

BEFORE THE DEPARTMENT OF TRANSPORTATION  
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS  
WASHINGTON, D.C.

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Benjamin Edelman, )  
third-party complainant )  
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v. ) Docket DOT-OST-2013-0024  
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American Airlines, Inc. )  
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**REPLY OF BENJAMIN EDELMAN**

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Dated: April 5, 2013

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**REPLY OF BENJAMIN EDELMAN**

1. My February 4, 2013 Complaint presented clear evidence of American Airlines employees misrepresenting carrier-imposed surcharge as “tax” in ordinary paid tickets booked by phone (pp. 1-2), in circle tickets booked by phone (p. 2), in award tickets booked by phone (pp. 2-5), in reaccomodating passengers after cancellation (pp. 5-6), and in around-the-world tickets booked online (pp. 6-7). I also alleged fuel surcharges of impermissible amounts and not supported with required calculations (p. 7), misrepresentations of carrier-imposed surcharges in customer correspondence (pp. 7-8), and failure to disclose all applicable fees in the first fare quote (pp. 8-9). I supported these serious allegations with exceptional proof including carefully-recorded calls and contemporaneous screenshots.

2. American's Answer attempts to thin my Complaint by ignoring false statements occurring before April 21, 2012, by claiming that my proof is insufficient, and by seeking shelter in the fact that, even if American employees and systems made false statements about "tax," the bottom line was correct. As detailed herein, these defenses fall flat a matter of law. I have offered ample evidence for the DOT to open a full investigation to determine the scope of the unlawful American practices I identified.

**I. My Complaint Properly Presents Practices Both Before and After the DOT's Notice of February 21, 2012**

3. My Complaint chronicles American staff and systems mischaracterizing carrier-imposed surcharges as "tax" both before and after the DOT's Notice of February 21, 2012, and both before and after April 21, 2012 (sixty days after the publication of that Notice).

4. American argues that "enforcement action based on ticket price quotations prior to April 21, 2012 would be inconsistent with the Notice" (Answer at pp.1-2). But the Notice does not call for the result American seeks. The Notice provides as follows:

The office will provide those subject to the full fare advertising rule and 49 U.S.C. 41712 60 days subsequent to the date of this notice to ensure they are in compliance before instituting enforcement action related to the issues covered in this notice.

5. Under the plain language of the quoted provision, the DOT stated its intention not to bring enforcement action as to practices that completely ceased before April 21, 2012. But the DOT nowhere disavowed enforcement action as to practices that began before April 21, 2012 and continued after that date. If a single unlawful course of conduct began before that date and continued after that date, the Notice does not promise to immunize the carrier for the portion of unlawful conduct preceding the Notice. To the

contrary, the delayed enforcement date serves only to protect carriers that wholly comply with the Notice by the date provided in the Notice.

## **II. American and Systems Continue to Mischaracterize Carrier-Imposed Surcharges as “Tax”**

6. While American suggests that the practices at issue are largely in the past, my experience is sharply contrary. To complete the record and provide evidence that the practices I alleged are still ongoing, I offer the following subsections showing false statements made by American employees and systems after the submission of my Complaint. These further false statements confirm that, contrary to American’s contention in its Answer, this matter is not moot.

### **A. American Employees Continue to Mischaracterize Carrier-Imposed Surcharges as “Tax” in Quoting and Canceling Award Travel**

7. American employees continue to mischaracterize carrier-imposed surcharges as “tax” in quoting award travel, and I have also found that American employees make similar false statements when canceling award travel.

8. On February 8, 2013, I called American Airlines telephone reservations staff to make an award booking for BOS-LHR. The representative quoted “tax” that was primarily a carrier-imposed surcharge. From the digital call recording<sup>1</sup>:

AA recording: Welcome to the Advantage Executive Platinum Desk! This call may be recorded.

Agent: American Airlines, Executive Platinum.

Edelman: Yes, for a new award travel.

Agent: Okay I can help you with that. From where to where?

Edelman: From Boston to London.

Agent: Departing on what day?

Edelman: February 10th, one-way.

Agent: You are looking for the non-stop flight?

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<sup>1</sup> Call recordings are posted to <http://www.benedelman.org/airfare-advertising/americanairlines.html>.

Edelman: Yes please, in First please.

Agent: Do you just need one seat?

Edelman: Just one, just me traveling. Agent: I have one seat on British Airways flight 214 on Sunday, tenth of February out of Boston at 9:10 in the evening, get into London at 8:25am on Monday morning. It's 62,500 miles and the taxes are \$438.20.

9. I issued this ticket with the genuine intent to travel on it, and I would have traveled on this ticket except that my plans changed in favor of other dates.

10. When I later needed to cancel this ticket, an American telephone representative indicated that the "taxes" would be refunded to my original form of payment. Here too, the agent misrepresented as "tax" certain charges that are actually carrier-imposed surcharges.<sup>2</sup>

11. The formal comment of Mike Borsetti is in accord, reporting an American representative mischaracterizing carrier-imposed surcharges as "tax" as of January 31, 2013. See DOT-OST-2013-0024-0010 at p.1: "The representative misstated the price of the new itinerary to me as 'taxes', when in reality the vast majority of it was in fuel surcharges."

**B. American Employees Continue to Mischaracterize Carrier-Imposed Surcharges as "Tax" in Quoting Ordinary Paid Travel**

12. American employees continue to mischaracterize carrier-imposed surcharges as "tax" in quoting ordinary paid travel, including misstatements of many hundreds of dollars on tickets with little or, I believe, no travel on other carriers.

