

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

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on the 16th day of April, 1996

SERVED: April 16, 1996

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

CONSENT ORDER

This consent order concerns the application of 49 U.S.C. § 41712 and the portion of Part 399 of the Department's regulations that deals with full-fare advertising requirements (14 CFR Part 399) to two advertisements promulgated by Southwest Airlines Co. ("Southwest"). This order clarifies the policy of the Office of Aviation Enforcement and Proceedings ("Enforcement Office") with respect to such advertising, and directs Southwest to cease and desist from future violations of the applicable requirements and to pay compromise civil penalties.

Internet Fare Listings

In March 1995, Southwest introduced a "Home Gate" site on the Internet's World Wide Web, at the <http://www.iflyswa.com> address, which contained various information concerning the carrier's services. One of the 35 categories of information available to Internet users in Home Gate listed Southwest's fares applying to travel in certain city-pair markets. The display containing the fares included various notations and conditions, including the statement that "limited seating, advance purchase, and other restrictions may apply." However, the fares listed did not include applicable Passenger Facility Charges (PFC's) of up to \$3.00 per departure charged by certain airports served by Southwest.

The Enforcement Office's policy is to permit the separate listing in fare advertisements of per-passenger taxes and fees -- including PFC's -- imposed or approved by government entities if the advertisement clearly indicates both the nature and amount of those charges. However, Southwest's Internet fare listings did not state the existence or amount of

applicable PFC's. A general statement such as "other restrictions may apply" is insufficient notification of per-passenger taxes and fees under our enforcement policy.

The Enforcement Office notified Southwest of the omission of PFC's from the Home Gate fare listings on July 13, 1995. Southwest revised the listings to conform to the Enforcement Office's concerns later that same day.

As originally presented, Southwest's Internet fare display violated section 399.84 of the Department's regulations (14 CFR 399.84) which states that: "any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, for passenger air transportation, a tour . . . or a tour component . . . that states a price for such air transportation, tour, or tour component [is considered] to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component." Any violation of 14 CFR 399.84 also constitutes a violation of 49 U.S.C. § 41712 which prohibits "unfair or deceptive practices or unfair methods of competition."

In mitigation, Southwest states that its Internet fare listings were developed in conformity with industry standards for fare displays used by on-line booking services, which have existed for a number of years. Southwest points out that because it was the first air carrier to display its own services on the Internet, Southwest simply patterned its fare displays upon the displays used by those online services. Southwest also states that while its advertising in conventional media has always adhered scrupulously to the Department's full-price advertising policies, the Internet fare listings were developed by a group within the company whose primary expertise is in information systems and technology; this group designed Home Gate not as an advertisement or solicitation, but as a resource for Internet users who were themselves soliciting information on Southwest, and thus the Home Gate displays were not subjected to the normal scrutiny the company gives to advertising materials. In addition, Southwest points out that consumers who booked reservations with Southwest, including those who had accessed Southwest's Home Gate, were informed by Southwest's reservations agents of the existence of any applicable PFC's and that neither it nor the Department received any consumer complaints that the original fare listings were misleading. Nevertheless, Southwest points out that it responded immediately to the Enforcement Office's concerns and modified its Internet fare displays to be in full compliance with the Department's guidelines.

50% Off Fare Advertising

In July 1995, Southwest began a major advertising campaign in newspapers, television and radio offering a "50% off" fare sale. The print and radio advertisements offered fares at 50% off Southwest's "already low full fares." The television advertisements initially used slightly different language, offering fares at 50% off Southwest's "everyday low fares." A few days after the campaign started, Southwest changed the language of the television

advertisements to conform to the newspaper and radio advertisements, *i.e.*, to offer fares at 50% off Southwest's "already low full fares."

