



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

Issued by the Department of Transportation
on the 28th day of March, 2013

Third Party Complaint of

Michael Gurevich and Elena Gurevich

v.

Compagnia Aerea Italiana, S.p.A.

Violations of 49 U.S.C. § 41712

Docket OST 2012-0040

Served March 28, 2013

CONSENT ORDER AND ORDER OF DISMISSAL

On March 15, 2012, Michael Gurevich and Elena Gurevich (the Complainants) filed a third-party complaint under 14 CFR 302.401 against Compagnia Aerea Italiana, S.p.A., (Alitalia) alleging that the carrier violated its contract of carriage when it denied compensation to the petitioners in a putative class action for two cancelled flights in 2009.¹ The complaint states that the contract of carriage is embodied in the carrier's General Conditions of Carriage, which are displayed on the carrier's website, and specifically adopt the compensation policy required under European Union rules. In denying liability under that compensation policy, the carrier, according to the complaint, 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 Alitalia's failure to provide clear and accurate disclosure of its policy regarding compensation for delayed and cancelled flights and of the existence of differences between the carrier's General Conditions of Carriage as displayed on its website and its tariffs filed with the Department, specifically Rule 55, constituted unfair and deceptive trade practices. In addition, the order directs the carrier to cease and desist from further similar violations of the cited statute, assesses a compromise civil penalty of \$125,000, and dismisses the complaint filed in this docket.

¹ Gurevich v. Compagnia Aerea Italiana, SPA, No. 1-11-cv-01890, (N. Dist. Ill, Order, Jan. 17, 2012).

The Complaint

The provisions at issue concern compensation for delayed and cancelled flights mandated under European Union (EU) rules, which according to the General Conditions of Carriage (GCC) are incorporated in the Alitalia contract of carriage that apply to all travel between the U.S. and points outside the U.S.² The complaint alleges that the carrier specifically requires that consumers acknowledge that the GCC terms apply in order to complete transactions on its website and provides a hyperlink to a copy of those terms. When Complainants sought compensation in the courts in a putative class action for two cancelled flights under the EU rules, however, Alitalia claimed that the GCC was inapplicable and that Rule 55 of the carrier's tariff on file with the Department was determinative.³ The tariff provision, by its terms, exempted travel to and from the U.S. from the terms of the conditions of carriage.

In addition, the complaint argues that the tariff itself, Rule 55, is invalid since it has never been formally approved, nor has it been adequately noticed according to the requirements of 14 CFR Part 221. The complaint asserts that the full tariff was not available on the carrier's website and that at the carrier's O'Hare International Airport ticket station there is no large type notice on "Public Inspection of Tariffs" as required by section 221.103. Rule 55 itself, moreover, is self-contradictory, the complaint argues, since it states in Rule 55(B)(3)(B) that the terms of the passenger's ticket apply, which incorporate the conditions of carriage, and then, in Rule 55(B)(3)(D), it states that with respect to transportation to and from the U.S. the conditions of carriage do not apply.⁴

With regard to disclosure of its applicable conditions of carriage, the complaint alleges that Alitalia's practices are unfair and deceptive in violation of section 41712. On its website, Alitalia, according to the complaint, gives prominent disclosure to the GCC through at least two hyperlinks, one on its passenger rights page and another on the

² Pursuant to EC Regulation 261/2004, the Complainants could be entitled to €600 for flights cancelled without at least two weeks' notice, contingent on certain conditions.

³ In *Michael Gurevich and Elena Gurevich v. Alitalia*, No.1:11-CV-01890, Northern District Illinois, Eastern Div., the court dismissed the complaint without prejudice in order that the plaintiffs could obtain a determination of the validity of the tariffs in question from the Department. Order dated January 17, 2012.

