



LEXSEE 1996 DOT AV LEXIS 551

UNITED AIRLINES Violations of 49 U.S.C. § 41712 and 14 CFR
Part 399

Order 96-9-9

Department of Transportation

Deputy General Counsel

1996 DOT Av. LEXIS 551

September 6, 1996

ACTION: [*1] CONSENT ORDER

ISSUEDBY: ROSALIND A. KNAPP, Deputy General Counsel

SERVED: September 6, 1996

This consent order concerns violations of 49 U.S.C. § 41712 and the advertising requirements in 14 CFR 399.84 by United Airlines ("United"). This order directs United to cease and desist from future violations and to pay compromise civil penalties.

"Two-for-One" Advertising

In the October 1995 edition of "Shuttle by United" *NewsFlash*, United published an advertisement that included the statement "Buy one ticket for yourself at our *everyday low fare* and get a 'Free Bee' ticket for a friend--gratis!" (emphasis added) The fine print at the bottom of the reverse side of the advertisement included a statement that "'Free Bee" fares are good seven days a week, with some restrictions" and "additional fare may be required if the above conditions are not met." When a consumer complainant called United about travel between Portland and Los Angeles, he was told that the 21-day advance purchase round-trip fare was \$ 148 but that in order to get a free ticket he would have to purchase a ticket for a round-trip fare of \$ 308.

The Department's policy concerning "two-for-one" advertising is that [*2] such promotions are deceptive if the fare that must be purchased to take advantage of the promotion is higher than other fares of that carrier in the same market, unless this fact is clearly and prominently disclosed in the advertisement. (See the December 20, 1994, industry letter signed by Secretary Pena.) As presented, United's "two-for-one" advertisement violated 49 U.S.C. § 41712 which prohibits "unfair or deceptive practices or unfair methods of competition."

Percentage-Off Fare Advertising

In February 1996, United published or caused to be published advertisements which appeared in the *New York Times*, *Washington Post*, and *Wall Street Journal*. Those advertisements included the caption "Take your first deduction of 1996" and promoted savings of "up to 40%" off certain "low domestic fares" but did not disclose the benchmark fare used to determine the advertised percentage off savings.

The Enforcement Office's policy regarding percentage-off advertising was reiterated in a letter to U.S. air carriers and other industry executives dated July 14, 1995. As stated in that letter, the benchmark fare (the fare upon which the savings are being computed or compared) [*3] must have been offered for sale in reasonable quantities immediately prior to the advertisement for the new fare. In addition, the advertisement must either identify and describe the benchmark fare, or the benchmark fare must be a discount fare comparable to the advertised fare, with similar restrictions. That letter also made clear that the Enforcement Office interprets "a discount fare comparable to the advertised fare, with similar restrictions" to mean the *lowest-priced* discount fare comparable to the advertised fare, with similar restrictions. (See also Order 96-4-33, issued April 16, 1996.)

In response to inquires from the Enforcement Office, United stated that the benchmark fare for the advertisements at issue was the carrier's "21-day advance purchase non-refundable fare" otherwise known as a "standard excursion fare." United also stated that although there were no lower fares with similar restrictions, the advertised discounted fares did not carry the same restrictions as the benchmark fare. nl Thus, United neither identified and described the benchmark fare, nor used as the benchmark fare a discount fare comparable to the advertised fare, with similar restrictions.

- - - - - Footnotes - - - - -

nl In at least one respect--days of the week travel was permitted--the advertised discount fare was more restrictive than the benchmark fare.

- - - - - End Footnotes- - - - -

[*4]

As presented, United's percentage-off fare advertising violated section 399.84 of the Department's regulations (14 CFR 399.84). Any violation of 14 CFR 399.84 also constitutes a violation of 49 U.S.C. § 41712.

In mitigation, United states that it has had a long history of cooperation with the Department and compliance with the Department's regulations. United also states that it has consistently displayed a sincere interest in avoiding deceptive and misleading practices.

With respect to its percentage-off fare advertising, United states that the advertisements that are the subject of this consent order were published only once and were authored and distributed in direct response to an advertising campaign originated by one of its competitors. The carrier asserts that the advertisements and the circumstances made clear that the benchmark fare was the standard 21-day advance purchase excursion fare and that the advertisements therefore had no deceptive or misleading effect. United also states that there was only one instance in which a lower fare of the same or lesser restrictions was available in the market for which the discounted fare was advertised.

With respect to its "two-for-one" [*5] advertising, United asserts that the mailer was sent to a limited distribution list--individuals in Western states who had used Shuttle by United. The carrier also asserts that the number of complaints resulting from the mailer -- which United claims it addressed in a timely and effective manner -- was extremely low, even in comparison to the total number of advertisements mailed. Finally, United states that it promptly indicated its willingness to meet and cooperate with the Enforcement Office, and it has, through its discussions with that office, formulated more specific internal advertising guidelines to ensure future compliance with the Department's advertising regulations.

The Enforcement Office has carefully considered the information provided by United; however, it continues to believe that enforcement action is warranted in connection with these advertisements. In this regard and in order to avoid litigation and without admitting or denying the alleged violations, United has agreed to a settlement of this matter with the Enforcement Office. United consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. § 41712 and section 399.84 of the [*6] Department's regulations and to the assessment of \$ 25,000 in compromise of potential civil penalties. The Enforcement Office believes that the assessment of a civil penalty is warranted in light of the nature and circumstances of the violations at issue here and the mitigating circumstances described by United. This order and the penalty it assesses will provide an adequate deterrence to future noncompliance by United, as well as by other domestic and foreign sellers of air transportation.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and find that the provisions of this order are in the public interest;
2. We find that United violated 14 CFR 399.84 by failing to either identify and describe the benchmark fare, or use a benchmark fare that was a discount fare comparable to the advertised fare, with similar restrictions, in percentage off advertisements that it published or caused to be published in the *New York Times*, *Washington Post*, and *Wall Street Journal* in February 1996;
3. We find that United violated 49 U.S.C. § 41712 by (1) engaging in the conduct described in ordering paragraph 2, above, and (2) failing to clearly and prominently [*7] disclose that the fare that must have been purchased to take advantage of the promotion was higher than other fares of that carrier in the same market in "two-for-one" advertisements that it published or caused to be published in the October 1995 edition of "Shuttle by United" *NewsFlash*;
4. United, and all other entities owned or controlled by or under common ownership with United, and their successors and assignees, are ordered to cease and desist from violations of 49 U.S.C. § 41712 and section 399.84 of the Department's regulations, as described in this order;
5. United is assessed \$ 25,000 in compromise of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3 of this order, due and payable within 15 days of the date of

issuance of the order. Failure to pay the compromise assessment as ordered will subject United to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order; and

6. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. [*8] Treasury. The wire transfer shall be executed in accordance with the instructions contained in Attachment 1.

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.

Attachment

[SEE FORM IN ORIGINAL]