13. On February 20, 2013, I put an itinerary on hold on AA.COM at the lowest available fare, then called American telephone reservations staff to request that the ticket be priced in a "B" fare. (I sought to use a restricted upgrade certificate not valid on

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<sup>2</sup> Before placing this call, I did not consider the possibility that an American employee would make a false statement of "tax" as I canceled the ticket. I therefore did not record this call and do not have a call recording of it.

the initial fare.) After an extended discussion in which the American representative struggled to find the B fare, I was quoted “tax” that was primarily a carrier-imposed surcharge. From the digital call recording:

AA recording: Welcome to the Advantage Executive Platinum Desk! This call may be recorded.

Agent: American Airlines, Executive Platinum

Edelman: Yes, could I give you a record locator?

Agent: Yes, go ahead.

Edelman: [reads record locator]

Agent: All right, and what did you want to change on this?

Edelman: I wanted to try to price it in a different fare class, B as in Bravo. I don't need the changeability or refundability. Just much easier to upgrade with some upgrade certificates that I have. It looks like there might be a very good B-fare on this route.

Agent: Well, let me check and see one moment.

...

Agent: We're getting a rate of \$1303.10, and that's the BLX going out and the BLW coming back.

Edelman: Could you confirm the fare versus the tax for me, just jot it down here?

Agent: All right Mr. Edelman, thanks again for holding. Your taxes were \$575.10. Your fare was \$728.

14. After receiving this fare quote, I asked that the reservation be placed on hold. I later called back to make small changes to routing and dates. I was again quoted a “tax” that consisted primarily of carrier-imposed surcharge. From the recording:

AA recording: Welcome to the Advantage Executive Platinum Desk! This call may be recorded.

Agent: Executive Platinum Desk! This is [agent name omitted]

Edelman: Yes, could I give you a record locator?

Agent: Yes, what is the locator?

Edelman: [reads record locator] The outbound is just perfect. For the return I'd like to change to March 15th.

Agent: March 15th?

Edelman: Yes, and it'll be Boston to London. I don't need to go to Manchester after all. We'll see if that's possible. And I prefer to route via Chicago for a better night's sleep if I can. Uh, flight American 1081, connecting to 98 please.

Agent: If we keep it in B inventory, that would be \$1325.50, Mr. Edelman.

Edelman: What's the fare and what's the tax?

Agent: Yes, it is 496 pounds is the base fare, the tax is... oh, in American dollars, that's \$767, and it's, uh, \$554.50 of taxes. Let me double-check.

Edelman: OK, that adds up.

Agent: Uh huh, that's correct sir, that's \$554.50 of taxes.

15. Because I sought to pay in part with vouchers, I traveled to the Manchester, UK airport ticketing desk (the closest ticketing location to me on that day). At the airport, I requested a printout showing the total amount I paid, inclusive of vouchers. Airport staff provided the document shown in Attachment 1. The document reports "taxes" of GBP 359.92, which approximately matches the \$554.50 to \$575.10 quoted by American's telephone representatives. Two lines below, I believe that the document reveals that the largest "tax" is "YR." I understand "YR" to be a code which travel professionals recognize as a carrier-imposed surcharge rather than a genuine "tax." However, ordinary consumers have no way and no reason to know the meaning the label "YR," particularly when it appears within the "tax" heading and particularly when the amount at issue is included within the total "tax."

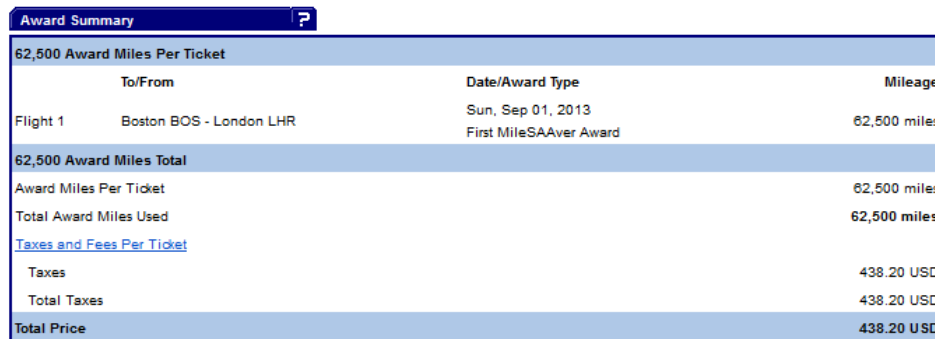
16. This ticket included only a single 151 mile segment on British Airways, MAN-LHR. Furthermore, I believe that the fare calculation (visible within Attachment 1) indicates that even if I had chosen a routing wholly on American (e.g. MAN-JFK-BOS-LHR or MAN-JFK-BOS-ORD-LHR), the same carrier-imposed surcharge would have been collected and would have been presented in the same way to me, both by telephone and in the written fare quote.



**C. AA.COM “Itinerary Summary On Hold” Emails Systematically Mischaracterize Carrier-Imposed Surcharges as Tax**

17. On April 3, 2013, I used AA.COM to search for award travel from Boston to London. I was quoted the required number of miles as well as “taxes & fees.” I selected an option labeled “Hold” to temporarily reserve the reservation.

18. I immediately received the email shown in Attachment 2.<sup>3</sup> The price section of the email provides as follows:



Award Summary			
62,500 Award Miles Per Ticket			
	To/From	Date/Award Type	Mileage
Flight 1	Boston BOS - London LHR	Sun, Sep 01, 2013 First MileSAAver Award	62,500 miles
62,500 Award Miles Total			
Award Miles Per Ticket			62,500 miles
Total Award Miles Used			62,500 miles
<a href="#">Taxes and Fees Per Ticket</a>			
Taxes			438.20 USD
Total Taxes			438.20 USD
Total Price			438.20 USD



19. The row labeled “Taxes” falsely reports that “Taxes” on this ticket are 438.20 USD. The subsequent row labeled “Total Taxes” reports, again falsely, that “Total Taxes” on this ticket are 438.20 USD. In fact, these amounts consist primarily of carrier-imposed surcharge.

