



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

**Issued by the Department of Transportation
on the 18th day of May 2018**

Third Party Complaint of

Mike Borsetti

v.

British Airways Plc

**Violations of 49 U.S.C. § 41712 and 14 CFR
Parts 250, 259, and 374**

Docket DOT-OST-2014-0166

Served: May 18, 2018

ORDER OF DISMISSAL

On September 22, 2014, Mike Borsetti (the Complainant) filed a third-party complaint under 14 CFR § 302.404 against British Airways (BA). The Complainant alleges that BA violated the Department's rules concerning oversales, refunds, and substantive responses to consumer complaints, 14 CFR §§ 250.2b, 250.3, 250.6, 250.9, 259.5, 259.7, and 374.3, when it downgraded his traveling party to a lower class of service. The Complainant also contends that BA's actions constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712. This order finds that BA did not violate these regulatory and statutory provisions, for the reasons stated in this order.

The Complaint

The Complainant purchased four Business Class tickets from American Airlines (American) for round-trip travel between Milan, Italy and Los Angeles, California. He paid \$2,777.80 for one of the tickets, and \$2,779.60 for another. For the remaining two tickets, he paid \$1378.30 for one, and \$1,187.10 for the other; these were purchased as Economy Class tickets but utilized non-cash upgrade certificates. The itinerary involved five flight segments, one of which was from Los Angeles International Airport (LAX) to Heathrow Airport (LHR).

The Complainant states that on February 14, 2014, he and three members of his party presented for check-in with confirmed Business Class tickets for American Flight 136 (AA136), from LAX to LHR. The flight was cancelled, so at the instruction of American Airlines staff, his party sought accommodation on BA Flight 268 (BA268). He states that BA initially refused to accept his party for check-in because the flight was oversold. However, BA ultimately offered his party seats in Economy Class on BA268, which the Complainant accepted.

On February 17, 2014, the Complainant first requested a refund for the downgrade from BA. On February 20, 2014, BA acknowledged receipt of that request. The Complainant then filed a complaint with BA on February 25, 2014. On March 12, 2014, BA Customer Relations notified the Complainant that BA's Refunds department had opened an investigation of his claim. The Complainant states that BA offered him \$500.00 per passenger as a gesture of goodwill, which he did not accept. On March 15, 2014, BA requested from the Complainant copies of the original tickets, which he transmitted the same day. On March 19, 2014, BA requested the Complainant's credit card information.

On April 5, 2014, the Complainant provided BA the original credit card number used to purchase the tickets. The Complainant continued to correspond with various BA personnel through May 21, 2014, when BA notified him that it had refunded \$949.00 to the credit card originally used to purchase the tickets. He received this credit on May 29, 2014. On June 5, 2014, BA notified the Complainant that it would send him three separate checks of \$502.00 each. The Complainant stated that sometime in late June or July 2014, he received three checks for \$408.00 each.

On September 22, 2014, the Complainant filed a formal complaint (Complaint) with the Department. The Complaint alleges that BA failed to solicit volunteers for an oversold flight, did not advise passengers of the compensation it was obligated to pay in an oversale situation, and used a boarding priority procedure that was unjustly discriminatory, in violation of 14 CFR Part 250. The Complaint further alleges that BA failed to provide a timely refund in the appropriate amount, in violation of 14 CFR §§ 250.6(c), 259.5(a), 259.5(b)(5), and 374.3. The Complainant cites European Commission Regulation 261/2004 (EC 261/2004) as the basis for his calculation of the refund due, which he states would amount to 75 percent of the total cost of the four tickets, or \$8,336.10. Additionally, the Complaint alleges that BA failed to provide timely substantive written responses to his prior written complaints, in violation of 14 CFR § 259.7(c).

Answer of BA

In its Answer dated October 21, 2014, BA states that severe winter weather and a medical emergency on the Complainant's ticketed flight (AA136) caused American to cancel the flight and seek BA's assistance in rebooking passengers on BA268. BA states that it advised American that only Economy Class seats were available and requested that no additional bookings be made in the Club World/Business Class cabin. BA notes that American personnel at LAX complied with that request, but that travel agents and American reservation agents, who may not have been aware of the BA request, apparently continued to book passengers in the premium cabins.

