



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

Issued by the Department of Transportation
on the 22nd day of May, 2018

Third Party Complaint of

Benjamin Edelman

v.

American Airlines, Inc.

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

Docket DOT-OST-2017-0037

Served May 22, 2018

ORDER OF DISMISSAL

On March 21, 2017, Benjamin Edelman filed a formal complaint against American Airlines, Inc. (American) pursuant to 14 CFR Part 302. Mr. Edelman alleges that American misrepresented carrier-imposed surcharges as “taxes.” Pursuant to 14 CFR 302.406(a)(2), we dismiss the complaint.

The Complaint

Mr. Edelman states that he purchased a round trip flight from Amsterdam to Brazil, traveling through Boston. Then, after ticketing, he used the “Your Trip” feature on American’s Web site (www.aa.com) to review American’s itemization of the ticket charges. He states that the “Your Trip” feature listed “taxes” in the amount of \$618.62 and “carrier-imposed fees” in the amount of \$0.00. He further states that he clicked on a “Price and Tax Information” link in order to see a list of the taxes that were imposed. According to Mr. Edelman, the list included an amount marked “Other Taxes” in the amount of \$540.50. Mr. Edelman contends that this description is deceptive because it reflects a carrier-imposed fee rather than a tax. He states that he then clicked a button marked “Print trip and receipt,” which again displayed a misleading characterization of the carrier-imposed fee as a tax.

In a separate matter, Mr. Edelman states that he assisted a friend in purchasing travel through AA Vacations (www.aavacations.com), a web site that markets air tour packages. He states that when he booked this vacation package over the telephone, the representatives did not itemize any component of the total price to be paid. He states that after purchase, he reviewed a confirmation email that reflected an unspecified “tax” in the amount of \$1,199.76. He contends that this is deceptive because a large portion of the “tax” is actually a carrier-imposed fee.

Mr. Edelman contends that these misrepresentations constitute violations of 14 CFR 399.84(a) and unfair and deceptive business practices in violation of 49 U.S.C. § 41712.

Answer of American

American filed its answer on April 18, 2017. American does not deny that the displays encountered by Mr. Edelman were inaccurate. American notes, however, that these errors occurred in displays that appeared only after purchase.

Specifically, with respect to Mr. Edelman’s Amsterdam travel, American contends that its website accurately displayed all taxes and carrier-imposed fees throughout the booking process. Specifically, American states that when Mr. Edelman booked his travel on February 27, 2017, American’s website correctly listed “taxes” as in the amount of \$266.72 and “carrier imposed fees” in the amount of \$422.60. According to American, the hyperlink displaying the breakdown of taxes and fees accurately listed all such items, but Mr. Edelman did not click on it. American states that after booking the flight, Mr. Edelman used the “Your Trip” function, and again was shown a correct breakdown of taxes and carrier-imposed surcharges. American states that the errors arose after Mr. Edelman changed his itinerary over the telephone on March 2, 2017. American states that when changes are made to an itinerary outside of aa.com (such as over the telephone), and the passenger later reviews the new itinerary through the “Your Trip” function, then an “obscure software fault” can create the type of inaccurate post-purchase display that Mr. Edelman encountered. In a supplemental communication, American confirmed that this error has been corrected.

Similarly, with respect to Mr. Edelman’s friend’s purchase of a vacation package, American acknowledged that it issued a post-purchase receipt which inaccurately listed the amount of taxes. American indicates that the error arose from a coding fault that has been corrected.

American contends that these errors do not constitute violations of section 399.84, because that regulation governs pre-purchase price displays. American argues that because all of its pre-purchase price displays were accurate, the carrier did not violate section 399.84 or section 41712.

Supplemental Filings

No additional pleadings were filed in this matter. On October 25, 2017, the Office of Aviation Enforcement and Proceedings (Enforcement Office) asked American to provide an evidentiary basis for certain statements in its Answer. American complied on November 14, 2017.¹

¹ www.regulations.gov, docket DOT-OST-2017-0037-0005.

Applicable Law

Section 41712 prohibits unfair or deceptive practices in air transportation or the sale of air transportation. Generally, a practice is unfair to consumers if it causes or is likely to cause substantial harm, the harm cannot reasonably be avoided, and the harm is not outweighed by any countervailing benefits to consumers or to competition.² A practice is deceptive if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (one that is likely to affect the consumer's decision with regard to a product or service).³

The Department's "full fare" advertising rule, 14 CFR 399.84(a), provides in relevant part that the first price quote for air transportation must state the entire price to be paid by the customer, including all taxes, fees, and carrier surcharges.⁴ Charges included within that total price may be stated separately, but those charges must, *inter alia*, accurately reflect the actual costs of the services covered, and may not otherwise be false or misleading.