20. American may be expected to seek shelter in the fact that the preceding row reads “Taxes and Fees Per Ticket.” But the format and indentation of the collection of rows suggests that the “Taxes and Fees” heading encompasses, potentially, multiple lines to follow – some of which may be are “Taxes” and some of which may be “Fees.” When American subsequently presents only lines reading “Taxes,” and no lines reading “Fees,” American necessarily (but falsely) tells consumers that the amount at issue on

<sup>3</sup> I present the email exactly as I saw it in Gmail, except that I have obscured the names of personal Gmail contacts who are by default presented by Google (left sidebar). Their names are irrelevant to this matter.

this specific ticket consists solely of “Taxes” and not at all of “Fees.” In this context, the presence of the words “and fees” implies that other tickets may include fees, but that this ticket does not do so.

21. American made these statements entirely before purchase. Indeed, American presents a red “Purchase” button at both the top and bottom of the email.

22. American may be expected to argue that prior statements on AA.COM correctly characterized the amounts at issue as “Taxes & Fees”. But American is obliged to be accurate in *every* statement to consumers, not just in some statements to consumers. Indeed, the DOT has previously found “unfair and deceptive in violation of section 41712” a carrier that “properly listed” fare and tax on initial pages but later added a false statement of “Tax” that was not truthful. See February 21, 2012 Notice at p.2 (“... but the confirming page...”).

23. American cannot seek shelter in the hyperlink associated with the label reading “Taxes and Fees Per Ticket.” For one, this hyperlink is nonfunctional: the hyperlink mistakenly points to a relative URL, /i18n/disclaimers/taxfeedisclaimc.jsp , which is not a valid URL when referenced from an email. Clicking the hyperlink therefore yields no popup, notice, or other information. The correct URL, <http://www.aa.com/i18n/disclaimers/taxfeedisclaimc.jsp> , is a valid web page but offers no support for American’s false characterization of a carrier-imposed surcharge as “Tax.”

### **III. It Is Deceptive to Mischaracterize a Carrier-Imposed Surcharge as “Tax”**

24. Facing the indisputable evidence in my Complaint that multiple American employees mischaracterized carrier-imposed surcharges as “tax,” American resorts to arguing that these misstatements were not “actual material consumer deception” (Answer

at p.3). But the DOT has already found that when carriers use the term “taxes” to describe carrier-imposed fees, those practices “were deceptive and in violation of section 41712” (DOT February 21, 2012 Notice at p.1) (emphasis added).

25. American attempts to recast the question as “whether American actually deceived any consumer regarding the full amount to be paid for his or her air transportation” (Answer at p.3, emphasis added). But this is contrary to the DOT’s February 21, 2012 Notice. Rather, the notice confirms that a false statement of “tax” is deceptive in and of itself, even if the quoted total is accurate.

26. There is ample intuitive, legal, and social science basis for the DOT’s prior conclusion that a false statement of “tax” is unfair, deceptive and contrary to the public interest. A full briefing of this question appears to be beyond the scope of this docket, particularly in light of the DOT’s prior conclusion on this exact subject.

#### **IV. AA Telephone Agents Regularly Quote Incorrect “Tax” without Any Special Customer Inquiry**

27. American’s Answer suggests that its employees’ statements are in some way unusual and limited to answers to my “oral inquiries” (Answer at p.4). American mischaracterizes the transcripts in my Complaint. In the majority of the examples I provided, American employees quoted “tax” without any special prompting from me and without any special “inquiry” from me about tax.

28. Specifically, of the six call recordings in my initial Complaint, four entail American employees affirmatively but falsely quoting “tax” without any request from me. See the four transcripts at heading “Ongoing Misrepresentations by American Airlines Telephone Representatives: Award Bookings” in my Complaint (pp. 2-5). My January 14, 2012 test call is representative: After confirming that award seats were

available on the dates I requested, and without any special request from me, the American employee stated “All right, round trip in first class. It's going to be a total of 125 thousand miles and it's giving me taxes of \$938.80.” The relevant transcript excerpts are provided in my initial Complaint, and full call recordings are available at <http://www.benedelman.org/airfare-advertising/americanairlines.html> .

29. My February 8, 2013 booking (presents at paragraph 8 above) offers two additional, and more recent, example of American employees mischaracterizing carrier-imposed fees as “tax” without a customer affirmatively inquiring as to whether the charges are fare or tax.

#### **V. American Is Liable for Its Employees’ Misstatements**

30. American seeks shelter in the fact that “American has provided to its reservations agents ... all of the information necessary to fully and accurately” present fares (Answer at p.4). But American must do more than provide accurate information to its employees. Rather, American must assure that its employees are in fact truthful in their statements to customers. My Complaint provides ample evidence that numerous American employees in multiple departments (including Executive Platinum reservations, the Around the World desk, and customer correspondence) mischaracterize carrier-imposed fees as “tax.” Whether these misstatements result from the information available to American’s employees, the training employees have received, the computer displays provided to employees, or other causes to be determined by DOT, American is liable for its employees’ misstatements. It is no answer to claim that employees had accurate information available and could have made accurate statements had they chosen to do so. They did not. They are employees acting for the benefit of their employer, and

under the well-established principle of *respondeat superior*, American is liable for their actions.

31. Nor is it any answer to claim that American's employees were "confus[ed]" (Answer at p.14). American's employees made unqualified, unequivocal, and unambiguous statements about "tax" which simply did not exist. Multiple employees made the same false statements in the same circumstances. The false statements were repeated both orally and in writing. Call recordings and emails reveal no sign of "confusion," misunderstanding, or deviation from training or standard practice.