BA contends that it did not violate any rules regarding oversales because all passengers holding confirmed reservations, including the Complainant and his party, were ultimately carried on BA268. As for the refund amount, BA does not dispute that EC 261/2004 applies to the

Complainant's journey, but argues that he is only entitled to payment for 75 percent of the value of the segment of the itinerary on which his party was downgraded, and not, as he claims, for 75 percent of the value of their entire trip, since it does not appear they were downgraded on any other segment. BA further responds that although EC 261/2004 applies, the Department has no jurisdiction to enforce that regulation. BA states that on May 21, 2014, it processed a \$949.00 credit card refund reflecting individual refund amounts of \$641.00, \$132.00, and \$176.00, and an additional credit card refund of \$611.00 on October 20, 2014, for a total of \$1,560.00. BA states that pursuant to its reading of EC 261/2004, these amounts are 75 percent of the fare values assigned by American (the carrier from which the Complainant purchased his transportation) to the LAX-LHR sectors of the Complainant's ticket and those of each member of his traveling party.

BA further states that it sent the Complainant three checks for \$408.00 each, and that to its knowledge, these checks were sent in error. In addition, BA states that it requested American to make an appropriate adjustment to the Complainant's "AAdvantage" account to reflect the inability of two members of his party to use "AAdvantage" upgrade certificates on the segment between LAX and LHR. BA states that, per information received from American, the certificates were not deducted from the Complainant's account. BA states that it remains willing to provide, as a gesture of goodwill for each member of his party, a choice of either a cash payment of £300.00 or \$500.00, or a \$650.00 travel voucher to be applied to a future BA flight purchase.

Subsequent Filings

In his Reply to BA's Answer, dated November 21, 2014, the Complainant states that pursuant to EC 261/2004, he is owed 75 percent of the flight price of the LAX-LHR segment, which is the ratio of the distance flown on that segment to the distance of the entire journey. Based on this calculation, the Complainant states that he is owed a refund of \$2,561.98 for the four tickets, and therefore that BA's refund of \$1,560.00 is deficient by \$1,001.98. The Reply also reiterates the Complainant's allegations that BA failed to provide a timely refund and to provide timely substantive responses to his written complaints.

In BA's Surreply, dated December 15, 2014, the carrier responds that it has provided an adequate refund under the methodology proposed in the Complainant's Reply, noting that the Complainant has received three checks of \$408.00 each, in addition to the credit card refund of \$1,560.00, for a total of \$2,784.00. BA also states that it requested information from American to determine the refund due, since the Complainant purchased the tickets from American. American informed BA that it would calculate the refund due as the difference between the fare paid and fare flown, using a flexible and fully refundable economy class fare as the value for fare flown. BA states that under this methodology, given that the Complainant purchased the two Business Class tickets at a significant discount, no refund would be due.

On December 15, 2017, the Complainant filed a Motion requesting the Department to act on the Complaint. The Motion further states that in reliance on BA's statement that the checks were sent in error, the Complainant destroyed the checks without cashing them. In its Contingent Answer to the Motion, dated December 27, 2017, BA responded that it never asked the Complainant to return or destroy the checks, but that it intends to send him replacement checks in the interest of resolving the Complaint.

Supplemental Information Provided by BA

The Office of Aviation Enforcement and Proceedings (Enforcement Office) separately requested information from BA for clarification of the fare values used in its refund calculation. BA's response to this information request is detailed further below in the discussion of the refund owed for the seat downgrade.

Analysis and Decision

Oversales: 14 CFR §§ 250.2b, 250.3, and 250.9

14 CFR Part 250 applies when a passenger is involuntarily denied boarding on an oversold flight. 14 CFR § 250.2b requires carriers to solicit volunteers to give up their seats when a flight is oversold before using any other boarding priority and to advise passengers of the compensation the carrier is obligated to pay if they are involuntarily denied boarding. 14 CFR § 250.3 requires that a carrier's boarding priority criteria do not make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust or unreasonable prejudice or disadvantage. 14 CFR § 250.9 requires that every carrier offer to passengers who are denied boarding involuntarily immediately after the denied boarding occurs, a written statement explaining the terms, conditions, and limitations of denied boarding compensation, and describing the carrier's boarding priority rules and criteria.

Here, because all passengers holding confirmed reservations, including the Complainant and all other members of his party, were carried on BA268, the flight was not oversold and there was no involuntary denial of boarding.

Refunds for Seat Downgrade: 14 CFR §§ 259.5 and 374.3

14 CFR §§ 259.5(a) and 259.5(b)(5) require that the carrier adopt and adhere to a Customer Service Plan, which allows for prompt refunds for credit card purchases, pursuant to 14 CFR § 374.3. The carrier must refund the balance within seven business days from receipt of a written request from the consumer.

