

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

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)	
Benjamin Edelman,)	
third-party complainant)	
)	
v.)	Docket DOT-OST-2013-0025
)	
British Airways Plc)	
)	
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REPLY OF BENJAMIN EDELMAN

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Dated: April 19, 2013

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REPLY OF BENJAMIN EDELMAN

1. My February 4, 2013 Complaint properly called into question whether British Airways fuel surcharges are a reasonable estimate of per-passenger fuel costs above a baseline (p.1) including costs implausibly high vis-à-vis ordinary paid tickets

(p.2) and seemingly beyond actual fuel costs (pp.3-4). I also noted certain BA award point tables failing to disclose carrier-imposed surcharges in the manner required by DOT instructions (p.4) and combining government-imposed taxes with carrier-imposed fees, again contrary to DOT instructions (pp.4-5). Finally, I showed around-the-world fare quotes systematically but falsely characterizing BA carrier-imposed surcharges as “tax” (p.5).

2. BA’s Answer argues that my Complaint errs in my precise estimation of fuel surcharge revenue and fuel expense, though tellingly British Airways never offers a contrary estimation of its own or any affirmative argument that its fuel surcharges reflect a reasonable estimate of per-passenger fuel costs above a baseline (as specifically required by DOT). Separately, BA attempts to escape liability for the prohibited statements in award charts and the online around-the-world booking tool via mischaracterization of applicable requirements. These defenses fall flat. The DOT should further investigate the scope of the unlawful BA practices I identified.

I. British Airways Has Repeatedly, and Yet Again, Failed to Defend Its Fuel Surcharge with Appropriate Estimates

3. The DOT has instructed that “carrier[s] should be prepared to detail the ... costs” of items subject to surcharges in order to allow the DOT and the public to confirm that “amounts listed as charges for particular services ... accurately reflect the actual costs of the service covered” (February 21, 2012 Notice, p.3). BA has systematically and repeatedly failed to do so.

4. Particularly tellingly, BA’s Answer confirms BA’s inability or refusal to provide the required estimation to support its fuel surcharges. BA’s Answer to my Complaint would have been a natural context in which BA could have argued, for

example, that a given flight on a given route entailed costs of \$x of fuel on some recent date, compared to \$y in some prior year, but BA collected only \$z of fuel surcharge. Alternatively, if BA cannot (or declines to) associate costs and revenues with individual flights, BA could have made a statement of the form that it spent \$x on fuel in 2012, systemwide or on some portion of its route network (e.g. transatlantic sectors), compared to a baseline of \$y in some prior year, with only \$z of fuel surcharge revenue in 2012. BA offered nothing of the kind. In this context, the DOT should conclude that BA has not complied with the DOT requirement to “be prepared to detail” the basis of a surcharge estimation, and has thus violated 14 CFR 399.84.

5. Nor is BA’s recent Answer the first opportunity in which BA has failed to defend its fuel surcharges with appropriate calculations. I have offered BA five separate opportunities to provide the basis of its surcharges. Specifically, I sent an online inquiry to British Airways customer relations on June 5, 2012 (Complaint, Attachment 8), I called British Airways telephone representatives (as instructed by British Airways in the reply to my June 5 inquiry), I inquired with British Airways Customer Relations by fax on June 7, 2012 and July 23, 2012, and I emailed the British Airways General Counsel, Americas, on November 8, 2012. I received no substantive response to any of these inquiries, including no information whatever as to the costs associated with the surcharge.

6. BA’s Answer creates a strawman of “an exact, statistical correlation between fuel surcharge and the actual cost of fuel actually expended on a particular flight” (Answer p.4), claims that I demand this level of precision, and argues that such precision is impossible. But I sought no such thing. What I actually requested, and what DOT rules require, is that any fuel surcharge must be a reasonable estimate of per-

passenger fuel costs above a baseline. Perfection is not required, nor did my Complaint seek perfection.

II. Public Sources Indicate that British Airways Fuel Surcharges Are Not a Reasonable Estimate of Per-Passenger Fuel Costs Above a Baseline

7. Without access to BA confidential business records, my initial Complaint used public sources to demonstrate that BA fuel surcharges are not a reasonable estimate of per-passenger fuel costs above a baseline. BA's Answer suggests various adjustments to my estimate (pp.7-10). The suggested adjustments serve to somewhat reduce fuel surcharge revenue and somewhat increase fuel costs, but they do not alter the conclusion that BA fuel surcharges are not a reasonable estimate of costs above a baseline.

