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

Issued by the Department of Transportation
on the **6th day of May, 2004**

Aer Lingus Limited **Violations of 49 U.S.C. § 41712 and** **14 CFR Part 399**	**Served: May 6, 2004** **OST 2004-16943**

CONSENT ORDER

This order concerns newspaper and Internet advertisements of Aer Lingus Limited (Aer Lingus) that the Department believes violate 49 U.S.C. § 41712, which prohibits unfair and deceptive practices, and the advertising requirements specified in 14 CFR Part 399. This order directs Aer Lingus to cease and desist from future violations and assesses the carrier a compromise civil penalty.

Aer Lingus, as a foreign air carrier, is subject to the advertising requirements of Part 399. To ensure that consumers are not deceived and are given accurate and complete fare information on which to base their airline travel plans, section 399.84 requires that fare advertisements by carriers or their agents state the full price to be charged the consumer. Under long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and other sellers of air transportation, such as passenger facility charges and departure taxes, to be stated separately from the base fare in advertisements, so long as the charges are approved or levied by a government entity, are not *ad valorem* in nature, are collected on a per-passenger basis, and their existence and amount are clearly indicated in the advertisement so that the consumer can determine the full fare to be paid. However, additional carrier-imposed fees and charges, including security and insurance surcharges, must be included in the advertised base fare. In addition, the Department has allowed carriers to advertise each-way fares that are available only when bought for roundtrip travel, so long as the disclosure of the roundtrip purchase requirement in the advertisement is clear and conspicuous (i.e., prominent and proximate to the advertised fares).[1] Advertisements that do not include carrier-imposed fees and charges in the advertised base fare or that fail to properly disclose a round

[1] Letter from Office of Aviation Enforcement and Proceedings to U.S. and Foreign Air Carriers, March 9, 1995 (http://airconsumer.ost.dot.gov/rules/19950309.htm).

trip purchase requirement do not comply with section 399.84 or the Department's enforcement case precedent and constitute an unfair and deceptive trade practice in violation of 49 U.S.C. § 41712.[2]

Furthermore, effective December 31, 2001, the Transportation Security Administration (TSA) promulgated 49 CFR Part 1510, which imposed a security service fee in the amount of $2.50 per enplanement per passenger (with a $10 maximum per round trip) on most air transportation originating at airports in the United States. Pursuant to section 1510.7, all direct carriers are required to identify the security service fee as the "September 11th Security Fee" in advertisements and solicitations for air transportation in which the security service fee is not included in the advertised base fare. Failure to identify the September 11th Security Fee as required by the rule constitutes a separate and distinct unfair and deceptive trade practice in violation of 49 U.S.C. § 41712.[3]

Between January 5 and February 3, 2003, Aer Lingus ran a series of advertisements in several major newspapers across the country touting various base fares between the United States and Ireland ranging from $99 to $264. Immediately following each of these fares was the statement "each way." However, a fine print disclaimer at the bottom of the advertisements stated that the fares were, in fact, "one way… based on roundtrip travel." Placing the roundtrip requirement below and outside the fare box, as occurred in this case, has long been held to be insufficient notice in a newspaper advertisement and, therefore, to constitute violations of 14 CFR 399.84 and 49 U.S.C. § 41712.[4]

With respect to Aer Lingus' fare advertising on its Internet website, the Office of Aviation Enforcement and Proceedings (Enforcement Office) found that, during the booking process, applicable taxes and fees were not disclosed at the *first* point in which fares were displayed, in contravention of 14 CFR 399.84 and 49 U.S.C. § 41712. Instead, potential customers were presented initially with a web page listing a selection of outbound and inbound flights together with a base fare, thus allowing them to construct a complete itinerary with a total base fare. While there was nothing impermissible *per se* in this method of allowing consumers to choose their fares and construct itineraries, Aer Lingus failed to comply with section 399.84 by not disclosing the amount of additional taxes until a later point in the booking process on a subsequent web page after consumers were presented with the initial selection of fares and flights. Moreover, the carrier did not specifically identify the

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[2] *See, e.g.,* Air Jamaica, Ltd., Violations of 49 U.S.C. § 41712, 14 CFR Part 399, and 49 CFR Part 1510, Order 2003-9-5 (carrier separated its own "security fee" from its advertised base fares); Martinair Holland, N.V., Violations of 49 U.S.C. § 41712 and 14 CFR 399.84, Order 99-6-16 (carrier failed to disclose a roundtrip purchase requirement prominently and proximately to its advertised base fares).

[3] *See, e.g.*, British Airways, PLC, Violations of 49 U.S.C. § 41712 and 14 CFR 399.84, Order 2003-6-29; A Better Fare, LLC, Violations of 49 U.S.C. § 41712 and 14 CFR 399.84, Order 2003-1-12.

