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DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2006

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When the Civil Aeronautics Board (CAB) was abolished in 1985, a significant portion of its authority was transferred to the Department of Transportation (DOT). One of the most noteworthy powers now exercised by DOT is to prohibit or regulate any "unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."[1] For twenty years, DOT has used its authority under this statute, as well as associated regulations, to monitor and sanction practices by air carriers, travel agents, and other entities involved in air transportation.

DOT Oversight of Air Carriers, Travel Agents, and Other Entities

DOT has several tools at its disposal for responding to an allegedly unfair and deceptive practice, including a private warning letter; a public consent order (under which the air carrier, agent, or other entity usually agrees to pay a fine); or a formal enforcement action before a DOT Administrative Law Judge (ALJ). DOT also periodically issues public notices setting forth its policies for advertising and other practices. Consent orders are among the most commonly used tools in DOT's arsenal; since 1996, DOT has entered into more than 233 consent orders with air carriers, travel agents, and other parties, with penalties totaling more than $21.8 million.[2] This article briefly summarizes the consent orders and other public guidance that were issued by DOT in 2006.

In the past year, DOT's Aviation Consumer Protection Division continued to closely monitor and investigate practices by air carriers, travel agents, and other entities involved in the aviation industry. Although the DOT's greatest area of concern in 2006, based on the orders issued, appears to have been unauthorized operations by U.S. and foreign air carriers, DOT nevertheless continued to assert jurisdiction over a vast array of practices, ranging from the requirements governing the carriage of passengers with disabilities to its standards for the advertising of airfares.

Additionally, in 2006 DOT's Inspector General released a report reviewing air carriers' compliance with customer service commitments that had been drafted in 1999 by the Air Transport Association.[3] Although the report concluded that the overall commitments were still

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1 49 U.S.C. § 41712 (formerly § 411 of the Federal Aviation Act).

2 DOT Inspector General, Follow-Up Review: Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment, Report No. AV-2007-012, at 8 (November 21, 2006) (http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/ACSfinal11-21signed.pdf).

3 Id.

in place, it also incorporated recommendations, including that: (1) air carriers resume efforts to self-audit their customer service plans; (2) air carriers improve the provision of information to consumers about flight delays., cancellations, and diversions; (3) air carriers enhance the training of personnel who assist passengers with disabilities; (4) DOT require air carriers to report standardized data on frequent flyer redemptions; (5) air carriers ensure that they comply with and fully disclose their own policies for compensating bumped passengers; and (6) DOT improve its oversight of its existing consumer protection regulations, such as by more extensive monitoring of compliance with consent orders.

Air Carrier and Travel Agent Advertising

DOT's "full-price rule" requires that advertising by air carriers or travel agents state "the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component."[4] Historically, DOT has interpreted this regulation to allow government-imposed per-person taxes and fees (i.e., the September 11th Security Fee, federal segment taxes, and airport Passenger Facility Charges) to be listed separately from an advertised fare, as long as the amount of those taxes and fees is clearly stated elsewhere in the advertising.[5]

In 2006, DOT issued numerous consent orders reiterating its interpretations of the full-price rule. DOT re-emphasized its position that if government-imposed taxes and fees are not included in an advertised fare, the amount thereof must be clearly stated elsewhere in the advertising.[6] DOT also reiterated that fuel and other carrier-imposed surcharges cannot be listed separately from an advertised fare at any point in the booking process,[7] as well as that the full-price rule applies to travel packages that include airfare.[8] Additionally, for advertising on the Internet, if the tax and fee information is not posted on the same page, it must be made available through a prominent hyperlink.[9]

Finally, DOT previously had issued a NPRM that requested comments as to whether the full-price rule should be amended to be more or less restrictive, or if the status quo should be maintained. In 2006, DOT withdrew the NPRM, stating that based on the comments received, the public interest would best be served by maintaining the status quo. At the same time, DOT clarified one of its existing requirements – namely, that if taxes and fees are listed separately

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[4] 14 C.F.R. § 399.84.

[5] Additionally, in 2006 the IRS announced inflation adjustments for certain air transportation taxes, effective January 1, 2007. Arrival and departure taxes increased to $15.10; the tax for domestic segments beginning or ending in Alaska or Hawaii increased to $7.50; and the tax for other domestic segments increased to $3.40. See Rev. Proc. 2006-53, § 3.34.

