

**BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
WASHINGTON, D.C.**

**Delta Air Lines, Inc.**

**Served December 23, 2014**

**Violations of 14 CFR Part 257 and 49 U.S.C. § 41712**

**DOT-OST-2014-0229**

**Enforcement Proceeding**

**ENFORCEMENT COMPLAINT**

**Nature of the Case**

1. Pursuant to the Department of Transportation's Rules of Practice in Proceedings, 14 CFR Part 302, the Office of Aviation Enforcement and Proceedings (Enforcement Office) hereby brings this Enforcement Complaint against Delta Air Lines, Inc. (Delta). As discussed more fully below, Delta failed on a number of occasions to comply with the code-share disclosure requirement of 49 U.S.C. § 41712(c) and the Department's code-share disclosure rule, 14 CFR 257.5(b). In doing so, Delta committed unfair and deceptive practices in violation of 49 U.S.C. § 41712, and violated the cease-and-desist provisions of a prior code-share disclosure order.

**Jurisdiction and Applicable Law**

2. Delta holds certificate authority under 49 U.S.C. § 41101 to engage in air transportation of passengers and cargo. Delta's principal office is located at 1030 Delta Boulevard, Atlanta, GA 30354-1989.
3. As an air carrier, Delta is subject to the Department's adjudicatory authority pursuant to 49 U.S.C. §§ 40101 et seq. and 14 CFR Part 302.
4. As an air carrier, Delta is subject to the requirements of 49 U.S.C. § 41712(a), which prohibits unfair and deceptive practices in air transportation.
5. As an air carrier, Delta is subject to the requirements of 49 U.S.C. § 41712(c)(1), which states that it shall be an unfair or deceptive practice under subsection (a) for any air carrier to fail to disclose, whether verbally in oral communication or in writing in written

or electronic communication, prior to the purchase of a ticket, the name of the air carrier providing the air transportation.

6. The Department's oral code-share disclosure rule, 14 CFR 257.5(b), states in relevant part that "in any direct oral communication in the United States with a prospective consumer and in any telephone calls placed from the United States concerning a flight that is part of a code-sharing arrangement[,]" a carrier "shall tell the consumer, before booking transportation, that the transporting carrier is not the carrier whose designator code will appear on the ticket and shall identify the transporting carrier by its corporate name and any other name under which that service is held out to the public."
7. Under 49 U.S.C. § 46101(a)(4), the Department may issue an order compelling compliance with the provisions of Part A, Subtitle VII of Title 49 U.S.C., including 49 U.S.C. § 41712. The Department may also issue an order compelling compliance with the requirements prescribed under that Part, including 14 CFR Part 257.
8. Under 49 U.S.C. § 41712, the Department may, upon finding that a carrier is engaged in an unfair or deceptive trade practice or unfair method of competition, issue an order directing the violator to cease and desist from such conduct.
9. Under 49 U.S.C. § 46301 and 14 CFR Part 383, the Department may assess civil penalties of up to \$27,500 for each violation of 49 U.S.C. § 41712.
10. Under 49 U.S.C. § 46301 and 14 CFR Part 383, the Department may assess civil penalties of up to \$27,500 for each violation of a regulation prescribed, or order issued under, 49 U.S.C. § 41712.

### **Background and Enforcement History**

11. Code-sharing is a common practice among air carriers. In a typical domestic code-sharing arrangement, a mainline carrier (such as Delta) will enter into an agreement with an independent, separately owned and managed commuter or regional air carrier (an "operating carrier," such as ExpressJet Airlines) to transport passengers to airports that are usually not served directly by the mainline carrier, often in smaller cities. The mainline carrier markets the flight and sells the ticket using a trade name that is similar to that of the mainline carrier (e.g., Delta Connection).
12. Because the mainline carrier typically markets a flight under a name that is similar to the mainline carrier's own name, there is a significant likelihood of confusion among consumers as to the true identity of the carrier that is actually providing the air transportation. Specifically, passengers may reasonably but erroneously conclude that a code-share flight is actually operated by a well-known mainline carrier, when it is in fact often operated by a smaller, lesser-known airline. Additionally, such flights are usually operated with smaller aircraft.

