



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

**Issued by the Department of Transportation
on the 1st day of October, 2012**

British Airways Plc

Docket OST 2012-0002

**Violations of Articles 17 and 19 of the
Montreal Convention, 14 CFR 399.84
and 49 U.S.C. § 41712**

Served October 1, 2012

CONSENT ORDER

This consent order concerns violations by British Airways Plc (British Airways) of Articles 17 and 19 of the Montreal Convention,¹ related to monetary claims for loss, damage or delay of checked baggage on flights to or from the United States. In addition, this order concerns advertisements published by the carrier that violate the Department's full-fare advertising requirements stated in 14 CFR 399.84 and enforcement case precedent current at the time of the advertisements' publication. The British Airways policies and practices in question, moreover, violated 49 U.S.C. § 41712, the statutory prohibition against unfair and deceptive trade practices and unfair methods of competition.

This order directs British Airways to cease and desist from future similar violations of Articles 17 and 19 of the Convention, 14 CFR 399.84, and 49 U.S.C. § 41712 and assesses the carrier a compromise civil penalty of \$250,000.

Violations of the Montreal Convention

Applicable Law

The Montreal Convention, to which the U.S. is a signatory, sets limits for air carrier liability regarding lost, stolen, delayed and damaged passenger baggage. Article 17 of the Convention provides that carriers are liable, up to the monetary amounts stated in

¹ *Convention for the Unification of Certain Rules for International Carriage by Air*, adopted on May 28, 1999

Article 22 of the Convention, currently 1,131 Special Drawing Rights,² for loss of or damage to checked baggage while in the custody of a carrier, except to the extent that the damage “resulted from the inherent defect, quality or vice of the baggage.” With respect to claims for compensation resulting from delayed baggage, Article 19 provides that carriers are liable up the limits of Article 22, except in cases in which the carrier can show that it took all reasonable measures to avoid such delay or that it was not feasible to take such steps.

By notice dated March 26, 2009, the Department reminded all airlines engaged in foreign air transportation that Article 17 prohibits them from applying blanket liability exclusions to any class or category of baggage that they have accepted for transport. Such exclusions have the effect of limiting a carrier’s liability to less than the limit set by Article 22 in contravention of Articles 17 and 19 of the Montreal Convention. Moreover, pursuant to Article 26 of the Montreal Convention, any provision in a carrier’s contract of carriage tending to relieve the carrier of liability or to fix a lower liability limit than that provided for in the Convention is null and void. Violations of Articles 17 or 19 also constitute an unfair and deceptive practice and an unfair method of competition in violation of section 41712. The notice gave air carriers ninety (90) days from the date of the notice to revise their tariffs, statements, and policies related to baggage liability.³

Background

In a review of British Airways tariff filings in early 2011, the Office of Aviation Enforcement and Proceedings (Enforcement Office) became aware of a rule which purported to exclude from liability for loss, damage or theft several classes of items, even when accepted in checked baggage. The carrier’s Rule 115 (A), which applied to service to and from the U.S., stated that “fragile or perishable articles, money, jewelry, silverware, negotiable papers, securities, or other valuables will not be accepted as checked baggage.” Paragraph (N) of that rule, relating to special value charges, states that if any of the excluded items are in checked baggage, the carrier will not be liable for any damage or loss. The list of excluded items was extended in paragraph (N) to include “computers, personal electronic devices, passports or other identification documents” in addition to the items listed above in paragraph (A) of the rule. These terms of the carrier’s tariff, therefore, explicitly contradicted the requirements of Article 17.

Moreover, an investigation of consumer claims relating to baggage received by British Airways, disclosed that, until at least February 2011, with respect to certain baggage claims, the carrier applied Rule 115(A) in violation of Article 17 by disallowing recovery for electronics, jewelry and other excluded items. British Airways’ unlawful policy of denying liability was also reflected in the carrier’s then-current internal manual

² *Inflation Adjustments to Liability Limits Governed by the Montreal Convention*, 74 Fed. Reg. 59017 (Dec. 30, 2011).

³ *Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries*, 74 Fed. Reg. 14837 (Mar. 26, 2009), available at <http://airconsumer.dot.gov/rules/webnotice>.

on baggage claims.⁴ In addition to violating Article 17 of the Montreal Convention, British Airways' conduct constituted an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712. In February 2011, the carrier rescinded its unlawful policy and practice of excluding liability for items contained in checked baggage, ultimately filing a conforming tariff with the Airline Tariff Publishing Co. (ATPCo) in December 2011.