BA and American have publicly available tariffs stating each carrier's rules for air transportation to or from the United States. The tariffs of both BA and American include the following provision:

when a passenger holding a ticket for carriage for a higher class of service between an origin and a destination is required by [the carrier] to use a lower class of service for any portion of such carriage, the amount of refund...for round trip, circle trip, or open jaw tickets [is] the difference between 50 percent of the round trip fare for the higher class of service and 50 percent of the round trip fare for the lower class of service between the points where the lower class of service is used.¹

¹ See Rule 90(D) of BA's International Passenger Rules Tariff, available at <http://www.britishairways.com/cms/global/pdfs/legal/International-Passenger-Rules-Tariff-Oct-2014.pdf>. See also Rule 90 of AA's International General Rules Tariff, available at <https://www.aa.com/i18n/Tariffs/AA1.html#0090>.

Here, the Complainant and his party were downgraded from Club World/Business Class to Economy Class. Thus, they are entitled to a refund, pursuant to the relevant tariff. BA did not dispute the Complainant's entitlement to a refund during their initial correspondence, and does not dispute it in this proceeding.

BA requested information from American to determine the refund due, since the Complainant purchased the tickets from American. According to BA, American informed BA that the total dollar value of the four tickets purchased by the Complainant for the segment between LAX and LHR was \$2,081.00. This amount is the total of the four fare segments for each of the tickets, which included two Business Class fares and two Economy Class fares, one of which was a child fare. According to BA, the fare values provided by American were \$855.00, \$815.00, \$235.00, and \$176.00.² The Business Class seating accommodation for the two economy fares was obtained through an upgrade certificate³ American further informed BA that for the accommodation in Economy Class between LAX and LHR, it would assign each ticket the value of a flexible and fully refundable economy class fare which amounts to \$1,198.96 per ticket. The value of four tickets at this fare would be \$4,795.84.

As stated above, the tariffs of both American and BA state only that "when a passenger holding a ticket for carriage for a higher class of service between an origin and a destination is required by" the carrier "to use a lower class of service for any portion of such carriage, the amount of refund...for round trip, circle trip, or open jaw tickets" is "the difference between 50 percent of the round trip fare for the higher class of service and 50 percent of the round trip fare for the lower class of service between the points where the lower class of service is used." Neither tariff specifies any particular fare category such as flexible and fully refundable economy class fare.

Based on the information in BA's filings and supplemental information provided to the Department, if the carrier had applied the formula outlined in the tariff provision to the fare information provided by American to the Complainant's downgrade, it would have calculated 50 percent of the value of the fares paid to be less than 50 percent of the value of the fares flown, as illustrated in the chart below:

² In response to a request by the Department's Office of Aviation Enforcement and Proceedings for clarification as to how American calculated this figure, BA stated: "Carriers around the world utilize a computer system called RAD to calculate the breakdown of a fare value assigned by the issuing carrier to each sector of a ticket, as well as the taxes applicable to each sector. According to RAD, American Airlines (the carrier from which Mr. Borsetti purchased his and his family's transportation) assigned the following fare values to the LAX-LHR sectors of Mr. Borsetti's four tickets...\$855...\$176...\$235...\$815...Total = \$2,081."

³ BA's response further clarified that the \$176 and \$235 values refer to "economy tickets with upgrade certificates to business class. American Airlines advised British Airways that the upgrade certificates were available to Mr. Borsetti as a result of his AAdvantage frequent flyer plan status, and that no monetary amount or frequent flyer miles were used to obtain those certificates. As stated in British Airways' Answer, British Airways requested that American Airlines make an appropriate adjustment to Mr. Borsetti's AAdvantage account to reflect the inability of his two companions to utilize their upgrade certificates. American Airlines subsequently advised that since the certificates were not used, they were never deducted from Mr. Borsetti's account."

Total Fares Paid for LAX-LHR segment	50 % of Fares Paid for LAX-LHR segment	Value of Fares Flown on LAX-LHR segment	50 % of Fares Flown on LAX-LHR segment
\$2,081.00	\$1040.50	\$4,795.84	\$2,397.92

Thus, since the value of the fare flown from LAX to LHR in Economy Class is greater than the value of the Business Class fare paid by the Complainant for that segment, BA might have concluded that no refund was due.

However, the Complainant alleges and BA agrees that pursuant to EC 261/2004, the refund owed would be calculated as 75 percent of the “flight price,” meaning the cost of the downgraded segment, which is determined by multiplying the ticket price by the ratio of the distance flown on that segment to the distance flown on the entire journey. Nevertheless, BA did not apply this formula based on flight distance, instead relying on the dollar values provided by American, discussed above, which total \$2,081.00 for all four tickets. BA concluded that the Complainant was owed 75 percent of that value, or \$1,560.00, which it refunded to the Complainant’s credit card.