[4] *See, e.g.,* Air Jamaica, Ltd., Violations of 49 U.S.C. § 41712 and 14 CFR Part 399, Order 96-11-20; Northwest Airlines, Violations of 49 U.S.C. § 41712 and 14 CFR Part 399, Order 93-3-24.

September 11th Security Fee, which was one of the fees included in the amount broken out from the advertised base fares.

Furthermore, in both its newspaper and Internet advertisements, Aer Lingus broke out a number of additional taxes and fees that it disclosed in the form of a maximum amount, i.e., "taxes/fees/facility charges up to $80 not included." While this method of disclosure is fully acceptable when the fees broken out of the base fare are of a kind that may be broken out, the Enforcement Office found subsequently that included in this maximum amount of $80 was an $8 carrier-imposed "insurance levy" impermissibly broken out from the base fares in its advertisements, thus contravening 14 CFR 399.84 and 49 U.S.C. § 41712.

In mitigation, Aer Lingus points out that it is a small European airline with a very limited presence in the United States. Aer Lingus states that it takes its compliance responsibilities seriously and makes every effort to follow the Department's rules. Aer Lingus asserts that it had no intention of misleading or otherwise deceiving the traveling public through its advertising. To the contrary, Aer Lingus states that it strives to inform the traveling public fully about its fare offerings, notwithstanding the Department's findings with respect to a single advertising campaign. Aer Lingus also maintains that its treatment of the insurance/security surcharge on its website was consistent with the treatment of the surcharge in computer reservations systems, whose fares are taken from the same source as Aer Lingus' webfares.[5] Throughout this proceeding, Aer Lingus has cooperated fully with and sought guidance from the Department to assure that its advertisements and website booking process satisfy the Department's requirements. Aer Lingus took immediate action to correct its print and Internet ads, and the carrier has committed substantial resources to revising its website booking process with respect to the insurance security surcharge.

The Enforcement Office views seriously the obligation of all carriers to comply with Departmental regulations and to observe the statutory prohibition against engaging in unfair and deceptive practices. Accordingly, the Enforcement Office has carefully considered all of the available information, including that provided by Aer Lingus, but continues to believe that enforcement action is warranted. In this connection and in order to avoid litigation, the Enforcement Office and Aer Lingus have reached a settlement of this matter. Without admitting the violations described above, Aer Lingus consents to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR 399.84 and to the assessment of $20,000 in compromise of potential civil penalties otherwise assessable. Of this total penalty amount, $10,000 shall be due and payable within 30 days of the issuance of this order. The remaining $10,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless Aer Lingus violates this order's cease and desist or payment provisions, in which case the entire unpaid portion of this civil penalty shall become due and payable immediately and Aer Lingus may be subject to further enforcement action. The Enforcement Office believes this compromise is appropriate, serves the public interest, and creates an incentive for all carriers to comply fully with the requirements of 49 U.S.C. § 41712 and 14 CFR Part 399.

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[5] The Enforcement Office notes that Aer Lingus provided the fares with the separate security surcharge in the first instance to a tariff publishing company, which converted the data into digital form and provided it to computer reservations systems and to Aer Lingus for display on the carrier's website.

This order is issued under the authority contained in 49 CFR. 1.57a and 14 CFR 385.15.

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 Aer Lingus Limited violated 14 CFR 399.84 by causing to be published airfares in newspaper and Internet advertisements that failed to state the entire price to be paid by the consumer;

3. We find that by engaging in the conduct and violation described in paragraphs 2 above, and by not properly identifying in its advertisements the September 11th Security Fee, as required by 49 CFR 1510.7, Aer Lingus Limited also engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;

4. Aer Lingus Limited and all other entities owned and controlled by, or under common ownership and control of Aer Lingus Limited and their successors and assignees, are ordered to cease and desist from future violations of 14 CFR 399.84 and 49 U.S.C. § 41712;

5. Aer Lingus Limited is assessed a civil penalty of $20,000 in compromise of the civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3 above. Of the assessed penalty, $10,000 shall be due and payable within 30 days of the issuance of this order. The remaining $10,000 shall be suspended for one year following the issuance of this order, and then forgiven unless, during this time, Aer Lingus Limited violates this order's cease and desist or payment provisions, in which case the entire unpaid portion shall be due and payable immediately. Failure to pay the penalty as ordered will subject Aer Lingus Limited to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible enforcement action for failure to comply with this order; and

6. Payment of the civil penalty described above 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 attached instructions.

This order will become a final order of the Department 10 days after its service unless a timely petition for review is filed or the Department takes review on its own initiative.

By:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

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