Furthermore, the Enforcement Office's review of the carrier's passenger baggage manual indicated that British Airways unlawfully established set limits for reimbursement for incidental expenses to be paid passengers whose baggage was lost, stolen or delayed. According to its baggage claims manual, the carrier, as a matter of policy, declined to reimburse passengers for incidental expenses incurred when the delay in the arrival or loss occurred on flights returning the passenger to his or her country of residence. A number of consumer claims the Enforcement Office reviewed confirmed that this policy was in fact applied by British Airways. By setting arbitrary limits to claims, or flatly refusing to reimburse claimants for valid claims, British Airways violated Article 19 of the Montreal Convention and engaged in an unfair and deceptive trade practice in violation of section 41712.⁵ British Airways has now revised its manual and practices to correct this area of non-compliance.

**Advertising Practices in Violation of
14 CFR 399.84 and 49 U.S.C. § 41712**

Applicable Law

British Airways, as a foreign air carrier selling air transportation and air tour packages, is subject to the advertising requirements of Part 399 of the Department's rules. Pursuant to 14 CFR 399.84 in effect at most of the time relevant to this matter, the Department allowed taxes and government fees collected by carriers and ticket agents, such as passenger facility charges and departure taxes, to be stated separately from base fares in advertisements so long as such taxes and fees were levied by a government entity, were not *ad valorem* in nature, were collected on a per-passenger basis, and their existence and amounts were prominently and clearly indicated at the first point in the advertisements where a fare was presented so that consumers could immediately determine the full fare to be paid. Air carriers and ticket agents were required to provide similar notice when air fares were held out as "free" or otherwise without monetary cost, but taxes and government-imposed fees must be paid by a passenger in order to use the "free" fare.⁶

⁴ British Airways' "Baggage Claims Process Manual," April 1, 2010.

⁵ Carriers must evaluate all claims for incidental compensation on an individual basis and pay all reasonable, actual and verifiable expenses related to baggage loss, damage or delay. *Caribbean Airlines Limited*, Order 2011-10-20 (Oct 28, 2011); *Emirates*, Order 2011-8-24 (Aug. 30, 2011); *Lufthansa*, Order 2011-6-18 (June 17, 2011); and *Société Air France*, Order 2010-12-26 (Dec. 23, 2010). See also *Notice Providing Guidance on Reimbursement of Passenger Expenses Incurred as a Result of Lost, Damaged or Delayed Baggage*, 74 Fed. Reg. 53309, Oct.16, 2009.

⁶ The Department provided advice regarding the advertisement of "free" fares in the notice dated September 4, 2003, *infra* note 9. The Enforcement Office regards reward travel, vouchers,

Carrier or ticket agent-imposed charges, such as fuel, insurance and service charges, always have had to be included in the advertised fare.⁷ Violations of section 399.84 constitute unfair and deceptive practices in violation of 49 U.S.C. § 41712. Regarding each way fares that are available only when bought on a round-trip basis, under long-standing enforcement case precedent, the Department has required that the round-trip purchase requirement be clear and conspicuous, that is prominent and proximate to the advertised fare the first time it is shown.⁸

With respect to fares described as “free,” the Department has distinguished among fares that are, in fact, free or require mileage without any monetary cost, fares that require monetary payment in addition to mileage, such as taxes and government-imposed fees, and fares that require in addition that other charges imposed by the carrier be paid. Established enforcement case precedent required carriers to disclose the nature and amount of any taxes or government fees to be paid by the consumer in order to make a booking under a “free” fare, and, as noted above, any carrier-imposed charge, which must be included in the advertised price, had to be covered by the award and could be imposed by the carrier as an additional charge.⁹ This policy has applied to any air-fare cost that is described as “free” or otherwise without monetary cost to the consumer, or in terms that would lead a reasonable consumer to believe the fare was free.¹⁰ *See Unique Vacations, Inc.*, Order 2010-11-7 (Nov. 8, 2010); *Prestige Cruise Holdings, Inc.*, Order 2010-4-11 (April 7, 2010).

