

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

ATTORNEYS AT LAW

888 Seventeenth Street, NW, Washington, DC 20006-3309
Telephone [202] 298-8660 Fax [202] 342-0683

DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2007

*By Jol A. Silversmith**

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 more than twenty years, DOT has exercised 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 (pursuant to 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 by far the most commonly used tool in DOT’s arsenal; according to its Inspector General, between 1996 and 2006 DOT entered into more than 233 consent orders, 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 2007.

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 2007, based on the orders issued, appears to have been the “full-price rule” for advertising by air carriers and travel agents, DOT also continued to assert jurisdiction over a vast array of practices, ranging from unauthorized operations by air carriers and/or charter brokers to the requirements governing the carriage of passengers with disabilities.

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,

* Jol A. Silversmith is an associate with the firm of Zuckert, Scoutt & Rasenberger, L.L.P., in Washington, D.C. The views expressed in this article are the author’s alone, and do not necessarily reflect those of the firm or any other individual or entity.

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>).

or tour component.”³ 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 or is available via a prominent hyperlink.⁴ Additionally, substantial restrictions, such as blackout dates and conditions on refunds, must be disclosed.

In 2007, DOT sanctioned three air carriers and five tour operators for violations of the full-fare rule. One air carrier had, in initial screens on its website, not included fuel surcharges in certain fare quotations.⁵ Another air carrier had failed to include any disclaimers about taxes not included in the fare in radio advertisements.⁶ The third air carrier had failed to disclose in advertisements that a sale for U.S. military personnel only included domestic fares, which DOT concluded was a restriction that should have been prominently disclosed.⁷

In the tour operator cases, DOT found that their fare quotations in brochures and on websites did not include fuel surcharges and did not provide adequate disclosure about the excluded taxes and fees. One tour operator also did not – as required by TSA regulations⁸ – properly identify the September 11th Security Fee.⁹ In addition, DOT indicated that the brochures should have warned consumers that the cited fares were not guaranteed and referred consumers to the tour operators’ websites for current information.¹⁰

Air Charter Brokers

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 from DOT.¹¹ In 2007, DOT sanctioned three brokers: One had arranged the charter of

³ 14 C.F.R. § 399.84.

⁴ In 2007, CBP announced that the user fee for international arrivals would increase to \$5.50 for tickets issued on or after April 1, 2007. Fees for Certain Services, 72 Fed. Reg. 3730 (January 26, 2007). Additionally, in 2007 the IRS announced inflation adjustments for certain air transportation taxes, effective for tickets issued on or after January 1, 2008. Arrival and departure taxes increased to \$15.40; the tax for domestic segments beginning or ending in Alaska or Hawaii increased to \$7.70; and the tax for other domestic segments increased to \$3.50. See “2008 Excise Taxes on Air Transportation,” <http://www.irs.gov/newsroom/article/0,,id=176947,00.html>, IRS Press Release no. IR-2007-208 (Dec. 27, 2007).

⁵ Air Canada, Order 2007-1-10 (January 18, 2007).

⁶ Iberia Airlines, Order 2007-9-21 (September 20, 2007).

⁷ United Air Lines, Inc., Order 2007-2-13 (February 9, 2007).

⁸ 14 C.F.R. § 1510.7.

⁹ Vantage Travel Service, Inc., d/b/a Vantage Deluxe World Travel, Order 2007-12-18 (December 20, 2007).

¹⁰ Vantage Travel Service, Inc., d/b/a Vantage Deluxe World Travel, Order 2007-12-18 (December 20, 2007); Group Voyagers, Inc., d/b/a Globus, Cosmos, Brennan Vacations, Monograms, and Avalon Waterways, Order 2007-11-13 (November 20, 2007); Uniworld River Cruises, Inc., Order 2007-8-23 (August 24, 2007); Trafalgar Tours West, Inc. d/b/a Trafalgar Tours, Order 2007-8-24 (August 24, 2007); Viking River Cruises, Inc., Order 2007-8-25 (August 29, 2007).

