitz, L.L.C., Travelocity.com L.P., and RADIUS[SM]-The Global Travel Company.

BY:

READ C. VAN DE WATER
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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