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Order 2001-8-7



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

**Issued by the Department of Transportation
on the 7th day of August, 2001**

Frontier Airlines, Incorporated

**Violations of 49 U.S.C. § 41712 and 14 CFR
399.81**

Served August 7, 2001

CONSENT ORDER

This consent order concerns deceptive on-time performance advertising by Frontier Airlines, Inc. (Frontier), a certificated air carrier, that constitutes violations of 49 U.S.C. § 41712 and 14 CFR 399.81. This order directs Frontier to cease and desist from future similar violations and to pay compromise civil penalties.

Frontier is a Denver-based air carrier that operates domestic scheduled passenger air transportation. Frontier is subject to the advertising requirements of Part 399 of the Department's rules (14 CFR Part 399). Section 399.81 requires that certain information be published with each on-time performance advertisement to enable consumers to make valid comparisons of airlines' on-time performance. After the adoption of section 399.81, the Department amended 14 CFR Part 234 (52 Fed. Reg. 34071, September 9, 1987) to require certain air carriers to report their on-time performance to the Department. Frontier is not required to report on-time data and has elected not to do so. Using the data collected, the Department in turn publishes a monthly consumer report, entitled the Air Travel Consumer Report, containing, among other data, summaries of each reporting carrier's on-time performance over various time periods.

As a result of the existence of this data source, the Department, as a matter of enforcement policy, has allowed carriers subject to the on-time performance reporting rule some flexibility in advertising their on-time performance. In this regard, the Department's enforcement case law in conjunction with section 399.81 consistently has required that any such advertisement (1) be accurate, (2) be based on (and state that it is based on) recently published arrival data in the Department's Air Travel Consumer Report, (3) state the time period covered by any on-time performance claim, which must correspond with a time period utilized in the report (e.g., previous month, quarter, year or data base to date), and (4) accurately identify the carriers or types of carriers (e.g., "major," "seven largest") being used for comparison purposes. See, e.g., Aloha Airlines, Order 99-11-5 (issued November 9, 1999) and Northwest Airlines, Order 93-3-24 (issued March 19, 1993).

The advertisement placed by Frontier in *The Washington Post* on August 15, 2000, states that "Frontier led the top 10 major airlines in on-time arrivals at 82.2 percent in 1999." However, the advertisement did not include the majority of the information required by section 399.81 pertaining to the basis for Frontier's claim. The advertisement did not mention, as required by section 399.81, the basis for the calculation, the pairs of points or percentage of system-wide operations represented by the on-time claim, and whether the claim is based on all scheduled flights or only scheduled flights actually performed. Moreover, Frontier has elected not to file with the Department relevant on-time data under 14 CFR Part 234; therefore, there is no way to verify its on-time performance claims, even in comparison with the filing carriers. Finally, the Frontier advertising in question is phrased in such a way that a reasonable reader is likely to be misled into believing that Frontier is one of the major carriers to which the advertisement refers, when that is not the case.

Frontier's advertisement violates section 399.81 of the Department's regulations because it fails to disclose adequately the relevant factual basis for Frontier's on-time performance representations. The promotional material also violates 49 U.S.C. § 41712, which prohibits "unfair or deceptive practices or unfair methods of competition," by violating section 399.81 and by creating the false impression that Frontier is a major carrier and led all major carriers in on-time performance.

In explanation and mitigation, Frontier states that it is proud of its established record of compliance with the Department's regulations. Frontier relates that the advertisement at issue here was designed to introduce new service by Frontier from twelve western cities to Washington Reagan National Airport, and that any violation of the regulations were inadvertent. The ad appeared in *The Washington Post* on August 15, 2000. When the error was discovered, Frontier states, it immediately corrected the advertisement and published the revised copy on August 22, 2000, in the same newspaper.

The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office) has carefully considered the information provided by Frontier but continues to believe that enforcement action is warranted. In this connection, the Enforcement Office and Frontier have reached

a settlement of this matter. Frontier consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR 399.81, and to the assessment of \$5,000 in compromise of potential civil penalties otherwise assessable. Of this total penalty amount, \$2,500 shall be due and payable within 15 days of the date of issuance of this order. The remaining \$2,500 penalty amount shall be suspended for one year following the date of issuance of this order, and then forgiven, unless, during that one-year period, Frontier violates this order's cease and desist provision or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$5,000 penalty shall become due and payable immediately, and the carrier may be subject to further enforcement action. We believe that this compromise assessment is appropriate and serves the public interest. It represents an adequate deterrence to future noncompliance with the Department's on-time performance advertising requirements by Frontier, as well as by other air carriers and foreign air carriers.

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 Frontier Airlines, Inc. has violated 14 CFR 399.81 by causing to be published advertising that made claims about the carrier's on-time performance but failed to provide the specific information needed to substantiate such claims as required by the regulation;
3. We find that by engaging in the conduct and violation described in paragraph 2 above, and by creating the false impression in an advertisement that it is a major carrier, Frontier Airlines, Inc., also engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712;
4. Frontier Airlines, Inc., and all other entities owned or controlled by or under common ownership with Frontier Airlines, Inc. and their successors and assignees, are ordered to cease and desist from violations of 49 U.S.C. § 41712 and 14 CFR 399.81;
5. Frontier Airlines, Inc. is assessed \$5,000 in compromise of civil penalties that might otherwise be assessed for the violations found in paragraphs 2 and 3 of this order. Of this total penalty amount, \$2,500 shall be due and payable within 15 days of the date of issuance of this order. The remaining \$2,500 penalty amount shall be suspended for one year following the date of issuance of this order, and then forgiven, unless,

during that one-year period, Frontier violates this order's cease and desist provision or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the \$5,000 penalty shall become due and payable immediately, and the carrier may be subject to further enforcement action. Failure to pay the compromise assessment as ordered will subject Frontier Airlines, Inc. to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order; and

6. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order.

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

BY:

(SEAL)

ROSALIND A. KNAPP
Deputy General Counsel

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