

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

-----)
)
Benjamin Edelman,)
third-party complainant)
)
v.) Docket DOT-OST-2013-0214
)
Air Europa)
)
-----)

REPLY OF BENJAMIN EDELMAN

Comments with respect to this document should be addressed to:

Benjamin Edelman
169 Walnut St.
Brookline, MA 02445
E-mail: ben@benedelman.org

Dated: January 30, 2014

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

-----)
)
Benjamin Edelman,)
third-party complainant)
)
v.) Docket DOT-OST-2013-0214
)
Air Europa)
)
-----)

REPLY OF BENJAMIN EDELMAN

I. There Is Reason to Believe the Air Europa US Site Made the False Statements at Issue on the Dates at Issue

1. My Complaint of December 16, 2013 alleged, among other things, that air Europa’s web site mischaracterized carrier-imposed surcharge as “tax.” Air Europa’s response noted that my screenshots show Air Europa’s “Spain” site, which Air Europa argues is not marketed to US consumers. On that basis Air Europa denies that DOT has jurisdiction to investigate my complaint or the false statements I found.

2. I urge the Department of Transportation to inquire whether Air Europa’s US web site mischaracterized carrier-imposed surcharge on December 16, 2013, the date of my complaint. Air Europa’s archived web site code, archived screenshots, change logs, and other records should make it straightforward for Air Europa to answer this question.

3. If the Air Europa US site made such a mischaracterization as of the date of my complaint, the DOT need not evaluate the jurisdictional defenses in Air Europa's answer. This would greatly simplify the set of issues before the DOT.

4. Air Europa's Answer of January 14, 2014 does not indicate whether, as of the date of my complaint, the Air Europa US web site engaged in the practices alleged in my complaint (including mischaracterizing carrier-imposed surcharges as "tax").

5. By email, I asked Air Europa counsel whether the Air Europa US site engaged in the practices alleged in my complaint as of the date of my complaint. He declined to answer.

6. My screenshot records confirm that Air Europa's US web site did make these mischaracterizations as of April 4, 2013. See Exhibit 1. (Note that that screenshot was prepared by one of my students, under my supervision.)

7. As of the date of Air Europa's Answer, Air Europa's US site no longer makes the mischaracterizations identified in my complaint. I do not know when Air Europa's US site ceased to make these mischaracterizations. By email, I asked Air Europa counsel when the Air Europa US site ceased to make these mischaracterizations. He declined to answer.

8. I believe that the Air Europa US site also made these mischaracterizations in my testing of early December 2013. I believe that I tested the Air Europa US site in early December 2013 as I conducted research to evaluate whether to file a complaint as to Air Europa practices. I offer this paragraph on information and belief because I tested numerous sites in a brief period. I did not retain a screenshot of those practices, nor

prepare notes or other records of my observations, because I planned to reproduce the practice in subsequent testing immediately before filing.

II. There Exists No Conflict of Law

9. Air Europa couches its jurisdictional defense in the argument that if DOT price advertising rules applied to Air Europa's Spain site, Air Europa would be "forc[ed] to choose, at [its] peril, whose rules to follow where the rules are not harmonious." Air Europa's concern is speculative. In fact, on every question at issue, DOT requirements are entirely harmonious with rules in Spain and the EC.

10. Air Europa does not and cannot identify any Spanish law or EC regulation requiring or authorizing Air Europa to characterize a carrier-imposed surcharge as a "tax." Indeed, the EU CPC Report on Airlines' Taxes, Fees, Charges, and Surcharges¹ criticizes exactly those false statements. Air Europa's statement of "tax" is literally and unambiguously false, and there is no serious suggestion that any country's laws or regulations permit such a false statement, not to mention requiring it.

11. Nor can Air Europa identify any Spanish law or EC regulation requiring or authorizing Air Europa to disclose compulsory booking fees only midway through the booking process. Indeed, EC Regulation 1008/2008², Provision Article 23(1), requires that "The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication." This requirement exactly rules out late-disclosed surcharges such as what my complaint demonstrated on the Air Europa site.

¹ http://ec.europa.eu/consumers/enforcement/docs/airline_charges_report.pdf

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R1008:EN:NOT>

12. Thus, Air Europa's worry of a conflict of law is inapt. US and European law are entirely harmonious on all questions at issue.

III. DOT Should Exercise Authority Over All Air Europa Marketing of Flights To/From the US

13. Air Europa quotes and applies DOT guidance as to 14 CFR § 399.84 wherein DOT indicates its intention not to bring enforcement actions, under § 399.84, as to certain websites not marketed to US consumers. But the practices at issue go beyond violations of 14 CFR § 399.84. For example, a false statement of "tax" is also a breach of contract with consumers, a violation of 14 CFR § 399.80(f), and, no doubt, a violation of myriad other statutes and regulations. Neither statute nor DOT guidance ever permitted carriers to make false statements of "tax"; such false statements were prohibited before the Second Rule on Enhancing Airline Passenger Protections, and DOT guidance on enforcement offers Air Europa no shelter as to false statements of "tax."

14. Meanwhile, the design of Air Europa's web site creates a reasonable probability that US consumers will end up using the Air Europa Spain site unintentionally. On information and belief, when an Air Europa server detects a user located outside the United States, the Air Europa site automatically and without warning transports that user to the version of the Air Europa site marketed to users from that country or, if no such country-specific site exists, to the Air Europa Spain site. (Indeed, I was in Singapore on the day when I prepared the screenshots shown in my complaint, and I believe Air Europa transported me to its Spain site silently and automatically – a result that I did not anticipate and did not realize until after receiving Air Europa's answer.) Consider the effects on US passengers who often travel internationally (an important set of passengers since Air Europa sells international air transport). If a passenger attempts

to book Air Europa travel at a time when the passenger happens to be outside the US, the passenger will be directed to the Air Europa Spain site. On Air Europa's theory, that passenger then forfeits the important benefits and protections that DOT otherwise guarantees to US consumers. But DOT rules require no such result. Having designed its site to silently and automatically transport these US passengers to a near-identical-looking "Spain" site, labeled as "Spain" in a way that users are unlikely to notice (due to color scheme, layout, and size³), Air Europa should accept the responsibility of complying with US law as to US passengers travelling to/from the US.