**VI. I Properly Alleged that American Collects Fuel Surcharges that Are Not a Reasonable Estimate of Fuel Costs Above a Baseline**

32. My complaint alleged that when American collects a fuel surcharge for travel on British Airways, the surcharge "is not a reasonable estimate of the per-passenger fuel costs incurred by the carrier above some baseline" (Complaint p.7). American claims that my Complaint offers "no support" for this claim (Answer p.9). American is mistaken. Specifically, my Complaint states: "See the evidence in my companion complaint, 'complaint as to price advertising violations by British Airways'" (p.7). My British Airways complaint was formally docketed as DOT-OST-2013-0025, just one day after my Complaint in this matter; it is prominently available on my web site (cross-linked with the call recordings that American's counsel have reviewed), and otherwise publicly known. In light of the clear citation in my Complaint, American cannot seriously claim to be unaware of my companion complaint as to British Airways. My arguments and factual support are properly before American, and American should answer in substance.

**VII. American Is Liable for the Fees It Collects for Travel on Other Carriers**

33. American understates its control over the fees that it collects.

34. As a threshold matter, American is under no obligation to collect any surcharge it deems unlawful. For example, if American concludes that British Airways fuel surcharges are not a reasonable estimate of fuel costs above a baseline, or are otherwise unlawful, American could refuse to sell a British Airways flight, or any other flight. Even if, as American argues, “the fees associated with award travel booked by American on another airline are within the discretion of that airline,” American is under no duty to sell tickets with fees it believes to be unlawful; it could instead refuse to sell tickets that would be subject to an unlawful fuel surcharge.

35. Furthermore, contrary to American’s Answer at p.9, American does far more than “arrange” travel on British Airways. Rather, American describes the charges to customers, seeks customers’ agreement to pay the charges, charges customers’ payment cards, serves as the merchant of record, and issues a ticket for travel. These many aspects of control rightly oblige American to comply with applicable law as to such charges.

36. American’s special relationship with British Airways makes it particularly unconvincing for American to argue that the surcharges at issue are “imposed by British Airways” and “within the discretion of that airline,” or to argue that that “American merely collects” the fees at issue (Answer at p.9). Just five years ago, American and British Airways sought and received DOT permission to coordinate pricing for their joint services. See Joint Application for Antitrust Immunity, DOT-OST-2008-0252-0001 at p.14 (“The Joint Applicants will cooperate in establishing fares, rates and pricing strategies for services provided under their alliance agreements and the JBA”). American

and British also indicated that they would “broadly shar[e] revenue on a metal neutral foundation” (Id. at p.11). There can be no serious dispute that carrier-imposed surcharges and fuel surcharges are “revenue” and “fares, rates and pricing” within the meaning of these statements. Thanks to the full antitrust immunity DOT provided to American and British Airways based on their representations in the 2008-0252 docket, American both influences and benefits from British Airways surcharges. Having sought these privileges from DOT and represented to DOT that it would use them, American cannot now disavow them by pushing all responsibility to British Airways.

37. See also the Comments of Mike Borsetti, DOT-OST-2013-0024-0011 at p.3 (“American directly benefits from the ‘British Airways’ fuel surcharges it charges on awards”).

**VIII. American Is Liable for False Statements of “Tax” on Around-The-World Tickets that Are Ticketed by AA, No Matter What Agent Quotes the Fare**

38. Under settled DOT authority, American is equally liable for misstatements on the OneWorld Around the World booking tool. American argues that that tool “is the product of oneworld Management Company and not American Airlines” (Answer p.8), suggesting that American is not liable for false statements made by that tool. But the DOT has long held that airlines are responsible for the actions and omissions of their agents, including travel agents acting on their behalf. The DOT most recently restated this principle in its Final Rule for Enhancing Airline Passenger Protections, which at 23143 reaffirms that “airlines have always been legally responsible along with their agents for their agents’ advertising violations and they will continue to be under the revised rule.” American is jointly and severally liable for the wrongful actions made by its agent oMC in the course of advertising pricing for American electronic tickets.

**IX. The DOT's February 21, 2012 Notice Does Not Immunize Carriers from Consumer Claims Before or After That Date**

39. In my March 25, 2012 letter to Gary Kennedy, I sought a refund for carrier-imposed surcharges that had been falsely described to me, prior to purchase, as "tax." See Attachment 12 to my Complaint. Mr. Nelson's June 26, 2012 response denied that refund in part because, he argued, the DOT's February 21, 2012 Notice only became effective on April 21, 2012 and thus, he argued, could not apply to the practices I complained about. See Attachment 13 to my Complaint.

40. The plain language of the DOT's February 21, 2012 Notice confirms that the Notice does nothing to extinguish meritorious claims a consumer might have, as to conduct occurring either before or after that Notice. Neither Mr. Nelson's letter nor American's Answer quotes or cites any contrary provision of the Notice. American's Answer characterizes this portion of our dispute as me "tak[ing] issue with the legal position taken by American" and me "disput[ing] American's reading of the notice." But American does more than merely misinterpret the Notice. Rather, American seeks to use the Notice as a shield to meritorious consumer claims. The DOT should not allow its Notice to be misused in this way. Instead, the DOT should explicitly advise carriers that the Notice offers neither support nor protection for a carrier denying refunds to customers who suffered misrepresentation of carrier-imposed fees as "tax" prior to purchase.

**X. The DOT Should Reject American's Extraneous Defenses**

**D. An Employee's Failure to "Completely Underst[an]d" a Clear Customer Request Cannot Excuse a Violation of the DOT's First Price Quote Rule**

41. My Complaint alleged that after I requested award travel for two passengers I described as "relatives," an American telephone reservations representative failed to mention telephone ticketing fees that American later required me to pay before a



ticket could be issued. I claimed that this practice violated the DOT's requirement that "the first price quote presented must be the full price, including all taxes, fees and all carrier surcharges" (emphasis added). See Complaint, p.8.

