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“The Dog That Did Nothing”: The Curious Incident of DOT’s Animal Incident Reporting Requirements

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Since May 2005, the U.S. Department of Transportation (“DOT”) has required U.S. airlines to file monthly reports on pets that died or were lost or injured during air transport. Now that the regulations have been in effect for more than a year, the time is ripe to review how effective the animal incident reporting requirements have been – as well as to consider what they may portend for other DOT rulemaking proceedings.

Despite the sunset of the Civil Aeronautics Board (“CAB”) more than two decades ago, the economics of commercial aviation continue to be closely regulated in comparison to other industries. In some cases, the rules are a continuation of CAB standards that subsequently were transferred to DOT. For example, DOT has the authority to sanction “[u]nfair and deceptive practices and unfair methods of competition” by airlines and ticket agents¹ – authority which not only overlaps that of the Federal Trade Commission but also preempts state regulation.² But many regulations are of more current vintage, having been enacted by DOT. The animal incident reporting requirements are only among the most recent.

There is no question that the animal incident reporting requirements were well-intentioned. Whether they are effective is a different issue. They are extremely narrow in scope, and thus do not provide a complete picture of the treatment of animals in commercial aviation. But they also implicate issues of broad concern, such as the privacy of passenger data – and also may provide some insight into concerns that are relevant to all DOT rulemaking proceedings.

The Background of the Regulations

According to the American Pet Product Manufacturers Association’s 2005/2006 National Pet Owners Survey, 63% of U.S. households own a pet, including 90.5 million cats, 73.9 million dogs, and 45.8 million birds, reptiles, and small animals.³ Indeed, pets are increasingly considered to be full-fledged household members. A growing – if still novel – topic of debate is to what extent animals should be recognized by the law to have rights and not to be mere

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¹ 49 U.S.C. § 41712.

² *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992). For an overview of some of the issues regulated by DOT pursuant to § 41712, see Jol A. Silversmith, “DOT Oversight of Air Carrier Advertising and Unfair or Deceptive Practices, 2004,” *The Air & Space Lawyer* (Winter 2005).

³ “Industry Statistics & Trends,” http://www.appma.org/press_industrytrends.asp.

personal property. For example, in 2001 Rhode Island became the first state to enact a definition of pet “guardians” – as an alternative to “owner” – into its animal cruelty statutes,⁴ while a recent survey by the American Association of Matrimonial Lawyers reported that “pet custody” was becoming a common issue in divorce cases.⁵

On the federal level, the principal statute governing the treatment of animals is the Animal Welfare Act of 1966.⁶ Although the authority granted to the U.S. Department of Agriculture (“USDA”) by the Animal Welfare Act included the authority to regulate the transportation of animals for research, experimentation or “other purposes,” the USDA’s historic emphasis has been on the use and transport of animals in scientific research and experimentation, and not overall transport issues.⁷ USDA has adopted regulations for the treatment of animals in transport,⁸ but airlines are only required to register with USDA, and not undergo the licensing process that is required of other facilities.⁹

However, on April 5, 2000, the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”) was signed into law.¹⁰ One of the lesser-publicized provisions of the wide-ranging law was section 710, which primarily required:

An air carrier that provides scheduled passenger air transportation shall submit monthly to the Secretary a report on any incidents involving the loss, injury, or death of an animal (as defined by the Secretary of Transportation) during air transport provided by the air carrier. The report shall be in such form and contain such information as the Secretary determines appropriate.¹¹

Although DOT itself estimated that more than two million animals are transported by air in the U.S. each year,¹² more than two years would elapse before DOT issued a notice of proposed rulemaking (“NPRM”) for the animal incident reporting requirements.¹³ Most of the

⁴ R.I. Stat. § 4-1-1(a)(3).

⁵ Jane Porter, “It Can Be A Regular Dog Fight,” Hartford Courant (July 10, 2006), <http://www.courant.com/features/lifestyle/hc-dogfight.artjul10,0,7515239.story?coll=hc-headlines-life>.

⁶ 7 U.S.C. §§ 2131 - 2159.

⁷ In the past twenty years, USDA has only on two occasions publicly sanctioned an airline for non-compliance with the Animal Welfare Act. See In re Delta Air Lines, Inc., 53 Agric. Dec. 1076 (Nov. 9, 1994); In re Continental Air Lines, Inc., 51 Agric. Dec. 1256 (June 1, 1992).