On February 21, 2012, the Enforcement Office issued guidance on the issue of labeling taxes and surcharges. The Enforcement Office considers including carrier-imposed surcharges and other fees not imposed by a government under the label of "taxes," or under the label "taxes and fees," to be an unfair and deceptive practice. The Enforcement Office reasons that such a practice "is likely to confuse consumers and deceive them into believing the government taxes and fees associated with their airfare are higher than they actually are."⁵ Carriers may, if they choose, use language such as "taxes and carrier-imposed fees" to collectively describe the charges that are separate from the base fare.

² The statute providing the Department authority to regulate unfair and deceptive practices, 49 U.S.C. § 41712, is modeled after Section 5 of the FTC Act, 15 U.S.C. § 45. In analyzing whether a practice of a carrier or ticket agent action is unfair, we use a standard similar to the Federal Trade Commission's standard for unfairness. See <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

³ The Federal Trade Commission's standard for deception is instructive. See <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁴ The rule states:

§ 399.84 Price advertising and opt-out provisions.

(a) The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation, a tour (*i.e.*, a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation that states a price for such air transportation, tour, or tour component to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless the price stated is the entire price to be paid by the customer to the carrier, or agent, for such air transportation, tour, or tour component. Although charges included within the single total price listed (e.g., government taxes) may be stated separately or through links or "pop ups" on websites that display the total price, such charges may not be false or misleading, may not be displayed prominently, may not be presented in the same or larger size as the total price, and must provide cost information on a per passenger basis that accurately reflects the cost of the item covered by the charge.

⁵ "Additional Guidance on Airfare and Air Tour Price Advertisements" (February 21, 2012) at 3; available at <https://www.transportation.gov/individuals/aviation-consumer-protection/additional-guidance-airfare-and-air-tour-price>

We note that Mr. Edelman filed two prior formal complaints regarding American's misrepresentation of taxes and fees. Both of those complaints related to oral and written misrepresentations made by American before the consumer purchased the ticket; both resulted in consent orders.⁶

Analysis and Disposition

We begin with the Department's "full fare" advertising rule. A plain reading of the rule indicates that it applies only to pre-purchase price displays; *i.e.*, displays of prices that are "to be paid" by the customer. The rule does not govern post-purchase price displays, such as receipts or purchase confirmations. Here, it is undisputed that all of American's inaccurate descriptions of taxes and fees were provided to the consumer for the first time after the purchase had taken place. Under the facts presented here, however, we conclude that section 399.84(a) does not apply.

American suggests that this conclusion must end our inquiry. *See* Answer at p.3, footnote 4 ("It is no argument to claim that even if American's actions were not a violation of section 399.84(a) that the carrier nonetheless violated 49 U.S.C. § 41712 for such would make a nullity of the specific violation as described in section 399.84(a)."). We disagree. Even if American's actions did not violate a specific regulation issued under section 41712, we may still examine whether the practice violated section 41712 itself. *See, e.g., Hayes v. American Airlines*, DOT Order 2016-12-11 (December 14, 2016) (examining whether American committed an unfair or deceptive practice when it deducted miles from a passenger's frequent flyer account, even though a specific regulation did not govern that action).

As noted above, a practice is unfair to consumers if it causes or is likely to cause substantial harm, the harm cannot reasonably be avoided, and the harm is not outweighed by any countervailing benefits to consumers or to competition. Here, Mr. Edelman has not identified any substantial harm that actually arose to him (or harm that would likely be suffered by consumers generally) from American's inaccurate post-purchase price displays, particularly given that they appear to have arisen under unusual circumstances and were promptly corrected.

Next, a practice is deceptive if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (one that is likely to affect the consumer's decision with regard to a product or service). While American's inaccurate post-purchase price displays may have been misleading, it is unlikely that that inaccuracy would have affected the consumer's decision with regard to a product or service in this instance.

We stress that the Enforcement Office does not approve of any carrier providing misleading information to consumers under any circumstances, particularly where such misinformation could lead to consumers to falsely conclude that a carrier's fee is actually an unavoidable tax. Under the unusual circumstances presented here, however, we do not have an adequate basis to conclude that American's conduct violated section 399.84 or section 41712.

⁶ *Edelman v. American Airlines*, DOT Order 2013-12-6 (December 11, 2013); *Edelman v. American Airlines*, DOT Order 2016-12-12 (December 14, 2016).

ACCORDINGLY, pursuant to the authority delegated under 49 CFR Part 1, we dismiss the complaint of Benjamin Edelman against American Airlines, Inc., in Docket DOT-OST-2017-0037. Pursuant to 14 CFR 302.406(b), this order shall become effective as a final order of the Department thirty days after service of this order.

BY:

BLANE A. WORKIE
Assistant General Counsel for
Aviation Enforcement and Proceedings

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