13. In September 1985, the Department issued a policy statement that it is an unfair and deceptive practice under 49 U.S.C. § 41712 for air carriers to fail to provide reasonable notice of code-sharing arrangements. Specifically, the Department required air carriers, “in any direct oral communication with a consumer concerning a code-sharing flight,” to (1) provide sufficient information to alert the consumer that the operating carrier is different from the mainline carrier, and (2) identify the carrier actually providing the service. 14 CFR 399.88 (Docket No. 42199, 50 FR 38508, September 23, 1985, removed March 8, 1999, and replaced with 14 CFR 257.5)
14. On August 10, 1994, the Department issued a Notice of Proposed Rulemaking (NPRM) to obtain comments on clarifying, expanding, and/or strengthening the code-share disclosure rule.
15. In the NPRM, the Department stated its policy: “to be timely, notice must be given during all discussions about a code-shared flight. Consumers must be given clear notice before they make reservations or buy transportation both that the service they are considering is on a code-shared flight and of the actual operator's identity, so that they can consider these facts in making travel purchase decisions.” 59 FR 40836 (August 10, 1994).
16. In the NPRM, the Department proposed, among other things, clarifying the specific types of code-share information that must be disclosed (e.g., the name of the operating carrier). The Department also sought comment on how mainline carriers should disclose code-share arrangements to consumers. *Id.*
17. On November 8, 1994, Delta submitted comments regarding the NPRM. In relevant part, Delta stated that “the most important time to provide notification of code-sharing arrangements is during conversations prior to booking. That is the time during which the consumer is evaluating his or her options.” (emphasis in original). Delta advocated for the information to be disclosed while a consumer is evaluating options, but opposed a requirement that the air carrier disclose code-share arrangements at the “first instance” that a code-share itinerary is offered. Docket 49702; OST-95-179-36 (November 8, 1994) at 3.
18. On March 15, 1999, the Department adopted a final rule, codified at 14 CFR Part 257. Among other changes, the final rule provides that the disclosure must include both (1) the corporate name of the operating carrier, and (2) the marketing name of the operating carrier (i.e., “any other name under which that service is held out to the public”). 14 CFR 257.5(b).
19. With respect to the timing of code-share disclosures, the final rule requires air carriers to provide code-share information “in any direct oral communication in the United States with a prospective consumer and in any telephone calls placed from the United States concerning a flight that is part of a code-sharing arrangement.” The required code-share information must be provided “before booking transportation.” 14 CFR 257.5(b).

20. In the preamble to the final rule, the Department discussed various airlines' comments and proposals, including Delta's, regarding the timing of code-share disclosures. In doing so, the Department explained that it chose to use the phrase "before booking transportation" because it is consistent with longstanding enforcement policy:

[D]uring a given encounter, the agent or carrier may not wait until after the consumer has decided to make the reservation or purchase the ticket and disclose the code-sharing arrangement only when reading back the flight information. Instead, the disclosure must be made at the time that the schedule information is being provided to the consumer during the "information" and "decisionmaking" portion of the conversation, as TWA and Delta recognize. We therefore reject Northwest's argument that disclosure should only be required during the booking process. Furthermore, the term "booking" has no meaning that departs from current policy, since it encompasses a reservation. (64 FR 12845-12846).

21. Delta has been on notice since at least September 1985 (when the Department issued its policy statement) that it was required to disclose code-share information to prospective consumers during discussions about a code-share flight. Since at least March 1999 (when the Department issued its final rule titled "Disclosure of Code-Sharing Arrangements and Long-Term Wet Leases"), Delta has clearly been on notice that the proper time to disclose code-share information is no later than the information and decisionmaking portion of a conversation, because it is during that time that a consumer is evaluating options. Moreover, Delta has itself taken that position as early as November 8, 1994, when it submitted its comments to the NPRM.
22. Delta has also been on notice since at least 1999 that it is required to provide code-share information in any direct oral communication with a consumer regarding a code-share flight, regardless of whether the consumer decides to actually book a flight. This fact is not only reflected in the preamble to section 257.5(b), but also in the text of the regulation itself. Specifically, air carriers must disclose code-share information to "prospective" consumers, not just to consumers who actually book a flight.
23. As noted above, the Department has determined that in oral communications concerning a code-share flight, consumers are entitled to information about the identity of the operating carrier, regardless of whether they ultimately book a flight during any particular conversation.
24. Over time, the Department has taken numerous enforcement actions against air carriers and ticket agents for failing to orally disclose code-share information as required. *See, e.g., United Airlines*, Docket OST 2009-0001, DOT Order 2009-7-6 (July 9, 2009); *U.S. Airways, Inc.*, Docket OST 2009-0001, Order 2009-8-2 (August 10, 2009); *FC USA, Inc., v. Liberty Travel*, Docket OST 2013-0004, DOT Order 2013-8-25 (August 29, 2013); and *Alaska Airlines, Inc.*, Docket OST 2014-0001, DOT Order 2014-6-15 (June 27, 2014). Through these orders, Delta has again been placed on notice of its code-share disclosure obligations.