8. In addition, some of BA's suggested adjustments are illogical and inapt. For example, BA suggests calculating fuel costs by considering "the cost of fully fueling" the planes used on transatlantic routes (p.8). But the short flight BOS-LHR simply does not call for the full 168,090 liters of fuel a 777 is capable of carrying. BA has no business purpose to load so much fuel, and in the unlikely event that so much fuel were loaded, significant fuel would remain unused at the conclusion of the flight. Moreover, my Complaint used BA's own web site statements about fuel consumption (Complaint p.3 at heading "Sources", subheading "Fuel consumption"). If BA seeks to argue that fuel consumption is greater than its web site indicates, and that this additional fuel consumption is needed to establish that BA's fuel surcharges are a reasonable estimate of fuel costs above a baseline, then BA should make this argument in specificity. BA should not conclusorily resort to the full fuel capacity of aircraft.

9. BA's reliance on systemwide load factor (p.8) is also inapt. My Complaint considered transatlantic load factors as reported in BA's 2012 Traffic

Statistics, cited at Complaint p.3 at heading “Sources”, subheading “Passenger load factor.” BA instead proposes using its systemwide load factor (Answer p.8). But I consider fuel surcharge revenue on two specific transatlantic routes. British Airways’ lower load factors elsewhere in its route network (e.g. its short-haul domestic and Europe routes with 74.7% and 75.1% load factor) are irrelevant. For purposes of computing transatlantic fuel surcharge revenue, I used – and the DOT should use – the most precise data available, specifically the data BA has published about its transatlantic load factors.

10. BA states that some seats are designated for crew rest (p.10). But BA nowhere indicates how many seats are so designated. I therefore cannot make adjustments accordingly.

11. Below, I recompute my estimates using BA’s figures for 777 fuel consumption per hour and 777 seating capacity, BA’s stated salable cargo capacity (per BA’s Corrected Answer, p.9), and BA’s proposed additional fuel cost of \$0.25 per gallon (\$0.066 per liter) (due to the costs of forward contracts). I also compute these estimates with both configurations of 747, as BA’s Answer suggested (p.10). The results:

	<u>BOS-LHR (777 service)</u>	<u>LHR-LAX (747 service I)</u>	<u>LHR-LAX (747 service II)</u>
<u>Fuel surcharge revenue</u>			
<u>Passengers</u>			
First Class	14 * \$414 = \$5,796	14 * \$452 = \$6,328	14 * \$452 = \$6,328
Club	48 * \$414 = \$19,872	52 * \$452 = \$23,504	70 * \$452 = \$31,640
World Traveler Plus	40 * \$229 = \$9,160	36 * \$229 = \$8,244	30 * \$229 = \$6,870
World Traveler	122 * \$229 = \$27,938	243 * \$229 = \$55,647	185 * \$229 = \$42,365
<u>Total passenger fuel surcharge</u>	\$62,766	\$93,723	\$87,203
<u>Cargo</u>			
Capacity	11,122 kg	8,000 kg	8,000 kg
Fuel surcharge	\$1.16/kg	\$1.16/kg	\$1.16/kg
<u>Total cargo fuel surcharge</u>	\$11,428	\$9,280	\$9,280
<u>Full fuel surcharge revenue</u>	\$75,668	\$103,003	\$96,483
Load-adjustment	83.7% passenger load factor, 73.9% cargo load factor		

<u>Load-adjusted fuel surcharge revenue</u>	\$61,630	\$85,304	\$79,846
<u>Fuel expense</u>			
Scheduled travel time	6:20	10:10	10:10
Fuel consumption per hour	8,290 liters/hour	12,788 liters/hour	12,788 liters/hour
Price of jet fuel	\$0.832/liter	\$0.832/liter	\$0.832/liter
<u>Total fuel expense</u>	\$43,683	\$108,169	\$108,169

12. These results qualitatively match the findings in my initial Complaint. Specifically, BA’s BOS-LHR fuel surcharge revenue still significantly exceeds BOS-LHR fuel expense. Furthermore, BA’s LHR-LAX fuel surcharge revenue is approximately 75% of total fuel cost. Neither is a reasonable estimate of increased fuel cost above a baseline.

