



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

Issued by the Department of Transportation
on the 21st day of June, 2001

Swain Australia Tours

**Violations of 14 CFR Part 257 and
49 U.S.C. 41712**

Served June 21, 2001

CONSENT ORDER

This Consent Order results from an investigation by the Department's Office of Aviation Enforcement and Proceedings of the code-share disclosure practices of Swain Australia Tours ("Swain"). This investigation was prompted by a recent newspaper advertisement by Swain that violated the Department's code-share disclosure rules (14 CFR Part 257). This order directs Swain to cease and desist from future violations and to pay compromise civil penalties.

The Department's code-share disclosure rule, 14 CFR Part 257, states that it is an unfair or deceptive practice under 49 U.S.C. 41712 for airlines sharing a single carrier designator code to fail to provide reasonable and timely notice to consumers of such an arrangement. The rule requires that any advertisement by an air carrier or ticket agent of code-share service shall disclose the nature of that service in reasonably sized type and must identify the transporting carrier by corporate name. 14 CFR 257.5(d). With regard to oral communications with potential customers, section 257.5(b) requires that a ticket agent or carrier must disclose to a consumer the existence of the code-share arrangement and the corporate name of the transporting carrier before booking the flight. This information must be given to the consumer regardless of whether the consumer makes a reservation.

An advertisement listing Swain as Air New Zealand's agent was published on October 8, 2000, which included the statement "100% Pure New Zealand Indulgence From \$1299." The ad lists an airfare from Chicago to Auckland, New Zealand, through Los Angeles but fails to note the corporate name of the carrier providing service from Chicago to Los Angeles, which in this case was United Airlines. In this regard, the ad contains only a statement in the fine print that "some services provided by other airlines." Because the code-share carrier is not identified, the advertisement fails to comply with section 257.5(d).

Similarly, a recent advertisement on Swain's website advertised a travel package to Sydney or Auckland from Los Angeles, Chicago or New York, but failed to disclose the code-share carrier, which again was United Airlines. As stated

above, any advertisement that does not disclose a code-share arrangement fails to comply with section 257.5(d).

A follow up investigation revealed a lack of compliance as well with the Department's code-share regulation by Swain reservation personnel regarding the service noted above. In a recent telephone survey of Swain personnel conducted by Department investigators, several callers were notified of the code-share arrangement only after they had booked their reservation and two callers were never provided the required disclosure during the course of their calls. In sum, Swain Tours personnel did not comply with the code-share disclosure rule more than half of the time. By failing to disclose the code-share arrangement in the oral communications, Swain violated 14 CFR 257.5(b). Violations of Part 257 are considered an unfair and deceptive practice in violation of 49 U.S.C. 41712.

In mitigation, Swain states that, although it is listed as Air New Zealand's agent, the print ad in question was developed and placed by the New Zealand Tourism Board and that Swain had no input into the contents of the ad. Swain further states that the October 8, 2000, ad was the only print ad in which it was listed as agent that involved a code-share arrangement. Moreover, in an effort to ensure future compliance with the Department's regulations, Swain states that it has taken immediate action to ensure that future advertising will disclose code-share arrangements, modified its website to disclose any code-share arrangements relating to offered fares, and retrained its sales staff to properly disclose code-share arrangements.

Disclosure of code share arrangements is essential to avoid consumer deception. We believe that Swain's failure to adequately disclose code-share arrangements warrants enforcement action, including a civil penalty payment. In order to avoid litigation, and without admitting or denying the alleged violations, Swain has agreed to settle this matter with the Department and enter into this consent order to cease and desist from future violations of 14 CFR Part 257 and 49 U.S.C. 41712. Swain has also agreed to the assessment of \$10,000 in compromise of potential civil penalties otherwise assessable under the provisions of 49 U.S.C. 46301. Of this total penalty amount, \$5,000 shall be due and payable within 15 days of issuance of this order. The remaining \$5,000 shall be suspended for one year following issuance of this order, and then forgiven, unless Swain violates this order's cease and desist provision within the one-year period or fails to comply with the order's payment provisions, in which case the entire unpaid portion of the civil penalty shall become due and payable immediately, and Swain may be subject to further enforcement action. The order and penalty assessed will provide a strong incentive to Swain and to carriers and their agents to ensure that they do not violate our code-share disclosure rule in the future.

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 Swain Australia Tours has violated 14 CFR Part 257 by failing to provide adequate disclosure of code-share arrangements to consumers in advertising and in oral communications with potential customers;
3. We find that Swain Australia Tours, in the instances described in paragraph 2, engaged in unfair and deceptive practices in violation of 49 U.S.C. 41712;
4. We order Swain Australia Tours to cease and desist from the activities described in ordering paragraphs 2 and 3 above;
5. Swain Australia Tours is assessed \$10,000 in compromise of the potential civil penalties that might otherwise be assessed for the violations described in ordering paragraphs 2 and 3 of this order. Of the penalty amount, \$5,000 shall be due and payable within 15 days of the issuance of this order. The remaining \$5,000 shall be suspended for one year following the issuance of this order, and then forgiven, unless Swain Australia Tours violates this order's cease and desist provision within that one-year period, or fails to comply with this order's payment provisions, in which case the entire unpaid portion of the civil penalty shall become due and payable immediately, and Swain Australia Tours may be subject to further enforcement action. Failure to pay the compromise assessment as ordered will subject Swain Australia Tours 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:

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Deputy General Counsel

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