⁴ Subparagraph (3) of Rule 55(B) reads as follows:

"(3) To the extent not in conflict with the provisions of paragraph (1) . . . above, all carriage hereunder and other services performed by each carrier are subject to:

- (A) Applicable laws . . . government regulations, orders and requirements;
- (B) Provisions set forth in the passenger's ticket;
- (C) Applicable tariffs;
- (D) Except in transportation between a place in the United States and any place outside thereof and also between a place in Canada and any place outside thereof, conditions of carriage, regulations and timetables of carrier which may be inspected at any of its offices . . ."

booking page.⁵ In order to book a ticket on-line, the consumer is urged to “carefully read” the terms of those conditions and then requires that the consumer check a box indicating acceptance of the fare rules and that the consumer has read the conditions that apply to the ticket. Nonetheless, a provision of Rule 55(B)(3)(D) provides that the conditions of carriage terms do not apply “in transportation between a place in the United States and any place outside thereof.”

Thus, according to the complaint, the carrier creates the impression on its website that the conditions of carriage apply to travel to and from the U.S., and then denies their applicability in its filed tariffs, which are not referred to on the website. The complaint argues that the carrier’s failure to provide a link or explicit notice of its tariff provisions on its website, while prominently displaying the allegedly inconsistent terms of its GCC, was an unfair and deceptive trade practice and unfair method of competition in violation of 49 U.S.C. § 41712.

Answer of Alitalia and Further Mitigation

Alitalia’s answer, filed April 20, 2012, contends that the policy stated in Rule 55 has been in place for decades and is similar to provisions in tariffs filed by many international air carriers. Pursuant to this widely followed tariff policy, Alitalia avers, carriers have, in standard form language on the carrier ticket stock and in filed tariffs, specified that the general conditions of carriage apply, except with respect to transportation to or from the U.S. or Canada. This practice of the tariff excluding application of the GCC for transportation to or from the U.S., Alitalia claims, has been approved for years.⁶

In addition, it is clear, Alitalia asserts, that, under longstanding precedent, affirmative Department approval is not required for a tariff to become effective. Once filed, a tariff is effective unless and until suspended by the Department.⁷ Referring to precedent in communications law, the respondent states that “it is well-settled that a tariff filed with the applicable regulatory agency has the force and effect of law.” (Answer at 16)⁸

The Alitalia answer admits that until a recent revision to its website, the site contained no reference or link to its filed tariff. The carrier has recently added a notice, similar to those on the websites of other carriers, which states that the provisions of the ticket and the conditions of carriage are controlling except when inconsistent with the filed tariffs, in which case the latter control. The carrier claims its recent revision cures a merely “technical” failure to provide notice and does not affect the validity of the tariff itself. Moreover, any alleged inconsistency between Rule 55(B)(3)(B), which states that

⁵ Since August 23, 2011, 14 CFR 259.6 requires that all air carriers post their current contracts of carriage on their respective websites.

⁶ The CAB approved virtually identical language on passenger tickets at least as early as 1957. *Pan American World Airways, Inc., Conditions of Carriage*, 24 C.A.B. 575, 579 (1957).

⁷ Alitalia cites a number of federal appellate and trial court cases and Civil Aeronautics Board cases, Answer at 8, that refer to “validly filed tariffs” as binding both on the carrier and the consumer.

⁸ Citing *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

provisions on a passenger's ticket apply, and Rule 55(B)(3)(D) should be resolved in favor of the latter paragraph which states that the provisions of the GCC do not apply to travel to or from the U.S. The answer does not address the issues raised in the complaint regarding section 41712.

By separate letter dated October 17, 2012, Alitalia asserts, in further mitigation, that if a U.S. passenger requested EU 261 compensation from it for cancellations and delays of more than 3 hours, it did pay such compensation after investigation of the particular circumstances and when deemed warranted.⁹ Alitalia further notes that, notwithstanding its denial in the *Gurevich* action of the applicability of the GCC to transportation to or from the U.S. because of tariff Rule 55, or its denial of any contractual or legal obligation in the U.S. to pay EU 261 compensation, the airline has a policy of paying compensation under EU 261 to U.S. passengers who request such compensation in writing, after investigation and when the facts warrant payment.