13. Consistent with the DOT’s February 21, 2012 Notice, the question is not, as BA argues (Answer p.7), whether “BA’s cost of fuel exceed recoverable fuel surcharges.” Rather, the Notice requires that “When a cost component is described as a fuel surcharge, for example, that amount must actually reflect a reasonable estimate of the per-passenger fuel costs incurred by the carrier above some baseline” (emphasis added) (p.2). For any reasonable baseline, consistent with fuel prices over the past decade, even BA’s LHR-LAX flight fails the DOT’s requirement in this regard.

14. Comments of Mike Borsetti (DOT-OST-2013-0025-0060) propose an alternative estimation methodology that reaches a similar result. For fuel expense, Mr. Borsetti divides BA’s total 2012 fuel expense by its total available seat kilometers, obtaining a fuel cost per seat kilometer. According to Mr. Borsetti’s method, BOS-LHR fuel expense is \$43,423 and LHR-LAX fuel expense is \$93,794 to \$108,224. The similarity of Mr. Borsetti’s result to mine, despite our independent data sources, confirms the reliability of our estimates.

III. Examining the Fuel Surcharge on Low Coach Fares Is an Appropriate Method to Consider the Basis of a Fuel Surcharge

15. BA says I “cherry picked” data (Answer p.10) in noting that a fuel surcharge exceeds 70% of a round-trip transatlantic ticket fare (Complaint p.2). But I used a simple and straightforward methodology: On BA’s own web site, I quoted an ordinary paid restricted coach ticket – the same kind of ticket that ordinary consumer travelers buy, and indeed the kind of ticket that BA widely promotes in advertising in multiple media (online banner advertisements, print, etc.) and that BA’s web site offers by default. I picked a standard, popular nonstop route on which BA now offers four flights per day, from the city where I live to BA’s hub. I chose a standard advance purchase of approximately six weeks. This is an entirely reasonable method of obtaining a representative fare quote. Nor is the result unusual: The total price listed in my fare quote is broadly consistent with my personal leisure travels, consistent with restricted tickets I have assisted friends, relatives and colleagues in booking for themselves, consistent with BA’s advertising in multiple media, and consistent with offerings broadly available in the marketplace. There simply is nothing “cherry picked” about the example.

16. Quite the contrary, BA’s counterexamples are by far the more unusual. On information and belief, far more travelers on BA’s BOS-LHR service pay fares that approximately match the itinerary I quoted than the \$4500 and \$2600 fares that BA quotes (Answer pp.9-10). On information and belief, BA’s advertising (online banner advertisements, print, etc.) promotes restricted coach fares similar to what I quoted, but rarely or never the \$4500 or \$2600 coach fares that BA quotes.

17. Indeed, the DOT has used the same methodology I chose. See the DOT’s Notice of February 21, 2012 at p.2: “In one particular example, the total fare for a U.S.-

Europe trip ... listed as \$769.41 ... includes an amount of \$476 described as ‘fuel surcharge.’” Like me, the DOT there quoted a restricted coach transatlantic ticket for an arbitrary date, then compared the base fare to the stated fuel surcharge.

IV. BA’s New “Carrier Charges” Surcharges Are Also Impermissible under DOT Rules

18. In its Answer, BA describes its shift to “Carrier Charges” rather than “fuel surcharge” (p.13). Indeed, current fare quotes on britishairways.com now present “European fuel surcharge/US carrier charge.” See Attachment 1. But this shift still falls short of DOT requirements.

19. The DOT’s February 21, 2012 Notice provides that even a vague surcharge must be linked to specific service and associated costs. Referring to the vaguely-named “Passenger service charge international” seen at another carrier, the DOT instructs that “the carrier should be prepared to detail the services and costs per passenger” (Notice at p.3).

20. To support its new “Carrier Charges” surcharge, BA must identify what services are associated with the new “carrier charges,” and what those services cost BA to provide (on a per-passenger basis). BA has not done so, not in its Answer nor on its web site nor, as best I can tell, anywhere else. I contacted BA telephone reservations to request information about the “carrier charges” but was unable to obtain any information about what services are included or why this charge is set at a particular amount.

21. The screenshot in Attachment 1 also reveals BA claiming, falsely, that the charges itemized in that screenshot are “Tax.” See the top-most heading of the screenshot, reading “Tax Breakdown.” In fact that screenshot itemizes a mix of actual government taxes and carrier-imposed surcharges, with fully 67% consisting of the latter.