42. In its Answer, American responds that "Since virtually all calls to the AAdvantage Executive Platinum desk are by members for their own travel, such that no telephone reservation fees normally apply, the first agent may not have completely understood the nature of the transaction and, therefore, the agent may have inadvertently failed to mention the applicable telephone reservations fee" (p.12). But the agent had specifically asked me for the names of both passengers, and I gave two names both distinct from my own (differing first names and surnames). I believe I also provided date of birth for both passengers (both different from my own date of birth), consistent with American's standard requirement that dates of birth be provided when a reservation is placed on hold. I believe I had even casually indicated my relationship with the travelers. American's computerized records should be in accord, confirming that passenger names and dates of birth were both entered when the itinerary was first placed on hold, and necessarily confirming that I was not among the passengers.

43. If an American reservations employee mistakenly believed that I was a member of the traveling party, that belief was erroneous. Specifically, that belief was irreconcilable with the undisputed facts of my request (including my providing two passenger names not my own and two dates of birth not my own) and manifestly unreasonable. In any event, the DOT "first price quote" rule offers no exception for employee error. Rather, after an American employee quoted a fare for the itinerary I requested, American was obliged to honor that fare. Instead, American refused to do so,

despite multiple requests from me that American reconsider this position (including the two replies in Attachment 11 to my Complaint).

44. American also errs in arguing that it did not violate the “first price quote rule” because the full price was made known before I purchased the ticket. The rule could not be more clear: “the first price quote presented must be the full price” (emphasis added). The plain language of the rule leaves no room for a carrier to add additional fees in a subsequent phone call.

**E. My Call Recordings Are Accurate and Appropriate**

45. American’s Answer questions whether my call recordings are authentic. Specifically, in its Supplement to Answer at p.1, American claims that “the website recordings appear to have been edited.” I edited the files only for listeners’ convenience, specifically to remove irrelevant discussion (omitting silence and discussion of extraneous matters such as ticketing deadlines and change penalties). Each cut is marked with a distinctive “fast-forward” sound. The limited edits make no change to the discussion relevant to the practices at issue.

46. For readers’ convenience, the transcripts in my Complaint similarly present only the relevant material. I saw no need to transcribe (or lengthen my Complaint to include) irrelevant sections with the additional details discussed above. I removed no relevant information.

47. As indicated in my initial Complaint, I retain full call recordings in digital form. On March 23, 2013, I indicated to AA counsel that I would be happy to provide full digital recordings (without any edits or cuts of any kind). On March 25, 2013, I modified <http://www.benedelman.org/airfare-advertising/americanairlines.html> to provide full call recordings (edited only to remove personal information such as my

AAAdvantage number, all agent names, all record locators, all payment card numbers) but retaining all other extraneous discussion.<sup>4</sup>

48. Importantly, American itself authorized my preparation of these call recordings. American admits that its telephone reservation system automatically and in every instance states “this call may be recorded,” a statement which I included in each transcript and in each excerpted recording. The literal meaning of this statement is to authorize both American and any interested customer to record the call if they care to do so. This grant of permission is unqualified and unambiguous. Even if it were ambiguous, standard principles of contract interpretation would require that any ambiguity be construed in my favor and against American, further buttressing and reaffirming my authorization to record the calls. Finally, American employees providing fare quotes to customers have no reasonable expectation of privacy in their statements (particularly since their employer already puts them on notice that they may be recorded), nor does American have any proper grounds to object to such recordings.

49. Even as AA criticizes my call recordings as improper, American elsewhere criticizes my failure to prepare and provide recordings of *all* the calls at issue. See Answer, footnote 8 at p.11, criticizing a section of my Complaint as unreliable in part because the call was “unrecorded.”<sup>5</sup> See also p.12, criticizing a section of my Complaint as difficult to evaluate because “there is no recording of the call to verify the details of this telephone exchange.” But I and others had no specific reason to expect deceptive

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<sup>4</sup> As to the two calls discussed in Section II.B of this Reply, the calls are particularly lengthy and contain extended discussion as to my travel plans. I therefore consider the full call recordings unsuitable for public posting, but I stand ready to provide the full call recordings to AA counsel and to DOT. My excerpted transcripts and excerpted call recordings present all material relevant to the practices here at issue.

<sup>5</sup> American also criticizes my complaint as “second hand” to the extent that it relies on interviewing my colleague Shawn Cole. For a first-hand account directly from Mr. Cole, see DOT-OST-2013-0024-0009. In all material respects, Mr. Cole’s first-hand submission matches my complaint.

practices in these calls with American employees, and in that period it was not my standard practice to record calls with American employees. To the extent that I do have call recordings, my recordings should be applauded for providing an exceptionally clear basis for DOT to evaluate the American practices I experienced. There simply is nothing improper about my call recordings.

**F. My Calls to the Executive Platinum Desk Are Representative of Standard Practice by American Reservations Employees**

50. In its reference to my calls to the Executive Platinum Desk (Answer at p.3), American seems to suggest that my experience in some way results from my use of that department rather than some other part of American. I understand that American's Executive Platinum Desk representatives are telephone reservations employees with supervisor status. As such, they might reasonably be expected to provide service of at least the quality and accuracy of other American reservations employees. Furthermore, my Complaint also demonstrated misstatements from other departments (including the Around the World Desk and passenger correspondence). American's repeated references to the Executive Platinum Desk are irrelevant to my Complaint.

**G. I Have Received No Refunds or Other Compensation for the Practices at Issue**

51. American's Answer occasionally suggests that I have received refunds or other compensation from American. For example, in Answer footnote 1 (p. 3), American says that "from time to time Mr. Edelman corresponded with American seeking refunds for various reasons and on several occasions American agreed to do so as an accommodation to Mr. Edelman." But none of these refunds were in any way related to the matters raised in my Complaint. I believe most or all of the refunds I received were

exactly as provided by American's tariff (e.g. voluntary refunds of refundable tickets, involuntary refunds after flight cancellation).<sup>6</sup> These refunds are entirely irrelevant.