15. The plain language of 14 CFR § 399.84 is in accord. Notice no restriction, within the language of § 399.84, to web site marketed to US passengers. Compare §399.85, repeatedly referencing "website[s] accessible [to] the general public in the U.S."

IV. Contrary to Air Europa's Answer, The Statements At Issue Are Literally False

16. Paragraph 5 of my Complaint alleged that "Air Europa's statement of 'tax' is literally false." In support, I offered ITA records of actual taxes and carrier surcharges.

17. Air Europa answered "Air Europa denies Paragraph 5 of the Complaint." Air Europa offered no specific facts or legal theories in support of this response.

18. DOT should invite Air Europa to substantiate its denial of the allegation. Alternatively, DOT should reject that denial as both unsupported and incorrect.

Respectfully submitted,
/s/
Benjamin Edelman

³ See e.g. the generally-applicable principles in the FTC's guidance on ".Com Disclosures", <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

Attachment 1 (screenshots prepared April 4, 2013)

www.aireuropa.com/waeam/xwaea/1/reservas/xreserva_v7.iniciar_reserva.html

USA - EN - English

Reservations On-line Boarding Services Passenger Guide Flying Blue Baggage & Service Fees

steps: search flights review travellers purchase reservation

review your flight details

New York to Paris

Flight 1 Sunday, April 07, 2013
 Departure: 22:05 New York, USA - John F Kennedy, terminal 4
 Arrival: 11:50 +1 day(s) Madrid, Spain - Barajas, terminal 1
 Airline: Air Europa UX092 Aircraft: Airbus Industrie A330-200
 Fare type: Economy Restricted

→ Change of plane required. Time between flights : 2:20.

Flight 2 Monday, April 08, 2013
 Departure: 14:10 Madrid, Spain - Barajas, terminal 2
 Arrival: 16:05 Paris, France - Orly, terminal W
 Airline: Air Europa UX1029 Aircraft: Boeing 737-500
 Fare type: Economy Restricted

Paris to New York

Flight 1 Sunday, April 14, 2013
 Departure: 11:35 Paris, France - Orly, terminal W
 Arrival: 13:40 Madrid, Spain - Barajas, terminal 2
 Airline: Air Europa UX1020 Aircraft: Embraer 190
 Fare type: Economy Restricted

→ Change of plane required. Time between flights : 3:50.

Flight 2 Sunday, April 14, 2013

Contact | SkyTeam | Sustainability | Alianzas | Be Live Hoteles | Accessible Web | Huelcón Viajes | Customer Commitment | Contingency Plan for Lengthy Tarmac Delays
 © 2010 Air Europa Líneas Aéreas, S.A.U. - Centro Empresarial Globalia. Apdo. Correos-132. 07620 Lluçmajor - Mallorca - España
 Reg. Merc. Palma de Mallorca, Folio 124, Tomo 461, Libro 383, Sección 3ª, Hoja nº 10069. CIF/VAT nº ES A07129430
 Privacy Policy | General Conditions

www.aireuropa.com/waeam/xwaea/1/reservas/xreserva_v7.iniciar_reserva.html

USA - EN - English

Reservations On-line Boarding Services Passenger Guide Flying Blue Baggage & Service Fees

→ Change of plane required. Time between flights : 3:50.

Flight 2 Sunday, April 14, 2013
 Departure: 17:50 Madrid, Spain - Barajas, terminal 1
 Arrival: 20:05 New York, USA - John F Kennedy, terminal 4
 Airline: Air Europa UX091 Aircraft: Airbus Industrie A330-200
 Fare type: Economy Restricted

BAGGAGE AND SERVICE FEES Legend: USD = U.S. Dollar

price

travellers	flights	taxes
1 adult(s) x	(563.00 +	665.14) =
1,228.14 USD		
total for all travellers		1,228.14 USD

convert displayed currency

flight notes

- This fare is bilaterally agreed between Air Europa and the selected airline(s).
- To ensure that you get this fare, the reservation should be made now.
- Specific rules and restrictions may apply to this fare.
- Taxes are included except where local airport taxes are collected at check-in time.
- To ensure you obtain the ticket(s) at the quoted fare(s), they must be purchased in the country of departure.

start over traveller details

Contact | SkyTeam | Sustainability | Alianzas | Be Live Hoteles | Accessible Web | Huelcón Viajes | Customer Commitment | Contingency Plan for Lengthy Tarmac Delays
 © 2010 Air Europa Líneas Aéreas, S.A.U. - Centro Empresarial Globalia. Apdo. Correos-132. 07620 Lluçmajor - Mallorca - España
 Reg. Merc. Palma de Mallorca, Folio 124, Tomo 461, Libro 383, Sección 3ª, Hoja nº 10069. CIF/VAT nº ES A07129430
 Privacy Policy | General Conditions

Certificate of Service

I hereby certify that I have, this 30th day of January, 2014 caused a copy of the foregoing Reply to be served by electronic mail on the following persons:

Aaron A. Goerlich, Esq.	agoerlich@ggh-airlaw.com
Samuel Podberesky, Esq.	sam.podberesky@dot.gov

/s/

Benjamin Edelman