It is an unfair and deceptive practice for the window's title, "Tax Breakdown," to falsely indicate that the window presents only taxes.

V. BA's OnBusiness Table Continues to Omit Information about Carrier-Imposed Surcharges, Contrary to DOT Requirements

22. My Complaint noted that BA's OnBusiness points table does not disclose carrier-imposed surcharges (p.4). In its Answer, BA seeks shelter in the fact that OnBusiness "is a business to business ('B2B') initiative, intended to provide incentives and discounts to small and medium-sized enterprises [pursuant to] terms formally agreed to by the SME" (p.11). My Complaint suggested nothing contrary. But these facts are irrelevant to DOT rules on point.

23. The DOT's revised full fare advertising rule, 14 CFR 399.84, prohibits any advertising or solicitation for passenger air transportation that does not state the entire price to be paid. By its plain language, this rule applies equally to all advertising and solicitations for air transportation, whether the advertising or solicitations are directed to consumers, businesses, or anyone else.

24. BA cites its contracts with OnBusiness members ("terms formally agreed to by the SME [small and medium sized enterprise]") (Answer p.11), but DOT rules offer no protection to a carrier that seeks advance permission, through a contract or otherwise, to engage in conduct prohibited by 399.84. Rather, 399.84 applies equally no matter what a carrier might have placed in prior terms. A carrier cannot, through its terms or other contractual provisions, escape the requirements of 399.84.

25. BA's Answer seems to seek shelter in the words "by consumers" in the May 17, 2012 Notice – as if to suggest that, by those words, DOT sought to offer lesser protection to participants in company-wide travel award programs such as BA

OnBusiness. BA reads too much into the word “consumer.” The best interpretation of the Notice’s reference to “consumers” is to encompass anyone redeeming awards through a carrier award program, and businesses and business travelers are among the “consumers” protected by the DOT in this sentence. More generally, in numerous contexts, DOT uses the term “Consumer” to mean any person purchasing or receiving air travel. Consider e.g. the DOT’s Aviation Consumer Protection Division (emphasis added), which equally protects business travelers. DOT regulations confirm the broad meaning of “consumer.” Consider 14 CFR 259.5, using “customer”, “consumer”, and “passenger” interchangeably (requiring a “customer service plan” which must “notify[] consumers of known delays, cancellations, and diversions” and must “identify[] the services [the carrier] provides to mitigate passenger inconvenience”), plainly providing benefits that apply to business passengers as well as consumers traveling for leisure. The reference to “consumers” in the DOT’s May 17, 2012 Notice does not lessen BA’s obligations to its OnBusiness customers. BA’s references to its “small and medium-sized enterprise” “business” customers do not excuse BA’s failure to comport its OnBusiness program to the requirements of the DOT’s May 17, 2012 Notice.

26. While some sections of the DOT’s May 17, 2012 Notice reference “mileage,” the Notice plainly includes award programs denominated in units other than miles. The title of the Notice specifically covers all “award” travel. Sections of the Notice discuss “award travel,” “award programs,” “promotions,” and the like – terms which are used interchangeably with “mileage award” and other mileage-specific terms. Furthermore, the Notice interprets the full fare advertising rule, 14 CFR 399.84, which broadly covers all advertising practices, in no way limited to mileage-based award

programs. BA cannot seek shelter in the fact that OnBusiness earnings are measured in “points” rather than “miles.”

27. In short, there exists no proper reason for BA OnBusiness to escape the requirements of the DOT’s May 17, 2012 Notice. That Notice plainly requires that when a flight award requires a surcharge, the surcharge must be presented “together with” the points required, and the surcharge must be given the “same prominence” as the points requirements (p.2). BA erred in mentioning the surcharge only in a footer at the bottom of the table (not “together with” points requirements) (as presented in Complaint p.14). In that footer, BA also erred in its vague reference to “[t]axes, fees, charges and security surcharges” – exactly omitting the required affirmative statement that these are “carrier-imposed” charges to alert consumers that, unlike bona fide “taxes,” these amounts are set wholly by BA. The DOT’s May 17, 2012 Notice requires disclosure that is both clearer and more prominent.