The Enforcement Office believes the language initially used in Southwest's television advertising did not adequately identify the "benchmark fare" from which the 50% discount was calculated and therefore did not fully comply with the Enforcement Office's policy regarding percentage-off advertising. That policy was most recently 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) 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.¹

In mitigation, Southwest states that the term "everyday low fare," in the context of Southwest's unique fare structure and pricing practices, is in fact an adequate description of the benchmark fare used for its 50% off sale. Southwest points out that, historically, a majority of its seats are sold, or are based upon, Southwest's full fares, either individually or on a two-for-one basis. According to the carrier, these fares are quite low compared to other carriers' full fares and are available every day, every flight, on an unrestricted, "walk-up" basis. In this respect Southwest states that its fare structure and pricing experience is quite different from that of other major carriers, which typically sell only a very small percentage of their seats at the full fare level. Because of this experience, Southwest's fare advertising has historically used the terms "everyday," "full," and "unrestricted" almost interchangeably in describing its full, walk-up fares. Southwest also points out that it has not received complaints or communications from passengers that indicate there is any public confusion over its use of the terminology "everyday fares" in its advertising.

Specifically with respect to the 50% off sale, Southwest states that there was no evidence that the public was confused or deceived by its advertising, as the Department received no consumer complaints despite the fact that the campaign was aired throughout much of the country. Southwest points out that it subsequently changed the language of the television advertisement on its own volition as a prudent business decision, so as to use common terminology in all its 50% off advertising to describe the benchmark fare. However, notwithstanding its belief that the use of "everyday low fare" in the initial television spots was appropriate, Southwest has agreed, in light of the Enforcement Office's concerns, not to use the terms "everyday fares" or "everyday low fares" to identify the benchmark fare in any future percentage-off fare advertising.

¹ That July 14 letter, which followed a December 20, 1994, letter to the industry from Secretary Peña, 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.

In view of all the circumstances, the Enforcement Office and Southwest have reached a settlement of these two matters, under which Southwest consents to issuance of an order to cease and desist from future violations of 49 U.S.C. § 41712, section 399.84, and the Enforcement Office's policy toward full-price advertising as enunciated above. As to the Internet matter, the Enforcement Office recognizes that the Home Gate displays were novel at the time they were first established and acknowledges that Southwest did not intend to mislead consumers. Also, Southwest's Internet fare displays have been in full compliance with the Department's requirements since June 13, 1995, the day the Enforcement Office alerted Southwest to the omission of PFCs and the displays were immediately corrected. Because of Southwest's prompt remedial action, its positive compliance history, and the other circumstances described above, the Enforcement Office believes it appropriate to assess only a relatively modest civil penalty of \$12,000.

As to the 50% off advertising matter, the Enforcement Office continues to believe that the language initially used in Southwest's television advertising was imprecise, and therefore had the potential to cause confusion. Nevertheless, we understand Southwest's belief that its use of "everyday low fare" in connection with this advertising was reasonable in the context of Southwest's fare structure and in light of its historical experience using similar terminology in its advertising, with apparent public acceptance. In view of all the circumstances, and in consideration of Southwest's agreement to cease and desist from using that term to identify the benchmark fare in future percentage-off advertising, the Enforcement Office is willing to forego the assessment of a civil penalty in connection with the "50% Off" matter.

We believe this settlement is appropriate and serves the public interest. It represents an adequate deterrent to future noncompliance by Southwest and others. The Enforcement Office takes this opportunity to emphasize that the Department's regulations regarding price advertising apply equally to displays of air transportation services appearing on the Internet and on-line services as to displays in any other medium used by the public. This order places all entities in the air transportation industry clearly on notice of our enforcement policy in this regard, and that the Enforcement Office will continue to apply this policy when it reviews advertising displays on the Internet, as well as in other media.²

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. In March 1995, Southwest promulgated or caused to be promulgated a fare display in the carrier's home page on the Internet's World Wide Web which failed to state the existence and amount of applicable Passenger Facility Charges;

² On March 18, 1996, the Enforcement Office sent a letter to the largest U.S. and foreign air carriers and travel agencies emphasizing its policies concerning Internet and on-line service advertising.

3. In July 1995, Southwest promulgated a percentage-off television advertisement which, as initially aired, did not adequately identify the fare used to compute the advertised percentage discount;
4. We find that by engaging in the conduct described in paragraphs 2 and 3, Southwest violated 49 U.S.C. § 41712 and 14 CFR 399.84;
5. Southwest, and all other entities owned or controlled by or under common ownership with Southwest, 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;
6. Southwest is assessed \$12,000 in compromise of civil penalties that might otherwise be assessed for the violations found in paragraph 2 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 Southwest 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
7. 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. 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.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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on the World Wide Web at
<http://www.dot.gov/dotinfo/general/orders/aviation.html>*