[6] Alitalia, Consent Order (2006-12-2, December 1, 2006); China Airlines, Ltd., Consent Order (2006-12-1, December 1, 2006); Israir Airlines, Order 2006-11-13; TACA International Airlines, S.A., Consent Order (2006-9-19, September 19, 2006); Grand Circle Corporation d/b/a Grand Circle Travel and d/b/a Overseas Adventure Travel, Consent Order (2006-7-23, July 20, 2006); Compania Mexicana de Aviacion S.A. de C.V., Consent Order (2006-4-18, April 19, 2006); Simmons Air, Order 2006-3-18.

[7] Alitalia, Order 2006-12-2; China Airlines Order 2006-12-1, Israir Airlines, Order 2006-11-13; Aloha Airlines, Inc., Consent Order (2006-11-2, November 1, 2006); Travelocity.com LP, Consent Order (2006-10-4, October 5, 2006); Grand Circle Corporation, Order 2006-7-23.

[8] Grand Circle Corporation, Order 2006-7-23.

[9] Grand Circle Corporation, Order 2006-7-23.

from an advertised fare, they may be disclosed as lump sum with the exception of the September 11th Security Fee, which Department of Homeland Security regulations require to be identified separately.[10]

Air Carrier Authority

Foreign air carriers are generally prohibited from operating services between two points in the United States.[11] In 2006, DOT sanctioned several foreign air carriers for transporting individuals between U.S. points, and emphasized that in enforcing the cabotage statute it will considers the itinerary of each passenger in addition to that of the aircraft as a whole.[12]

In addition, foreign air carriers can operate services to and from points in the United States only after they have been issued the appropriate authority by DOT.[13] In 2006, DOT sanctioned two air carriers that had operated services without such authority,[14] and one air carrier that had advertised and sold tickets without such authority.[15]

Since 2004, DOT has entered into numerous consent orders with air charter brokers (i.e., entities that link prospective charter customers with direct air carriers). DOT takes the position that brokers must act on behalf of either the direct air carrier or the charter customers; in contrast, a broker must not hold out air transportation on its own behalf without a Part 121 air carrier license.[16] In 2006, DOT imposed sanctions on four additional companies (two of which held a Part 125 private carriage license, and two of which held no DOT license), and also imposed sanctions on the principals of two of the companies.[17]

Passengers with Disabilities

In 2006, DOT concluded that an air carrier had violated the requirements of Part 382 – which sets forth its standards for the treatment of passengers with disabilities – by denying boarding to disabled passengers on the ground that they were not accompanied by an attendant.[18] Part 382 provides that an attendant is not required for a passenger with a mobility impairment if

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[10] Price Advertising, 71 Fed. Reg. 55398 (September 22, 2006). In another rulemaking development, DOT adopted a final rule repealing Part 256, which prohibited CRSs from denying system access to code-share carriers. DOT stated that the rule was obsolete in light of its prior repeal of other rules governing CRSs, and the divestment of most airlines' interests in CRSs. Display of Joint Operations in Carrier-Owned Computer Reservations Systems Regulations, 71 Fed. Reg. 8800 (February 21, 2006).

[11] 49 U.S.C. § 41703.

[12] Platinum Jet Management, LLC, Michael F. Brassington, Andre Budhan, and Paul Brassington, Consent Order (2006-6-14, June 12, 2006); Aero Services Corporate, S.A., Consent Order (2006-4-19, April 19, 2006); I.M.P. Group Limited d/b/a Execaire, Consent Order (2006-1-17, January 23, 2006).

[13] 49 U.S.C. § 41301.

[14] Kazar Construction Limited d/b/a Sifton Air, Consent Order (2006-8-23, August 25, 2006); Aero Peninsule Ltee d/b/a Air Optima Consent Order (2006-2-6, February 8, 2006).

[15] Israir Airlines and Tourism, Ltd., Consent Order (2006-11-13, November 16, 2006).

[16] 49 U.S.C. § 41101.

[17] Classic Designs of Tampa Bay, Inc. d/b/a Bell Air Aviation, Consent Order (2006-11-25, November 29, 2006); Platinum Jet Management, et al., Order 2006-6-14; Simmons Air, Inc., Consent Order (2006-3-18, March 21, 2006); Principal Air Services, LLC, and David C. Bernstein, Consent Order (2006-7-13, July 11, 2006).