The Complainants have argued, Alitalia states, that there is an inconsistency in the wording of the tariff itself that, even if the tariff is construed as valid, would require that Alitalia honor its GCC. According to the complaint, Rules 55(B)(3)(B), (C), and (D) state, respectively, that the terms and conditions of the passenger's ticket applies, that the tariff applies, which would include the terms of ticket, and that the GCC applies except in travel to and from the U.S. Alitalia points out, however, that numerous courts have held that filed tariffs displace contrary language in the GCC or on the ticket.¹⁰ In mitigation, Alitalia points out that in those rare instances where the applicable international convention does not provide a remedy for passengers and the GCC are inapplicable because of Rule 55(B)(3)(D), Rule 55(C)(1) of Alitalia's filed tariff provides a means for passengers to recover provable damages upon proof of the carrier's negligence. Alitalia argues that because the language that the GCC is not applicable to transportation to or from the U.S. or Canada was previously accepted by the Department in its filed tariffs,¹¹ the tariff terms effectively displace language on the ticket and in the GCC.

Petitioner's Reply

In a reply filed April 12, 2012, accompanied by a motion to file a reply pursuant to 14 CFR 302.6, the Complainants state that Alitalia's answer essentially admits that its website and its GCC contained no reference to its filed tariff until recent revisions. In the absence of notice on the website, the Complainants maintain, the carrier was not in compliance with 14 CFR 221.100. The reply emphasizes that the stopgap message, recently added, does not remedy the carrier's practices of prior years.

⁹ According to Alitalia, it has been unable to locate any written request by the Complainants prior to filing the *Gurevich* court action.

¹⁰ E.g., *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 186 (2d Cir. 1984).

¹¹ In another context, the identical language has actually been approved. See footnote 8, *supra*.

Applicable Law and Decision

The explicit language of 49 U.S.C. § 41504(c), regarding rejection of tariffs, is that a “tariff or change that is rejected is void.” By inference, until rejected, a tariff remains in effect. The Alitalia tariff Rule 55, which has not been rejected, is therefore effective.

With respect to the notice requirements of 14 CFR 221.100, 221.101 and 221.103, we note that the rule requires notice to the public of all tariff terms by posting and having available for public inspection at each office or station a complete text of all tariffs applicable to travel to or from each respective station.¹² As indicated previously, the complaint asserts that the full tariff was not available on the carrier’s website and that at the carrier’s O’Hare International Airport ticket station there is no large type notice on “Public Inspection of Tariffs” as required by section 221.103. Alitalia did not respond to this allegation, and we have no information that the complaint is inaccurate in this regard. As a result, we will accept the claim as admitted.

Unfair or deceptive trade practices and unfair methods of competition are explicitly prohibited under 49 U.S.C. § 41712. The Complainants have alleged that the carrier’s holding out in its GCC and on displays on its website terms that conflicted with the terms of its filed tariff constituted such an unfair trade practice. We agree. Alitalia references, in its GCC, on its tickets and on its website clearly indicated that EU-mandated compensation for delay and cancellations applied to service to and from the U.S., yet in the context of its filed tariffs, the carrier excepted travel to the U.S. from such rules. In the absence of adequate disclosure that different policies may exist for travel to and from the U.S., such contradictory statements are inherently unfair and deceptive.

Required Tariff Revisions and Disclosure of GCC Terms

The Complainants have argued that there is an inconsistency in the language of the tariff itself that, even if the tariff is construed as valid, would require that Alitalia honor its GCC. We agree that the current tariff contains apparently contradictory language that requires clarification.

Rule 55(B)(3) provides, under subparagraphs (A) through (D), that the carriage and services of the carrier are subject to (A) applicable laws and regulations; (B) terms of the passenger’s ticket, (C) the tariff; and (D) the GCC, except in travel to and from the U.S. EU laws and regulations may not, by themselves, be the “applicable” laws or regulations in the United States and the first provision in subparagraph (A) does not imply otherwise. With respect to the second provision in subparagraph (B), it could create some confusion to the extent the passenger’s ticket may refer to the GCC. The explicit language in the fourth provision, subparagraph (D), on the other hand, states that the GCC do not apply to travel to or from the U.S. The third provision in subparagraph (C) confirms the law in the United States that the foreign air transportation is subject to a tariff required to be filed.

