



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

Issued by the Department of Transportation
On the Thirtieth day of July, 2013

Southwest Airlines Co.

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

**Docket OST 2013-0004
Served July 30, 2013**

CONSENT ORDER

This order concerns violations by Southwest Airlines Co. (Southwest) 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 Southwest to cease and desist from future similar violations and assesses the carrier \$200,000 in civil penalties.

Applicable Law

As an air carrier, Southwest is subject to the advertising requirements of 14 CFR Part 399 and the prohibition in 49 U.S.C. § 41712 against engaging in unfair and deceptive practices. To ensure consumers are not deceived and are given accurate and complete fare information on which to base their airline travel purchase decisions, 14 CFR 399.84(a) requires that advertisements specifying air fares and air tour packages state the entire price to be paid by the consumer.

Carriers have long been on notice that, as a corollary to the requirement that advertisements state the full price to be paid by the consumer, it follows that a seller of air transportation must have a reasonable number of seats available at the advertised price when a fare is advertised.¹ This means that in addition to having a reasonable number of

¹ *Industry Letter from Secretary Peña to U.S. Air Carriers and Air Travel Industry Associations and Labor Unions* (dated December 20, 1994), available at <http://www.dot.gov/sites/dot.dev/files/docs/19941220.pdf>.

seats available each time an advertisement is run, the carrier must also ensure that, during the overall period within which the fare is offered, there is no lengthy period of time when no seats are available.² Once the carrier determines that a reasonable number of seats are no longer available, it must take prompt action to discontinue the advertisement or to modify the advertisement to make clear to which destinations or date ranges the advertisement applies.³ Failure to have a reasonable number of seats available at the advertised fare is a violation of section 399.84(a) and constitutes an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712.

Facts

In response to a consumer complaint, the Office of Aviation Enforcement and Proceedings (Enforcement Office) investigated Southwest's "The Luv a Fare Sale," which the carrier promoted in advertisements emailed to consumers on January 11, 2013. The email advertised one-way, nonstop fares "for \$100 or less" for travel on February 14, 2013. However, the Enforcement Office's investigation revealed that Southwest failed to have a reasonable number of seats available in a number of city-pair markets that were included in the fare sale. For example, in the Atlanta–Las Vegas market only two percent of seats were made available at the sale fare and in the Minneapolis–Phoenix market only one percent of the seats were available.

Further, on January 30, 2013, Southwest published a fare advertisement through its "DING!" application⁴ for \$66 one-way fares from Dallas Love Field (DAL) to Branson Airport (BKG) in Missouri between March 1, 2013, and March 21, 2013. However, there were no seats available at the sale fare on any day during the sale period. Specifically, Southwest's service between DAL and BKG did not commence until March 9, 2013, and there were no fares available for \$66 from March 9 through March 21.

² See, e.g., *MN Airlines, LLC d/b/a Sun Country Airlines*, Order 2010-9-25 (September 24, 2010); *AirTran Airways, Inc.*, Order 2010-5-29 (May 28, 2010); *American Trans Air, Inc.*, Order 97-12-1 (December 1, 1997); *US Airways, Inc.*, Order 97-8-25 (August 27, 1997); *Continental Airlines, Inc.*, Order 93-10-49 (October 29, 1993).

³ *Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections*, Section IX, Question 158, pg. 26 (Issued August 19, 2011; last revised June 15, 2012), available at <http://www.dot.gov/airconsumer/aviation-rules>.

⁴ Southwest's "DING!" application is a stand-alone software program that, among other things, sends consumers fare advertisements directly to their computers and/or smartphones. Fare sales that are advertised through the "DING!" application are not available through any other medium (e.g., Southwest's website, newspapers, emails, Facebook, Twitter, etc.). In order to use the application, consumers must download it to their computers and/or smartphones. Consumers using the application on their computers to purchase a fare must click on the offer and the application will automatically open the consumers' default browser and direct them to Southwest's website to complete their purchases. Consumers using the application on their smartphones may purchase the sale fare on their smartphones directly through the "DING!" application.

By advertising fares for which a reasonable number of seats were not available and advertising fares that were not available at all, Southwest violated 14 CFR 399.84(a) and engaged in unfair and deceptive practices in violation of 49 U.S.C. § 41712.

Mitigation

In mitigation, Southwest states that it believes the “Luv a Fare Sale” was very beneficial to consumers. Southwest states that it made sale fares available in 786 one-way, non-stop city-pair markets, constituting approximately 79 percent of all such markets that Southwest served at the time. Southwest further states that although certain markets had low availability, in total less than 10 percent of the offered city-pair markets were sold out at the end of the sale. Finally, Southwest states that technical glitches with the Dallas-Branson DING! offer were responsible for preventing the sale fares from being available to consumers as Southwest had intended. Southwest states that these errors were unintentional and safeguards have been put in place to ensure such errors do not occur in future sales.

Decision

The Enforcement Office has carefully considered the information provided by Southwest, but continues to believe enforcement action is warranted. The Enforcement Office and Southwest have reached a settlement of this matter in order to avoid litigation. Without admitting or denying the violations described above, Southwest consents to the issuance of this order to cease and desist from future violations of 14 CFR 399.84(a) and 49 U.S.C. § 41712 and to the assessment of \$200,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.

The compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It establishes a strong deterrent to future similar unlawful practices by Southwest and other carriers.

This order is issued under the authority contained in 14 CFR Part 1.

ACCORDINGLY,

1. Based on the above information, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Southwest Airlines Co. violated 14 CFR 399.84(a) by failing to have a reasonable number of seats available at the fares advertised in the “Luv a Fare Sale” and the Dallas–Branson fare sale promotions;
3. We find that by engaging in the conduct described in ordering paragraph 2, above, Southwest Airlines Co. engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;

4. We order Southwest Airlines Co., its successors, its affiliates, and all other entities owned by, controlled by, or under common ownership and control with Southwest Airlines Co., its successors, its affiliates, and its assigns to cease and desist from further violations of 14 CFR 399.84(a) and 49 U.S.C. § 41712;
5. We assess Southwest Airlines Co. \$200,000 in compromise of civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3, above. Of this total penalty amount, \$100,000 shall be due and payable within thirty (30) days of the date of this issuance of this order. The remaining portion of the civil penalty amount, \$100,000, shall become due and payable immediately if, within one year of the date of issuance of this order, Southwest Airlines Co. violates this order's cease and desist provisions or fails to comply with the order's payment provisions, in which case Southwest Airlines Co. may be subject to additional enforcement action for violation of this order; and
6. We order Southwest Airlines Co. to pay the penalty through Pay.gov to the account of the U.S. Treasury. Payments shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Southwest Airlines Co. to the assessment of interest, penalty, and collection charges under the Debt Collection Act and to further enforcement action for failing 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:

SAMUEL PODBERESKY
Assistant General Counsel for
Aviation Enforcement and Proceedings

An electronic version of this document is available at
www.regulations.gov