52. American also suggests that I have received AAdvantage miles "on numerous occasions in the past" (Answer p.16). I believe each of these credits was an ordinary customer service matter (e.g. broken seat, involuntary downgrade for which I agreed to accept miles rather than cash), unrelated to questions of pricing or price advertising and also entirely irrelevant. In a million miles of paid flying, such incidents are to be expected. They are irrelevant to the dispute at hand.

53. In its Supplemental Answer at ¶37, American claims to have provided a travel voucher in an amount matching the telephone ticketing fee that was not disclosed in the first fare quote. I received no such voucher. In a brief investigation, American counsel and I were unable to determine why the transmission email did not reach me. In any event, even if I had received the voucher, it would have been restricted in various ways (e.g. usable only in a certain time period for certain kinds of tickets) and hence less valuable than the funds charged as a ticketing fee. Thus, even if I had received the voucher, it would not moot my Complaint of a fee impermissibly not included in the first fare quote. Furthermore, American indisputably previously refused to refund the fee (including the multiple denials presented in Attachment 11 to my Complaint). In addition, the purported voucher was sent, according to American's records, fully four months after my first message to American on this subject, fully two months after my final message to American on this subject, and after at least three separate denials from

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<sup>6</sup> I recall one complaint relating to price advertising: I once questioned American's failure to disclose an "upgrade tax" at the time in the manner I believed to be required by law. American provided either a refund or a voucher, which resolved this dispute. This was at least five years ago and wholly unrelated to the surcharge matters raised in my complaint in this docket.

American on this subject (including internal escalation, per Attachment 11: "... reaffirmed our decision ..."). The delay and prior denials confirm that American's policy was to collect and to retain a fee not disclosed in the first fare quote, notwithstanding the DOT's "first fare quote" requirement.

#### **H. American Mischaracterizes the Refund I Previously Requested**

54. American mistakenly claims that my letter of December 31, 2011 to American's counsel sought "a refund of \$8,261.60" (Answer p.2). The plain language of the letter reveals otherwise.

55. I wrote that "the agent told me I had been charged 'fuel tax collection by British Airways' of \$309.60, \$251 (for each of two passengers), and \$502." Because no such "tax" exists, I sought a refund of any amount that was "label[ed] as 'tax' [but] is not required by any law or regulation, and that is not remitted to any government, airport, or similar authority." See Attachment 3 to my Complaint.

56. The amount at issue, as to the three tickets there at issue, is  $\$309.60 + (\$251 * 2) + \$502 = \$1,313.60$ . Contrary to American's allegation, I never requested a refund of \$8,261.60, not in my December 31, 2011 letter nor anywhere else.

#### **I. American's References to Statements on AA.COM Are Irrelevant when AA Telephone Reservations Employees Make Contrary Statements**

57. American has repeatedly sought shelter in information that was available at AA.COM, even when its telephone reservation employees provided false statements of "tax." For example, in its Answer, American relies on "the AA.com booking path which clearly and correctly labeled all applicable taxes and carrier charges" (p.2). Similarly, Mr. Kennedy's January 11, 2012 letter to me (Complaint, Attachment 4) presents AA.COM statements as to the existence of fuel surcharges as well as, American argues, correct presentation of actual "tax" at AA.COM.

58. When a customer purchases a ticket in a telephone call to an American telephone reservations employee, statements on AA.COM are irrelevant. Crucially, for each of the tickets for which American seeks shelter in AA.COM statements, I purchased the ticket via a telephone call to American telephone reservations employees. I clearly conveyed this fact to American in my letter of March 25, 2012: “In your letter of January 11, you describe the messages that might have appeared on screen had I used AA.COM to purchase certain travel .... But in fact I was unable to purchase this ticket on AA.COM due to its complexity .... I therefore ticketed this itinerary via AA telephone reservation agents” (Complaint, Attachment 12) (emphasis added). I also pointed out that during the relevant period, award travel on British Airways could only be booked by telephone and not on AA.COM, making it particularly unlikely that customers would look to AA.COM for statements about the taxes or fees that apply to such bookings. Finally, in the event of a conflict between a general statement on AA.COM and a personalized fare quote from a telephone reservations employee processing a customer’s specific itinerary, the customer rightly and reasonably relies on the latter. Accurate general statements somewhere on AA.COM cannot cure the false statements made by an American telephone employee in response to a customer’s individual request.

59. I have been abundantly clear that I ticketed these tickets by making telephone calls to American employees. Yet AA continues to describe these itineraries as “air fare purchases [I] made on aa.com” (Answer p.2) and to seek shelter in statements that could have appeared at AA.COM. The DOT should reject American’s reliance on these AA.COM statements as irrelevant, illogical, and inapt.

**XI. DOT Should Order American to Provide Refunds to Affected Passengers, Insist on the Largest Assessment Available at Law, and/or Offset Refunds Against an Assessment**

60. Relying on *Statland v. American Airlines*, 998 F.2d 539, 541 (7th Cir. 1993), American argues that it is “beyond the DOT’s jurisdiction to order” refunds to ticket purchasers (Answer at p. 14). But *Statland* holds nothing of the kind. In *Statland*, American Airlines withheld funds which a customer claimed should have been refunded. The customer filed suit in federal court under Section 411(b) of the Federal Aviation Act, which the *Statland* court rejected, holding that there is no private right of action under 411(b). This is inapposite to the matter at hand. The unavailability of a private right of action in federal court in no way implies that the DOT lacks jurisdiction. Quite the contrary, the *Statland* court explicitly instructed that plaintiff to proceed to the DOT: The final sentence of the decision provides that “[i]f [Statland] wants American to change its ticket refund policies, she may complain to the Department of Transportation.”