¹² 14 CFR 221.100 *et seq.*

The apparent confusion engendered by subparagraph (B) should be corrected, for example, by incorporating the subparagraph (D) language into the ticket or conditions of carriage, or by deleting subparagraph (D) from Rule 55. This order requires that Alitalia submit appropriate new and clarified tariff language or delete Rule 55(B)(3)(D) within 60 days of the date of this order. The current language will remain in effect until substitution of a clarifying amendment.¹³ Finally, the carrier must modify language on its web site and its GCC to be consistent with its revised tariff language and to state accurately the carrier's actual policies.¹⁴

The Enforcement Office has considered the arguments in this proceeding and believes Alitalia engaged in an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712 by publishing a compensation policy for delayed or cancelled flights on its website that failed to disclose any limitation on or inapplicability of that policy in the U.S. or for flights to and from the U.S. We believe that enforcement action is warranted. The Enforcement Office and Alitalia have reached a settlement of this matter in order to avoid litigation. Alitalia consents to the issuance of an order to cease and desist from future similar violations of 49 U.S.C. § 41712. The carrier also consents to correct statements on its web site to accurately reflect its policy with regard to compensation for delayed and cancelled flights and to file a revision to its tariff with clarifying language which is not inconsistent with those policies. The carrier also agrees to the assessment of \$125,000 in compromise of potential civil 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 the size and sophistication of the carrier, and will serve the public interest. It represents a strong deterrent against future misrepresentations of the carrier's conditions of carriage on its website and in its filed tariffs.

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 Compagnia Aerea Italiana, S.p.A., engaged in an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712 by displaying on its website its General Conditions of Carriage indicating that EU compensation applied to travel to and

¹³ The Department is aware that many foreign carriers may have tariff provisions similar to Alitalia's Rule 55; however, no other carrier to our knowledge has cited those provisions to vitiate their respective GCCs.

¹⁴ Alitalia's recently revised prefatory language in its GCC, stating that the tariff language takes precedence over the GCC where the two are in conflict, is not sufficient since it leaves the consumer in doubt as to whether the tariff or the GCC would apply in a specific instance. The carrier has agreed to remove this language as part of the revisions to its GCC which it will make as directed by this order.

from the U.S. without providing passengers with any effective means to learn that, pursuant to valid filed tariffs, those General Conditions of Carriage in fact did not apply to such travel;

3. We find that Compagnia Aerea Italiana, S.p.A., violated the requirements of public disclosure and availability for public inspection of the full text of its tariffs as required by 14 CFR 221.101 and 221.103 by failing to have available for public inspection a full text of its applicable tariffs at its stations in the U.S.;

4. We order Compagnia Aerea Italiana, S.p.A., and all other entities owned or controlled by or under common ownership with Alitalia, and their successors and assignees, to cease and desist from similar violations of 49 U.S.C. § 41712 through misleading representations of or in its General Conditions of Carriage and shall within 60 days of the date of issuance of this order amend its General Conditions of Carriage to provide a clear and consistent statement of the carrier's policies affecting travel to and from the U.S., including those related to delayed or cancelled flights;

5. Compagnia Aerea Italiana, S.p.A., shall within 60 days of the date of issuance of this order submit a new tariff rule to replace its current Rule 55 which shall be clarified in accordance with these findings and is not inconsistent with the revised General Conditions of Carriage;

6. We order Compagnia Aerea Italiana, S.p.A., and all other entities owned or controlled by or under common ownership with Compagnia Aerea Italiana, S.p.A., and their successors and assignees, to cease and desist from similar violations of 14 CFR 221.101 and 221.103 as described in ordering paragraph 3, *supra*;

7. Compagnia Aerea Italiana, S.p.A., is assessed \$125,000 in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 and 3 above; of this total amount, \$62,500 shall be due and payable within 15 days of the date of issuance of this order; the remaining \$62,500 shall become due and payable if Compagnia Aerea Italiana, S.p.A., violates this order's cease and desist provision within one year following the date of issuance of this order or fails to comply with the order's payment provisions; and

8. Payment shall be made to the account of the U.S. Treasury through the Pay.gov website in accordance with the attached instructions. Failure to pay the penalty as ordered shall subject Alitalia to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible additional enforcement action for failure to comply with this order; and

9. We dismiss the complaint filed in Dkt. DOT-OST-2012-0040.

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:

SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and Proceedings

(SEAL)

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