¹¹ 49 U.S.C. § 41101.

an aircraft from a third-party which the broker was aware lacked proper DOT authority;¹² while the others each had represented that it was itself a direct air carrier.¹³

DOT also has proposed certain disclosure requirements for Part 135 air taxi operations which reflect some of DOT's concerns about air charter brokers. In particular, air taxis would be required to inform customers of the name of the company with operational control of the flight; the name of the aircraft owner; and the name of any broker involved in arranging the flight.¹⁴ In addition, in a letter to the National Business Aviation Association, DOT generally warned that brokers should be cautious in the distribution of "branding materials" (i.e., napkins, brochures, pad and pens) which, under the totality of the circumstances, create the impression that a broker is a direct air carrier.¹⁵

Air Carrier Authority

Citizens of the United States generally are required to obtain authority from DOT before they can engage directly or indirectly in the air transportation of passengers or property.¹⁶ In 2007, DOT sanctioned three companies which had improperly held themselves out to the public as qualified to offer air transportation. One had only a Part 125 private carriage license, and made its aircraft available through an air charter broker;¹⁷ one had no DOT authority but had offered "membership units" for air transportation via aircraft that were under the same ownership or control;¹⁸ and one had no DOT authority but had held itself out to be a direct air carrier, and accepted funds for a charter flight to Liberia that it failed to operate or to arrange for a qualified air carrier to operate.¹⁹

Additionally, foreign air carriers can operate services to and from points in the U.S. only after they have been issued the appropriate authority by DOT.²⁰ In 2007, DOT sanctioned a foreign air carrier for operating flights to and from points in the U.S. without DOT authority.²¹

Passengers with Disabilities

In 2007, DOT reminded air carriers which operate services in U.S.-U.K. markets that they should ensure their compliance with the U.K.'s Pet Travel Scheme (PETS) since any failure to transport a service animal in a U.S.-U.K. market due to the carrier's lack of compliance would

¹² Private Jet Services Group, Inc., Order 2007-8-7 (August 10, 2007). See also footnote 17.

¹³ OneSky Network, LLC, Order 2007-6-1 (June 4, 2007); Imperial Jets, Inc., Order 2007-4-7 (April 6, 2007). DOT noted that the brokers' conduct also violated 14 C.F.R. § 399.80(a), which generally prohibits travel agents from misrepresenting themselves to be air carriers.

¹⁴ Consumer Information Regarding On-Demand Air Taxi Operations, 72 Fed. Reg. 3773 (January 26, 2007).

¹⁵ Use of Branding Materials By Air Charter Brokers (June 25, 2007) (<http://web.nbaa.org/public/ops/part135/brokers/branding.pdf>).

¹⁶ 49 U.S.C. § 41101.

¹⁷ IDM Corporate Aviation Services, LLC, Order 2007-2-6 (February 5, 2007). See also footnote 12.

¹⁸ Jet Choice I, LLC, Order 2007-4-23 (April 20, 2007).

¹⁹ Montgomery Jet Center, Inc., Southern Skies, Inc., and Ronald E. Mays, Administrative Law Judge's Order Approving Settlement and Dismissing Proceeding, (May 11, 2007), Docket OST-2007-26820.

²⁰ 49 U.S.C. § 41301.

²¹ Caribair, SA, Order 2007-1-9 (January 17, 2007).

amount to a violation of the U.S. laws protecting passengers with disabilities.²² DOT subsequently provided additional guidance as to what steps passengers themselves would need to take in order to ensure that their service animals were PETS-compliant.²³ In addition, DOT sanctioned eight carriers for failing to submit annual reports detailing the disability-related complaints that they had received from passengers, as required by 14 C.F.R. § 382.70.²⁴

Oversales

DOT regulations generally require air carriers to compensate passengers who are denied boarding involuntarily, as well as set out requirements for providing information about denied boarding compensation to passengers.²⁵ In 2007, one air carrier was sanctioned for failing to have written guidance about its denied boarding policies available at its ticket counters and gates, as required by the regulation.²⁶ In addition, DOT proposed to increase the maximum required compensation, which had not been adjusted in more than 25 years, as well as to extend the rule's threshold, which had been aircraft with 60 or fewer seats, to aircraft with fewer than 30 seats.²⁷

On-Time Performance

DOT regulations generally require air carriers to file on-time performance reports,²⁸ and specifically require them to disclose the same information, upon request, to consumers.²⁹ In Congressional testimony, responding to high-profile flight delays, the Assistant Secretary for Aviation and International Affairs, Andrew B. Steinberg, stated that DOT was investigating eight air carriers' compliance with this requirement.³⁰ Subsequently, DOT sanctioned three carriers for failing to provide accurate data to consumers.³¹ In addition, DOT proposed to require air

²² Guidance Concerning the Carriage of Service Animals in Air Transportation Into the United Kingdom, 72 Fed. Reg. 8268 (February 26, 2007).

²³ Carriage of Service Animals into the United Kingdom and Foreign Health Documentation Requirements for Service Animals in Air Transportation (July 17, 2007) (<http://airconsumer.ost.dot.gov/rules/UKServiceAnimalJulyNotice.pdf>).