61. Other than its misplaced reliance on *Statland*, American offers no authority for its contention that the DOT lacks authority to order refunds to affected passengers.

62. In the event that the DOT nonetheless concludes that it lacks the authority to order American Airlines to provide refunds to affected passengers, or that that the DOT otherwise declines to order American to do so, the DOT should impose the largest assessment available at law. While giving appropriate weight to any mitigating factors American may raise, the DOT should note American’s considered and repeated refusal to offer refunds even to passengers who capably document the false statements made by American representatives and who specifically request such refunds. American’s refusal



to provide such refunds – retaining ill-gotten gains from false statements by its employees and its systems – is proper cause for a larger assessment.

63. Finally, if the DOT declines to order American to make refunds to affected passengers, DOT should provide in its assessment that if American makes refunds to affected passengers, some or all of those refunds are offset against the assessment resulting from this matter. See e.g. *Spirit Airlines Inc. Violations of 49 USC §41712 and 14 CFR 399.84*, docket OST-2008-0031-0019, a consent order resulting certain Spirit price advertising practices. The consent order in that matter provided that the assessment “may be offset for verified refunds paid to customers for ... fees charged to customers in violation of” applicable law and regulation (p.3).

## **XII. DOT Precedent Supports Considering the Aggravating Factors I Cite**

64. American argues that the “aggravating factors” I cite are not “worthy of weight” in the DOT’s proceedings (Answer at p.15 and Supplement at ¶47). But DOT has repeatedly cited many of these same factors. See e.g. DOT-OST-2012-0002 Order 2012-10-1, *British Airways Plc, Violations of Articles 17 and 19 of the Montreal Convention, 14 CFR 399.84 and 49 U.S.C. §41712*, citing “the nature and extent of the violations described herein, and the size and sophistication of the carrier” as factors to be considered in setting the amount of the compromise assessment. Page 10 of my Complaint noted several of the same factors that the DOT flagged in its 2012-0002 decision as to British Airways. These factors deserve weight for the same reasons that led DOT staff to apply the factors in the British Airways matter and in other matters.

### **XIII. The Public Interest Favors Further DOT Investigation**

65. The public interest favors further DOT investigation due to the following factors:

66. American employees and systems made statements that were literally false – asking consumers to pay “tax” in amounts that never existed. Literal falsity, in statements made to customers as to price prior to purchase, is inherently unfair and deceptive and favors further investigation by DOT to determine the full scope of activity.

67. The amounts at issue are substantial. American regularly charged many hundreds of dollars of nonexistent “tax” on a single ticket.

68. American’s false statements are likely to deceive consumers into believing that government taxes and fees associated with travel are higher than is actually the case.

69. American’s false statements inflate users’ understanding of the value of American’s AAdvantage program. American’s false statements cause consumers to believe that their “award” redemptions require only cash payment of genuine government-imposed taxes, when in fact there are large carrier-imposed surcharge copayments. American’s false statements thereby induce consumers to ascribe greater value to AAdvantage miles than is actually the case, causing consumers to endeavor to earn AAdvantage miles to a greater extent than they otherwise would.

70. American’s misstatements of “tax” are likely to extend beyond the specific areas I have uncovered. I have personally found such misstatements in seven contexts (telephone booking of paid tickets, telephone booking of award tickets, telephone bookings of circle tickets, telephone cancelation of award tickets, customer correspondence, online booking of circle tickets, and online award hold confirmation emails) and I have heard from others about similar misstatements in two contexts

(reaccommodation after cancellation and reaccommodation after aircraft downgrade).

These myriad contexts suggest that other contexts are probably unknown. Indeed, I uncovered American's false statements in online award hold confirmation emails only on April 3, 2013. A DOT investigation is likely to uncover other contexts, unknown to me and not disclosed by American, in which American employees and systems mischaracterize carrier-imposed surcharges as "tax."

71. Further DOT investigation can appropriately expand the factual record. My Complaint presented only those practices of which I have knowledge, based on my own travels, the test calls I performed, and (where indicated) the experiences of others who both noted improprieties in their experiences and conveyed their experiences to me. In contrast, DOT can obtain superior evidence including call recordings prepared by American in its ordinary course of business (which may reveal other false statements made to other customers); training materials, scripts, and on-screen displays that facilitate the oral statements of American's telephone representatives (which may reveal how employees were trained to present carrier-imposed fees); templates and change logs for web site fare quotes and receipts (which may reveal what statements American systems made to customers on an automated basis, including the full time period during which these statements were made); and customer complaints (which may reveal whether other consumers recognized and complained about improprieties, and if so how American responded to those complaints).

72. The public interest also favors further DOT investigation because American's actions stand sharply in contrast to DOT regulation and to the DOT's February 21, 2012 Notice. The DOT gave carriers every opportunity to comply with

DOT's requirements, including a 60-day enforcement delay. Now that there is evidence that American did not comply, DOT should endeavor to determine the full scope of that noncompliance.

Pursuant to Title 18 United States Code Section 1001, I certify that I have not in any manner knowingly and willfully falsified, concealed or failed to disclose any material fact or made any false, fictitious, or fraudulent statement or knowingly used any documents which contain such statements in connection with the preparation, filing or prosecution of the pleading. I understand that an individual who is found to have violated the provisions of 18 U.S.C. section 1001 shall be fined or imprisoned not more than five years, or both

Respectfully submitted,

/s/ Benjamin Edelman

Benjamin Edelman

Attachment 1

\*PQ

PRICE QUOTE RECORD -- DETAILS

PQ 1

	BASE FARE		TAXES	TOTAL
	GBP496.00		352.92XT	GBP848.92ADT
XT	65.00BB	35.42UB	3.50YC	4.50XY
	3.20XA	3.20AY	213.00YR	22.20US
	2.90XF			