Background

The Enforcement Office’s investigation disclosed that the air fares and air tour packages promoted by British Airways, both in e-mail and print solicitations and on its web site, did not comply with Department requirements described above in two specific respects.

redemption travel, mileage award travel, coupons and “air fare credits” as falling within this category of advertisements, including those addressed to frequent flyer program members, to be subject to the disclosure requirements outlined in the September 4 notice.

⁷ On April 20, 2011, a new Department rule changed its enforcement policy with respect to section 399.84 to require that airlines and ticket agents comply with the rule as written. Under this new enforcement policy, which was effective Jan. 26, 2012, airlines and ticket agents must include all taxes and government fees in every advertised fare. *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23110 (Apr. 25, 2011); effective Jan. 26, 2012.

⁸ See Letter to Industry, March 9, 1995. This requirement is specifically mandated in the revised section 399.84(b). *Virgin Atlantic Airways, Ltd.*, Order 2011-9-18 (Sept. 26, 2011); *Aerovias de Mexico, S.A. de C. V.*, Order 2011-1-1 (Jan. 4, 2011); *ATA Airlines, Inc.*, Order 2005-10-11 (Oct. 17, 2005).

⁹ *See Allegiant Air, LLC*, Order 2012-2-10 (Feb. 15, 2012). The Department noted in its September 4, 2003, guidance on free advertisements, that free fares should be accompanied by a notice regarding any additional charges that may apply, stating that “some examples of conditions that must be noted are any requirements that the consumer pay the taxes and *fees that may properly be separately stated from the fare* [emphasis added], or the existence of significant restrictions.”

¹⁰ Current policy regarding the use of the term “free” in air fare advertisements is stated in the Department’s notice of May 17, 2012.

First, British Airways deceptively advertised air fares as “free” or based on mileage awards that were made available to members or joiners of its frequent flyer programs, in connection with promotions of British Airways credit cards, companion fares or frequent flyer awards, when, in fact, consumers would in some cases be required to pay mandatory charges imposed by the carrier, described by British Airways as “airline surcharges, including fuel surcharges.” The mandatory charge that, according to British Airways, represented a “fuel surcharge” in some cases amounted to as much as \$600 per person for each reward or “free” ticket. In addition, in the relevant advertisements British Airways failed to provide proper notice of additional taxes and government fees that could at the time properly be stated separately from the advertised “free” fares.

The Enforcement Office reviewed a number of air fare and air tour advertisements offered on British Airways’ web sites and in the company’s electronic e-mail solicitations, regarding “complimentary,” “companion,” “redemption,” or “reward” air travel. The review showed in many instances British Airways not only failed to state the full price to be paid by the consumer by omitting mandatory carrier charges, but it failed to provide proper disclosures of applicable taxes and government fees. While noting, in the terms and conditions appended to the promotional offers, that the consumer was liable for taxes and government-imposed fees in order to use the earned reward travel, these advertisements failed to disclose the amounts of these additional taxes and fees, either on the same screen or through a hyperlink. These violations continued after the effective date of the Department’s new rule which requires that all mandatory charges, including taxes and government fees, be included in the advertised fare with respect to all air fares.¹¹

A second type of violation found involves a number of British Airways advertisements in which the carrier failed to state clearly and conspicuously and prominently and proximately to the advertised fare that an advertised “each way” fare required a round-trip purchase. For example, British Airways in 2011 promoted low fares from multiple gateways in the United States to London and beyond, but the round-trip purchase requirement was described in very small type, using uncommon abbreviations and positioned beneath a prominent illustration such that it did not comply with the requirement that it be prominent and proximate to the advertised fare.

¹¹ In a recent guidance document, the Enforcement Office web site details how mandatory charges associated with “free” fares and certain frequent flyer mileage award tickets should be disclosed in advertisements. Carriers may not impose surcharges in connection with “free” travel, although fees for special services such as special delivery options may be applied if disclosed. See, http://airconsumer.dot.gov/rules/EAPP_2_FAQ_01-11-2012final.pdf, at p. 23. The Department notice of May 17, 2012, also discusses how award travel involving both mileage and cash payment may be advertised. Thus if a roundtrip award ticket from the U.S. to London costs 50,000 frequent flyer miles plus \$700 in taxes and carrier charges (which may be labeled surcharges only if the amount quoted is an accurate reflection of the relevant cost component, such as the added cost of fuel over some baseline) each advertisement for that service must say so with equal prominence for the mileage and monetary amounts.