VI. Any “Tension” Between US and EU Rules Is Easily Addressed

28. BA seems to seek shelter in EU rules which, it claims, require certain presentation of surcharges. Specifically, BA argues: that “The [EU] rules require that, in addition to specifying the final price payable by the consumer, a breakdown of the following items must be included; namely, (i) ‘taxes,’ (ii) ‘airport charges,’ and (iii) ‘other charges, surcharges or fees, such as those related to security or fuel’” (p.13). BA describes “tension” between this EU requirement and DOT requirements. But BA never identifies the exact inconsistency between EU and DOT rules. If BA believes it is impossible to simultaneously satisfy specific EU and DOT rules, BA should be explicit in specifying the precise requirements claimed to be irreconcilable.

29. In fact the EU rules are easily reconciled with the DOT's requirements.

For one, if BA ceased to impose carrier-imposed surcharges, BA would have nothing to disclose as such – hence no need to comply with either EU or DOT rules about carrier-imposed surcharges. Furthermore, if BA's fuel surcharges were a reasonable estimate of per-passenger fuel costs above a baseline, BA would comply with DOT rules on point and could also easily present such surcharges in the manner required by EU rules. Thus, there is no genuine difficulty in complying with both sets of rules. Rather, BA's difficulty comes from attempting to impose a "fuel surcharge" that is not an estimate of increased fuel cost, and from attempting to impose a "carrier charge" not associated with any specific service – practices which DOT simply does not allow, and which the EU rules neither require nor encourage. There is no genuine "tension" between these requirements.

VII. BA Is Liable for False Statements of "Tax" on Around-The-World Tickets that Are Ticketed by BA, No Matter What Agent Quotes the Fare

30. Under settled DOT authority, BA is equally liable for misstatements on the OneWorld Around the World booking tool. BA argues that that tool "is a specialized site owned and managed by oneworld Management Company" (Answer p.12), suggesting that BA 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." BA is jointly and

severally liable for the wrongful actions made by its agent oMC in the course of advertising pricing for BA electronic tickets.

31. BA argues that “the subject matter of the Complaint in this regard [mischaracterizing carrier-imposed surcharge as tax] has been resolved” (Answer p.13). But affected passengers have not received refunds. On information and belief, if an affected passenger requested a refund from BA, BA would deny such a request. BA retains its ill-gotten gains from the misstatements at issue. This matter is not “resolved.”

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,

Benjamin Edelman

Attachment 1

Tax Breakdown - Mozilla Firefox

www.britishairways.com/travel/fx/public/en_us?eld=111082

BRITISH AIRWAYS

Charges applied to your flight

There are certain taxes, fees and carrier charges that are applied to your booking by British Airways, airport operators, governments or other authorities. Here you will find a full breakdown and explanation of the taxes, fees and carrier charges applied to your booking.

Government, authority and airport charges	Per adult
Customs User Fee - USA	USD 5.50
Transportation Tax(Departure) - USA	USD 17.20
Transportation Tax(Arrival) - USA	USD 17.20
Animal & Plant Health User Fee (Aphis) - USA	USD 5.00
Immigration User Fee - USA	USD 7.00
Passenger Civil Aviation Security Service Fee - USA	USD 2.50
Air Passenger Duty - United Kingdom	USD 102.04
Passenger Service Charge - United Kingdom	USD 60.54
Passenger Facility Charge	USD 4.50
Total government, authority and airport charges*	USD 221.48
> More information	

British Airways fees and carrier charges	Per adult
European fuel surcharge**/US carrier charge***	USD 458.00
Total British Airways fees and carrier charges	USD 458.00
> More information	

Total taxes, fees and carrier charges per person	USD 679.48
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*Government and/or airport taxes are refundable, however some countries will apply a Value Added Tax, Sales Tax or equivalent, which will only be refunded on fully flexible tickets.

**In line with the fare rules, a refund of fuel surcharge can be made on fully flexible tickets only with unused flights in your itinerary.

***On US flights, British Airways imposes a carrier charge as part of the total price of the airline ticket, which you may see stated separately in certain displays during the booking process or on your final e-ticket receipt. In line with the fare rules, a refund of the carrier charge can be made on fully flexible tickets only with unused flights in your itinerary.

[Close](#)

Certificate of Service

I hereby certify that I have, this 19th day of April, 2013 caused a copy of the foregoing Reply to be served by electronic mail on the following persons:

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Benjamin Edelman