The Complainant initially requested a refund of 75 percent of the total cost of each ticket under EC 261/2004, including the four additional segments on which none of his party was alleged to have been downgraded. However, his Reply dated November 21, 2014, proposes a calculation based on the flight price of the LAX-LHR segment, for all four tickets.⁴ Pursuant to that calculation, the Complainant stated that he is owed \$2,561.98, as shown below:

Ticket Price	Distance of Journey	LAX-LHR Distance	Ratio	Flight Price	75% of Flight Price
\$2,777.80	12,969	5,454	.42 %	\$1,168.18	\$876.13
\$2,779.60	12,969	5,454	.42 %	\$1,168.94	\$876.70
\$1,378.30	12,969	5,454	.42 %	\$579.63	\$434.72
\$1,187.10	12,969	5,454	.42 %	\$499.22	\$374.42
				Total	\$2,561.98

The Complainant’s calculation includes the two Economy Class fares of \$1,378.30 and \$1,187.10. The Complainant had upgraded these tickets to Business Class using non-cash upgrade certificates earned through frequent flyer mileage. Since the two travelers were unable to use the upgrade certificates on the LAX-LHR segment, American did not deduct the corresponding mileage from the Complainant’s account even though the travelers were apparently able to travel in Business Class on the other four segments of the journey.

⁴ Reply of Mike Borsetti at 2, *Mike Borsetti et al. - Complaint Against British Airways Plc*, DOT-OST-2014-0166, available at <https://www.regulations.gov/document?D=DOT-OST-2014-0166-0006>.

BA does not dispute the Complainant's calculation of \$2,561.98 but instead points out that in addition to the credit the Complainant received, BA also sent him three checks of \$408.00 each⁵, adding up to a total of \$1,224.00 in addition to the \$1,560.00, for a total refund of \$2,784.00. Since this amount exceeds the Complainant's entitlement, BA provided an appropriate refund.⁶ Furthermore, because the Complainant was not owed a refund under BA's tariff, the seven-day requirement in 14 CFR §§ 259.5(a) and 374.3 does not apply.

Responses to Consumer Complaints: 14 CFR § 259.7

14 CFR § 259.7(c) requires that each covered carrier shall acknowledge in writing receipt of each complaint regarding its scheduled service to the complainant within 30 days of receiving it and shall send a substantive written response to each complainant within 60 days of receiving the complaint. A complaint is a specific written expression of dissatisfaction concerning a difficulty or problem which the person experienced when using or attempting to use an airline's services.

The Complainant initially requested a refund on February 17, 2014, which BA acknowledged three days later, on February 20. The Complainant sent an additional complaint to BA on February 25, of which BA acknowledged receipt that same day. Also on February 25, the Complainant submitted an informal complaint to the Department, which was forwarded to BA on March 3. BA acknowledged receipt on March 4.

In a March 12 email, BA offered the Complainant a choice of either a cash payment of £300.00 or \$500.00, or a \$650.00 travel voucher to be applied to a future BA flight purchase, for each member of his party. BA states that this offer was not intended to substitute for, or offset, any subsequent compensation for the downgrade. The email addresses the substantive issue of reimbursement for the downgrade.

BA also sent additional correspondence to, or otherwise communicated with, the Complainant on March 15, March 17, March 19, March 23, March 25, March 27, April 9, April 25, May 13, May 21, June 4, and June 5, 2014. In all of these emails, BA discussed the amount of refund due or the form of payment by which it could provide the refund. Thus, BA acknowledged all written complaints within 30 days of receipt and provided substantive written responses to the Complainant within 60 days.

⁵ As noted previously, although BA stated in its Answer that these checks were sent in error, it appears, based on its Contingent Answer to the Complainant's Motion, that BA intends these checks to be included in the total amount refunded to the Complainant as compensation for the downgrade.

⁶ This finding does not constitute a determination as to the validity of the refund calculation methodology of EC 261/2004. The Department enforces only U.S. federal aviation consumer protection requirements, and affords carriers discretion in applying policies that compensate consumers beyond those requirements.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY, we dismiss the complaint filed in Docket DOT-OST-2014-0166. Pursuant to 14 CFR 302.406(b), this order shall become effective as a final order of the Department thirty (30) days after service of this order.

BY:

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