By failing to include all mandatory carrier-imposed charges in advertised fares and failing to properly disclose taxes and government fees applicable to those fares, and by failing to properly disclose the round-trip purchase requirements in certain sale fares advertising, British Airways violated section 399.84 and engaged in unfair and deceptive trade practices in violation of 49 U.S.C. § 41712.

Mitigation

In mitigation, British Airways states that it is fully committed to complying with the Department's requirements as well as the requirements imposed by the other countries which it serves. British Airways further states that any delay in complying with the Montreal Convention minimum liability limits was attributable to its need to ensure that it remained compliant with the requirements and interpretations of the authorities in each of the countries which it serves.

With respect to the price advertising issues, British Airways states that most of the advertisements objected to by the Department were not advertisements for "free" airfare but advertisements soliciting acquisition of a British Airways branded credit card. In this regard, British Airways notes that the word "free" did not appear in the advertisement, and that the advertisements disclosed that offer was "subject to taxes, fees, charges and surcharges, including airline surcharges." British Airways further maintains that although it recognizes that the Department's policies require that fuel surcharges be included in advertised fares, no Department regulation, industry letter or consent order specifically applied that principle to frequent flyer promotions during the period when the advertisements the Department is objecting to were published.

With respect to the advertisements for "each way" fares, British Airways notes that the required "each way based on round trip" disclosure was included twice, in the body of the advertisement and in the terms and conditions included in the advertisement and that any failure to display that disclosure prominently and proximately to the advertised fare would have been inconsistent with British Airways internal policy.

Finally, British Airways notes that it fully cooperated with the Department during the course of this investigation and that its consent to the issuance of this order does not constitute an admission that is committed the violations alleged by the Department.

Decision

The Enforcement Office has carefully considered the information provided by British Airways but continues to believe that enforcement action is warranted. The Enforcement Office and British Airways have reached a settlement of this matter in order to avoid litigation. British Airways consents to the issuance of an order to cease and desist from future violations of Articles 17 and 19 of the Montreal Convention, 49 U.S.C. § 41712 and 14 CFR 399.84 of the Department's regulations, and to the assessment of \$250,000 in

compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301.¹²

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 an adequate deterrence to future noncompliance with the Montreal Convention and the Department's full-fare advertising rules by British Airways, as well as by other air carriers, foreign air carriers, and ticket agents.

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 British Airways Plc violated Article 17 of the Montreal Convention by excluding certain classes of items from the minimum liability limits set out in Article 22 for loss, theft and damage of items in checked baggage;
3. We find that British Airways Plc violated Article 19 of the Montreal Convention by setting arbitrary limits, lower than amounts stated in Article 22 of the Convention, for reimbursement of passenger incidental expenses related to the delays in the return of checked baggage;
4. We find that British Airways Plc violated 14 CFR 399.84 by publishing fare advertisements that failed to state the full price of the service advertised;
5. We find that British Airways Plc violated 14 CFR 399.84 by publishing fare advertisements on an each-way basis that failed to state clearly and conspicuously and prominently and proximately to the advertised fare that a round-trip purchase was required;
6. We find that by engaging in the conduct and violations described in ordering paragraphs 2 through 5, above, British Airways Plc has also engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
7. We order British Airways Plc, and all other entities owned or controlled by or under common ownership with British Airways Plc, and their successors and assignees, to cease and desist from further violations of Articles 17 and 19 of the Montreal Convention, 14 CFR 399.84, and 49 U.S.C. § 41712;

¹² This consent order also resolves all matters raised in a separate investigation of two ancillary websites operated by British Airways (http://www.britishairways.com/travel/home.public/en_pr and [same prefix] en_us) regarding compliance with 14 CFR §§ 399.84 and 399.85.

8. British Airways Plc is assessed \$250,000 in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 through 6 above. Of this total penalty amount, \$125,000 shall be due and payable within 15 days from the date of issuance of this order; the remaining one-half of the civil penalty amount shall become due and payable immediately if British Airways Plc violates this order's cease and desist provisions within one year following the date of issuance of this order or fails to comply with this order's payment provisions; and

9. We order British Airways Plc to pay the penalty through Pay.gov to the account of the U.S. Treasury. Payment shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the compromise assessment as ordered shall subject British Airways Plc to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible further enforcement action for failure 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:

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