25. Delta itself has been the subject of a consent order involving code-share disclosures with respect to online listings (not oral communications). On July 9, 2010, the Department issued a consent order against Delta for failing to disclose code-share information as required. *Delta Air Lines, Inc. and Northwest Airlines, Inc.*, Docket OST 2010-0005, DOT Order 2010-07-4 (attached). The Department found that Delta failed to submit code-share information to the Official Airline Guide (OAG), and that this failure resulted in code-share information being omitted from online listings of Delta code-share flights. In mitigation, Delta stated that it is “committed to strict compliance with the disclosure requirements of Part 257.” *Id.* at 2. Delta agreed to the assessment of \$80,000 in civil penalties, and agreed to cease and desist from future similar violations of Part 257 and 49 U.S.C. § 41712. *Id.* at 4.

### **Facts Giving Rise to This Action**

26. From September 2013 to September 2014, the Enforcement Office conducted an investigation into whether Delta’s telephone reservations agents were providing full and timely code-share disclosure information to prospective consumers.
27. During this time period, Transportation Industry Analysts (Analysts) from the Department’s Aviation Consumer Protection Division, within the Enforcement Office, called Delta’s telephone reservations line, expressing an interest in booking flights that the Analysts knew to be code-share flights (the “target flights.”) See attached declarations.
28. As noted below, each Analyst entered into the information and decisionmaking portion of the conversation by stating that he or she was interested in flying one-way from a particular city to a destination city, on a particular date, during a specified time period on that day. The Delta reservations agent then disclosed information about the target flight, such as the flight number, the time of departure, and the price. In the cases described below, the reservations agent did not disclose the full, required code-share information (i.e., the corporate name of the operating carrier and the marketing name of the operating carrier). The Analyst closed each conversation without booking a flight. Specifically:
- a. On September 15, 2013, Analyst George Gilbert called Delta’s reservations line, expressing an interest in a one-way flight from Atlanta, GA, to Killeen, TX, on Saturday, November 16, 2013, at around 10:00 a.m. The target flight was flight #5165, departing at 10:25 a.m. For this flight, the corporate name of the operating carrier was ExpressJet; the marketing name of the operating carrier was Delta Connection. The Delta reservations agent stated that they had a flight, #5165, to Killeen. Mr. Gilbert asked the agent to confirm this information, at which time the agent repeated that they had a flight, #5165, to Killeen. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of George Gilbert, Exhibit A).
  - b. On September 23, 2013, Analyst Brian McQuillen called Delta’s reservations line, expressing interest in a one-way flight from Atlanta, GA, to Toronto, Canada, on the morning of November 16, 2013. The target flight was flight #4956, departing at 9:58

- a.m. For this flight, the corporate name of the operating carrier was ExpressJet; the marketing name of the operating carrier was Delta Connection. The Delta reservations agent stated that they had a flight departing at 9:58 a.m., and identified the flight number as #4956. When Mr. McQuillen asked the agent to repeat the information, she did so, and stated that the fare was \$317.01. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of Brian McQuillen, Exhibit B).
- c. On December 20, 2013, Analyst Brian McQuillen called Delta's reservations line, expressing interest in a one-way flight from Washington, DC, to Detroit, MI, on the morning of February 14, 2014. The target flight was flight #3637, departing at 9:40 a.m. For this flight, the corporate name of the operating carrier was Endeavor Air; the marketing name of the operating carrier was Delta Connection. The Delta reservations agent stated that they had three options for the morning flight, including one leaving at 9:40 a.m. Mr. McQuillen stated that he was interested in the flight leaving at 9:40. The Delta agent stated that this flight arrived at 11:21 a.m., and asked if Mr. McQuillen would like to book the flight. Mr. McQuillen asked the agent to repeat the information, which he did. The agent also asked if Mr. McQuillen needed a car or hotel, and stated that Mr. McQuillen could cancel the booking without penalty for 24 hours. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of Brian McQuillen, Exhibit C).
- d. On January 27, 2014, Analyst Adam Duffy called Delta's reservations line, expressing interest in a one-way flight from Washington, DC (Dulles) to New York City (LaGuardia) on February 14, 2014. The target flight was flight #6195, departing at 6:00 a.m. For this flight, the corporate name of the operating carrier was GoJet; the marketing name of the operating carrier was Delta Connection. The Delta reservations agent stated that they had a flight departing at 6:00 a.m. Mr. Duffy confirmed that the flight departed at 6:00, at which point the agent disclosed that the flight landed in LaGuardia at 7:15 a.m. and would cost \$247. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of Adam Duffy, Exhibit D).
- e. On February 4, 2014, Analyst Alex Taday called Delta's reservations line, expressing interest in a one-way flight from Washington, DC (Dulles) to New York City (LaGuardia) on February 14, 2014. The target flight was flight #6195, departing at 6:00 a.m. For this flight, the corporate name of the operating carrier was GoJet; the marketing name of the operating carrier was Delta Connection. The Delta reservations agent stated that they had a flight departing at 6:00 a.m., but identified the flight number as #6181. When Mr. Taday asked the agent to repeat the information, the Delta agent stated the price of the flight and that it was flight #6181. At this point the agent stated that the flight was operated by GoJet, but did not disclose the marketing name of the carrier, Delta Connection. (See Affidavit of Alex Taday, Exhibit E).
- f. On September 23, 2014, Analyst Jessica Ilich called Delta's reservations line, expressing interest in a one-way flight from Washington, DC, to New York City on October 11, 2014. The target flight was flight #1346, departing at 6:00 a.m. For this flight, the corporate name of the operating carrier was Endeavor Air; the marketing name of the