[18] British Airways, PLC, Consent Order (2006-8-7, August 7, 2006).

that person can assist in hid or her own evacuation of the aircraft.[19] Two air carriers were sanctioned for failing to equip new aircraft with 100 or more passenger seats with in-cabin stowage space for a wheelchair, and DOT noted that the carriers also had provided inaccurate information about the availability of in-cabin wheelchair stowage space in response to telephone inquiries.[20]

DOT denied a petition from an air carrier for an exemption from its in-cabin wheelchair stowage space requirement.[21] DOT stated that the carrier had not adequately demonstrated that in-cabin stowage was not possible, or shown any reason that it should be placed in a preferred regulatory position vis-à-vis other carriers.[22] However, DOT did agree to amend a consent order that it had entered into with a carrier in 2003. The order nominally imposed a fine of $1.35 million due to the carrier's failure to assist passengers in wheelchairs and respond to complaints. But DOT allowed $1.3 million to be offset by expenditures made to improve its procedures for passengers with disabilities; however $50,000 of the offset was conditioned on the carrier meeting certain complaint reduction targets. In 2006, DOT agreed to allow the $50,000 offset, even though the carrier had not met the full complaint reduction targets in 2003.[23]

DOT dismissed a complaint which alleged that a carrier had discriminated against a passenger who was authorized to use marijuana by an experimental program established by the Department of Health and Human Services, but was not allowed to travel with the marijuana without a medical certificate. DOT concluded that Part 382 was not applicable because the marijuana had not been made available by HHS for medical purposes but rather for research purposes.[24] At the same time, DOT reiterated that air carriers may request medical certificates from passengers prior to travel under only limited circumstances.[25]

Finally, DOT issued a NPRM which would expand the scope of Part 382. Most notably, DOT proposed to require captions on videos and other audio-visual displays on aircraft and in airports; to require that TTY lines provide the same response time and level of service that is provided to other individuals; and to require air carrier personnel to be trained to recognize and respond to accommodation requests from individuals with visual or hearing impairments. Comments on the NPRM were due on June 24, 2006; as of early 2007, the proposal remains pending.[26]

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[19] 14 C.F.R. § 382.35.

[20] United Airlines, Consent Order (2006-10-17, October 31, 2006); US Airways, Inc., Consent Order (2006-8-26, August 31, 2006).

[21] 14 C.F.R. § 382.21.

[22] Aloha Airlines, Inc., Order of Dismissal (2006-2-15, February 21, 2006).

[23] Delta Air Lines, Inc., Order (2006-9-1, September 8, 2006).

[24] Complaint of Irvin Rosenfeld v. American Airlines, Inc., Order Dismissing Complaint (2006-7-20, July 17, 2006).

[25] 14 C.F.R. § 382.53.

[26] Accommodations for Individuals Who Are Deaf, Hard of Hearing, or Deaf-Blind, 71 Fed. Reg. 9285 (February 23, 2006); 71 Fed. Reg. 19838 (April 18, 2006).

Additional Issues

Public Charters. DOT requires a public charter operator to comply with Part 380, the requirements of which include that: (1) no charter flights are sold unless a charter prospectus has been filed with and approved by DOT; (2) the charter operator deposit all funds that it receives from passengers in an escrow account; and (3) the charter operator remit payments for the round-trip transportation of passengers to the direct air carrier before the commencement of the outbound portion of the passengers' trips.[27] DOT sanctioned one charter operator for failing to comply with all of these requirements, and prohibited its owner from being involved in air carrier or public charter operations for one year.[28] DOT also sanctioned another charter operator for failing to comply with the escrow requirements, and prohibited its president from being involved in air carrier or public charter operations for ten years,[29] and sanctioned two additional charter operators for failing to comply with the prospectus requirement.[30]

Ticket Refunds. DOT requires air carriers to issue refunds of tickets purchased by credit card within seven business days, and to issue refunds of tickets purchase by cash within 20 days, pursuant to Part 374. DOT sanctioned an air carrier that had failed to comply with these deadlines,[31] as well as a charter operator that had failed to comply with the additional refund requirements imposed by Part 380.[32]

Air Carrier Insolvency and Bankruptcy. In the aftermath of the September 11 terrorist attacks, Congress required air carriers to provide transportation to passengers of other air carriers that had ceased operations due to insolvency and bankruptcy.[33] The expiration date of the statute was extended several times, but it expired without further Congressional action on November 30, 2006.[34]