²⁴ Israir Airlines and Tourism Ltd, Order 2007-12-4 (December 11, 2007); Eurofly S.p.A., Order 2007-10-25 (October 22, 2007); Cayman Airways, Order 2007-10-19 (October 16, 2007); Air New Zealand, Order 2007-10-8 (October 5, 2007); Alia – Royal Jordanian Airlines, Order 2007-9-19 (September 19, 2007); Lloyd Aereo Boliviano, S.A., Order 2007-9-11 (September 12, 2007); LAN Airlines, S.A., Order 2007-5-15 (May 30, 2007); Austrian Airlines, Order 2007-5-8 (May 21, 2007).

²⁵ 14 C.F.R. Part 250.

²⁶ Northwest Airlines, Inc., Order 2007-7-12 (June 18, 2007).

²⁷ Oversales and Denied Boarding Compensation, 72 Fed. Reg. 65237 (November 20, 2007).

²⁸ 14 C.F.R. Part 234.

²⁹ 14 C.F.R. § 234.11.

³⁰ Sudeep Reddy, "Transportation department to probe airline delays," Dallas Morning News (April 20, 2007) (<http://www.dallasnews.com/sharedcontent/dws/news/washington/sreddy/stories/042107dnbusairlinedelays.2aef3203.htm>). In response to its own concerns about delays, New York enacted a "passenger bill of rights" (Gen Bus. L. §§ 251-f – 251-j). The Air Transport Association challenged the statute, alleging that it was preempted by federal law (49 U.S.C. § 41713(b)(1)), but a court rejected the challenge and allowed the statute to enter into effect as scheduled on January 1, 2008. See Air Transport Association of America, Inc. v. Cuomo, 2007 WL 4480046 (N.D.N.Y. December 20, 2007).

³¹ Delta Air Lines, Inc., Order 2007-11-6 (November 19, 2007); Hawaiian Airlines, Inc., Order 2007-10-5 (October 3, 2007); Jet Blue Airways Corp., Order 2007-10-4 (October 3, 2007).

carriers to publish on-time performance information on their websites; to sanction air carriers that operated chronically delayed flights; and to start collecting on-time performance data for international flights.³²

Flight Cancellations

DOT sanctioned an air carrier for misrepresenting the cause of widespread flight cancellations (which were due to the failure of its crew scheduling system, but were asserted to some passengers to have been caused by weather) and not providing amenities, as provided in its contract of carriage, for delays within its control.³³ In addition, DOT proposed to expand the data collected from air carriers about the causes of flight cancellations.³⁴

Additional Issues

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 started the wet lease of an aircraft to a foreign carrier before it obtained authority from DOT.³⁶

Freight Forwarders. DOT regulations generally exempt indirect air freight forwarders from regulation,³⁷ but they may not hold out service in their own right absent DOT authority.³⁸ In 2007, one freight forwarder was sanctioned for advertising which suggested that it was authorized to conduct direct air transportation.³⁹

Prior Consent Orders. DOT denied the request of an air charter broker, which had ceased operations, for an extension of the deadline for it to pay the penalty to which it had agreed in a 2006 consent order; the Enforcement Office did not oppose the request, but the Assistant Secretary for Aviation and International Affairs concluded that there was no prospect that forbearance would increase the likelihood of payment at a later date.⁴⁰ Additionally, DOT noted that a Canadian air taxi had failed to pay the majority of the penalty to which it had agreed in a 2003 consent order, and that the matter had been referred to the U.S. Department of the Treasury for collection.⁴¹

³² Enhancing Airline Passenger Protections, 72 Fed. Reg. 65233 (November 20, 2007). DOT also proposed to require air carriers to: adopt contingency plans for lengthy delays; respond to consumer complaints within 30 days; publish complaint data on their websites; and audit their compliance with their own customer service plans.

³³ Comair, Inc. d/b/a Delta Connection, Order 2007-5-9 (May 17, 2007).

³⁴ Revision of Airline Service Quality Performance Reports and Disclosure Requirements, 72 Fed. Reg. 65230 (November 20, 2007).

³⁵ 14 C.F.R. § 212.9.

³⁶ Ryan International Airlines, Inc., Order 2007-9-5 (September 7, 2007).

³⁷ 14 C.F.R. Part 296.

³⁸ 14 C.F.R. § 296.10.

³⁹ Arrowhead Express, Inc., Order 2007-8-1 (August 2, 2007).

⁴⁰ Platinum Jet Management, LLC, et al., Order 2007-9-8 (September 14, 2007). DOT subsequently denied a motion for reconsideration. Order 2007-11-8 (November 13, 2007).

⁴¹ Flight-Ops International, Inc., d/b/a SkyXpress Airline, Order 2007-2-20 (February 21, 2007).

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.