operating carrier was Delta Connection. The Delta reservations agent stated that they had a flight departing at 6:00 a.m. During this conversation, the agent gave the arrival time of the flight, quoted a fare of \$152.10, confirmed that the flight departed out of Reagan Airport, and asked if Ms. Ilich would like assistance with a hotel or rental car. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of Jessica Ilich, Exhibit F).

- g. On September 24, 2014, Analyst Jessica Ilich called Delta's reservations line, expressing interest in a one-way flight from Atlanta, GA, to Baton Rouge, LA, on October 11, 2014. The target flight was flight #5166, departing at 9:00 a.m. For this flight, the corporate name of the operating carrier was ExpressJet; the marketing name of the operating carrier was Delta Connection. The Delta reservations agent stated that they had six flights on that route; Ms. Ilich stated that she would like the first flight of the day. During this conversation, the Delta agent stated that they had a flight leaving at 9:00 a.m., with flight number 5166, at a fare of \$390.10. Ms. Ilich stated that she would have to think about that fare. The agent asked if there was anything else he could assist with, and Ms. Ilich said no. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of Jessica Ilich, Exhibit G).
- h. On October 7, 2014, Analyst Adam Duffy called Delta's reservations line, expressing interest in a one-way flight from Atlanta, GA, destination Baton Rouge, LA, on October 11, 2014. The target flight was #5166, departing at 9:00 a.m. For this flight, the corporate name of the operating carrier was ExpressJet; the marketing name of the operating carrier was Delta Connection. Mr. Duffy stated that he was travelling economy, and asked what time the earliest flight departed. The agent responded that they had a 9:00 a.m. flight, and quoted the price of \$555.10. The agent then asked if Mr. Duffy would like to "confirm" the ticket. Mr. Duffy replied that he was writing the information down, and asked to confirm the arrival and departure time. The agent did so. At no time did the Delta reservations agent disclose the required code-share information. (See Affidavit of Adam Duffy, Exhibit H).

### **Claim for Relief**

- 29. Delta Air Lines' failure to disclose all required code-share information to prospective consumers, as described above, in eight instances, constitutes eight violations of the code-share disclosure provisions set forth in 49 U.S.C. § 41712(c) and 14 CFR 257.5.
- 30. In eight instances, during telephone conversations, Delta Air Lines omitted material information in a manner that is likely to mislead consumers who were acting reasonably under the circumstances. Accordingly, Delta committed eight acts of unfair practices or unfair methods of competition in violation of 49 U.S.C. § 41712(a).
- 31. Delta Air Lines' failure to disclose all required code-share information to prospective consumers, as set forth above, in eight instances, constitutes eight violations of the cease-and-desist provisions found in *Delta Air Lines, Inc. and Northwest Airlines, Inc.*, DOT Order 2010-07-4.

### Prayer for Relief

WHEREFORE, the Office of Aviation Enforcement and Proceedings requests the Department of Transportation to:

- A. Find that, by failing to disclose all required code-share information to prospective consumers, as set forth above, Delta Air Lines, Inc., has committed eight violations of 49 U.S.C. § 41712(c) and 14 CFR 257.5;
- B. Find that, by omitting material information during telephone conversations in a manner that is likely to mislead consumers who were acting reasonably under the circumstances, as set forth above, Delta Air Lines, Inc., has committed eight acts of unfair practices or unfair methods of competition in violation of 49 U.S.C. § 41712(a);
- C. Find that, by failing to disclose all required code-share information to prospective consumers, as set forth above, Delta Air Lines, Inc., has committed eight violations of the cease-and-desist provisions found in *Delta Air Lines, Inc. and Northwest Airlines, Inc.*, DOT Order 2010-07-4;
- D. Assess civil penalties against Delta Air Lines, Inc., in the amount of \$27,500 for each of the violations described in paragraphs A, B, and C, above, for a total of \$660,000, and \$27,500 for each additional similar violation revealed in the course of this investigation pursuant to 49 U.S.C. § 46301;
- E. Order Delta Air Lines, Inc., to cease and desist from violating 49 U.S.C. § 41712 and 14 CFR Part 257 by engaging in the conduct described in paragraphs A, B, and C; and
- F. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/

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