ADT-01 BLXUKJB BLWUKJB

LAST DAY TO PURCHASE 24FEB

MAN BA X/E/LON AA BOS M362.66BLXUKJB AA X/E/CHI AA LON 10M

434.30BLWUKJB NUC796.96END ROE0.621791 XFORD4.5

NONREFUNDABLE/RESTRICTIONS APPLY

01	O	MAN	BA	1373B	25FEB	930A	BLXUKJB	25FEB	25FEB	01P
02	X	LHR	AA	109B	26FEB	955A	BLXUKJB	26FEB	26FEB	01P
03	O	BOS	AA	1081B	15MAR	755P	BLWUKJB	15MAR	15MAR	01P
04	X	ORD	AA	98B	15MAR	1025P	BLWUKJB	15MAR	15MAR	01P

LHR  
BAG ALLOWANCE -MANBOS-01P/BA/EACH PIECE UP TO 50 POUNDS/23  
KILOGRAMS AND UP TO 81 LINEAR INCHES/208 LINEAR CENTIMETERS  
2NDCHECKED BAG FEE-MANBOS-GBP40.00/BA/UP TO 50 POUNDS/23 KILOGR  
AMS AND UP TO 81 LINEAR INCHES/208 LINEAR CENTIMETERS\*\*

BAG ALLOWANCE -BOSLHR-01P/BA/EACH PIECE UP TO 50 POUNDS/23  
KILOGRAMS AND UP TO 81 LINEAR INCHES/208 LINEAR CENTIMETERS  
2NDCHECKED BAG FEE-BOSLHR-GBP40.00/BA/UP TO 50 POUNDS/23 KILOGR  
AMS AND UP TO 81 LINEAR INCHES/208 LINEAR CENTIMETERS\*\*

ADDITIONAL ALLOWANCES AND/OR DISCOUNTS MAY APPLY

\*\*BAG FEES APPLY AT EACH CHECK IN LOCATION

MAN MAN 552B 0341/22FEB STATUS-ACTIVE

PRICE-SYS

MAN.MAN552B 0343 22-FEB-2013 A9F248

Attachment 2

Google  Ben Ed

Gmail

**COMPOSE**

**Inbox**  
Sent Mail  
Drafts (5)  
Spam (206)  
Trash  
Notes  
Personal  
Travel  
More ▾

Search people...

**AA.com Itinerary Summary On Hold**

**American.Airlines@aa.com** via bounce2.pobox.com 8:54 PM (34 minutes ago) ☆

**AmericanAirlines**  
AA.com

Reservations | AAdvantage Account | Fare Sales & Offers

Dear BENJAMIN EDELMAN,

Thank you for making your travel arrangements on AA.com! Your requested itinerary is now ON HOLD. Details below.

To ensure that your reservation is not canceled you must complete the purchase of this reservation by clicking the "Purchase" button on this email, or by using the "My Reservations" section on [www.aa.com](http://www.aa.com). Award reservations 20 days or less from the date of departure will incur a \$75USD charge. An additional \$75 USD will be added for each additional award processed from the same account at the same time.

If you have purchased AAdvantage miles, you must return to AA.com to complete the purchase of your Award reservation once the miles have posted to your AAdvantage account. Otherwise, your award reservation will be canceled.

**Earn 30,000 AAdvantage® bonus miles and get your first checked bag free!**

This reservation is on HOLD until **April 08, 2013 11:59 PM EDT (Eastern Daylight Time)**.

Record Locator: **PHQDXF**

**Passengers**  
BENJAMIN EDELMAN

**Your Itinerary**  NOTE: This is not a ticket or electronic receipt

Carrier	Flight Number	Departing		Arriving		Cabin	Seats	Meals
		City	Date & Time	City	Date & Time			
BRITISH AIRWAYS	202	BOS Boston	Sep 01, 2013 10:50 PM	LHR London	Sep 02, 2013 10:05 AM	First Z	unassigned	Meal

**Award Summary**

62,500 Award Miles Per Ticket			
To/From	Date/Award Type	Mileage	
Flight 1 Boston BOS - London LHR	Sun, Sep 01, 2013 First MileSAver Award	62,500 miles	
<b>62,500 Award Miles Total</b>			
Award Miles Per Ticket		62,500 miles	
Total Award Miles Used		62,500 miles	
<b>Taxes and Fees Per Ticket</b>			
Taxes		438.20 USD	
Total Taxes		438.20 USD	
<b>Total Price</b>		<b>438.20 USD</b>	

Please note the following:  
 • Fares are only guaranteed up to 24 hours.  
 • Additional foreign taxes may apply.  
 • Additional fees may also apply for tickets not purchased through AA.com.

This is not the itinerary receipt that is required for identification purposes at the airport check-in. That receipt will be furnished upon purchase of this reservation.

In order to proceed to your gate you must present a government issued photo I.D. and either your boarding pass or a priority verification card at the screening security checkpoint.

For international travel, please ensure that you have the proper documentation. All necessary travel documents for the countries being visited must be presented at airport check-in. Additional information can be found at [International Travel](#).

If you are not a resident of the U.S., U.K., Canada or select countries in Latin America and the Caribbean, tickets must be purchased at an American Airlines ticketing location/airport, or by calling an [American Airlines International Reservations office](#). Flights booked on carriers other than American Airlines, American Eagle® or AmericanConnection® are on a request basis only.

**Self-Service Check-in**  
For International & Domestic Flights

[Unsubscribe](#) [Change your email address](#) [Update your email preferences](#) [Privacy Policy](#)

**Certificate of Service**

I hereby certify that I have, this 5th day of April, 2013 caused a copy of the foregoing Reply to be served by electronic mail on the following persons:

Robert Silverberg, Esq.      rsilverberg@sbgdc.com  
Samuel Podberesky, Esq.      sam.podberesky@dot.gov

/s/ Benjamin Edelman

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Benjamin Edelman