Wet Leases. DOT requires U.S. carriers to obtain a statement of authorization for any long-term wet lease on behalf of a foreign air carrier.[35] DOT sanctioned a U.S. carrier that had

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[27] DOT also issued a letter reminding colleges and other entities that charter aircraft to bowl games and other events that: (1) an air carrier and/or air charter broker must comply with all applicable DOT licensing requirements; (2) if the college or other entity resells seats to the public, it must itself comply with Part 380; and (3) if tickets to a bowl game or other event are offered in conjunction with the flight, the college or other entity must be in possession of a sufficient number of tickets, pursuant to Part 381. College Bowl Games and Playoffs (December 13, 2006) (http://airconsumer.ost.dot.gov/rules/Bowl%20Game%20Guidance%202006%20Final%20one.pdf).

[28] Ritetime Aviation & Travel Services, Inc., and O. Peter Obafemi, Consent Order (Docket OST-2006-24628, September 21, 2006).

[29] Thomas Kolfenbach, individually, and Southeast Airlines, Inc., Consent Order (2006-12-5, December 6, 2006).

[30] Vision Airlines, Inc. d/b/a Vision Air, Consent Order (2006-11-20, November 30, 2006); Israir Airlines, Order 2006-11-13.

[31] Boston-Maine Airways Corp.., Consent Order (2006-7-7, July 7, 2006).

[32] Thomas Kolfenbach,and Southeast Airlines, Order 2006-12-5.

[33] Pub. L. No. 107-11, § 145 (Nov. 19, 2001).

[34] Pub. L. No. 109-115, § 178 (Nov. 30, 2005).

[35] 14 C.F.R. § 212.9.

continued to wet lease an aircraft to a foreign carrier, and engaged in additional wet lease services, after its authorization had expired.[36]

Trade Names. DOT requires air carriers to register a trade name pursuant to Part 215 before it advertises or sells air transportation under that trade name. DOT sanctioned a carrier that had started to use a trade name after it had filed an application but before it was registered by DOT.[37]

Reporting Requirements. DOT sanctioned four carriers for failing to comply with its reporting requirements.[38] Two carriers had not filed annual reports detailing the disability-related complaints that they had received from passengers, as required by Part 382.[39] One carrier had not filed accurate reports about the causes of flight delay, as required by Part 234.[40] One carrier had not filed reports about its financial performance and other operational data, as required by Part 241.[41]

Conclusion

As demonstrated by this article, DOT's authority to regulate the practices of air carriers, travel agents, and other entities involved in the aviation industry is wide-ranging. Although DOT's historic focus has been on advertising, its authority sweeps in a variety of other areas of industry activity. Nevertheless, DOT's enforcement powers are relatively unknown. Attorneys that represent clients in the aviation industry should take care to familiarize themselves with DOT's regulations and interpretations; to review their clients' practices in light of DOT's guidance; and to keep abreast of new developments, such as those reviewed above.

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[36] North American Airlines, Inc., Consent Order (2006-10-16, October 30, 2006).

[37] Mesa Airlines, Inc., d/b/a *go!*, Consent Order (2006-8-20, August 22, 2006). DOT also revoked an air carrier's registration of the name "Nantucket Shuttle." DOT stated that it does not normally intervene in name similarity issues, but noted that in this case the same name previously had been registered by an air taxi which operated similar equipment in the same geographic region. In re Hyannis Air Service, Inc. d/b/a Cape Air d/b/a Nantucket Airlines, Order Revoking Trade Name Registration (2006-7-16, July 14, 2006).

[38] DOT also sent a letter to 18 U.S. air carriers, stating that reports of passengers denied confirmed space filed pursuant to Part 251 should distinguish between compensation paid to passengers in the form of cash and checks and in the form of vouchers. Reporting Oversales: Value of Travel Vouchers (April 21, 2006) (http://airconsumer.ost.dot.gov/rules/20060421.pdf).

[39] Skyservice Airlines, Inc., Consent Order (2006-12-26, December 29, 2006); Aerovias del Continente Americano, S.A., Consent Order (2006-6-19, June 26, 2006).

[40] SkyWest Airlines, Inc., Consent Order (2006-8-1, August 7, 2006).

[41] USA Jet Airlines, Inc., Consent Order (2006-12-11, December 13, 2006).