⁸ 9 C.F.R. Part 3. See also Carole Lynn Nowicki, “The Animal Welfare Act: All Bark and No Bite,” 23 Seton Hall Legis J. 443, 457 n.71 (1999).

⁹ 9 C.F.R. § 2.25. In addition, until 2004, as a matter of policy the USDA did not apply the standards for the treatment of animals in transport to foreign airlines. See 68 F.R. 58575 (Oct. 10, 2003); 69 F.R. 17899 (April 6, 2004).

¹⁰ P.L. 106-181.

¹¹ This requirement is codified at 49 U.S.C. § 41721, along with the other provisions of section 710.

¹² “Transporting Live Animals,” <http://airconsumer.ost.dot.gov/publications/animals.htm>.

¹³ 67 F.R. 61238 (Sept. 27, 2002).

requirements were for basic information.¹⁴ However, the NPRM also provided that, for the purposes of reporting, the definition of an animal would be limited to an animal “being kept as a pet in a family household in the United States, or is being transported for the purpose of being sold as a pet in a family household in the United States.”¹⁵

DOT subsequently finalized the rules in August 2003.¹⁶ More than 3,700 comments had been filed on the NPRM, primarily by members of the general public, but also by airlines, aviation associations, and animal welfare associations.¹⁷ However, the only substantive change made by DOT was the deletion of the “being transported for the purpose of being sold as a pet” clause of the above proposed definition of “animal”; DOT asserted that the definition should be narrowed even further because the legislative history of AIR 21 revealed an intent to require reports only about household pets. Nevertheless, almost two years would elapse before the rule entered into effect due to various delays, including DOT’s decision that the reports were better directed to its own Aviation Consumer Protection Division than to USDA’s Animal and Plant Health Inspection Service,¹⁸ as well as the approval of the information collection request by the Office of Management and Budget.¹⁹

The Regulations in Practice

Based on the data collected by DOT, incidents involving animals are relatively uncommon on U.S. passenger airlines. Between May 2005 and June 2006, 15 airlines (including five commuter airlines) filed animal incident reports, informing DOT of 31 deaths, 23 injuries, and eight losses. Of the deaths, 24 were dogs, four were cats, two were birds, and one was a rat;

¹⁴ Specifically, an airline must submit the following information: (1) airline and flight number; (2) date and time of the incident; (3) description of the animal, including name, if applicable; (4) identification of the owner(s) and/or guardian of the animal; (5) narrative description of the incident; (6) narrative description of the cause of the incident; (7) narrative description of any corrective action taken in response to the incident; and (8) name, title, address, and telephone number of the individual filing the report on behalf of the airline.

¹⁵ In addition, the regulation’s definitions refer to an animal’s “owner or guardian.” See *supra* footnote 4. As will be discussed in greater detail below, this is just one of the many unclear provisions of the regulations; *i.e.*, the distinction between “owner” and “guardian” is not specified, nor is it clear if an owner or guardian must accompany an animal on a flight for the regulation to be applicable, since an airline’s responsibilities are defined to end when an animal is returned to an owner or guardian. See 14 C.F.R. § 234.13(c)(1).

¹⁶ 68 F.R. 47798 (Aug. 11, 2003).

¹⁷ The parties that filed comments included: the Air Transport Association; the American Kennel Club; Continental Airlines; the Humane Society of the United States; the International Air Transport Association; the National Animal Interest Alliance; People for the Ethical Treatment of Animals; the Pet Industry Joint Advisory Council; and the Regional Airline Association. In addition, a study by the American Veterinary Medical Association Animal Air Transportation Study Group, which had been commissioned by USDA, was included in the docket.

¹⁸ 70 F.R. 7392 (Feb. 14, 2005). The regulation, which was initially codified at 14 C.F.R. § 119.72, was re-codified at § 234.13.

¹⁹ 70 F.R. 9217 (Feb. 25, 2005); 70 F.R. 18449 (April 11, 2005).

of the injuries, 17 were dogs and six were cats; and of the losses, two were dogs and six were cats.²⁰

However, the manner of DOT’s presentation of the collected data has limited its utility. DOT compiles the data only on a month-to-month basis, which impedes any ongoing analysis.²¹ Moreover, the figures do not distinguish between incidents in which the airline was at fault, as opposed to the owner (*i.e.*, by sedating an animal with medicine intended for human use), a pre-existing condition (*i.e.*, animals with known breathing or heart problems), or an animal’s own efforts to escape its kennel. Based on a review of the reports to date, no deaths and only two injuries and three losses clearly can be attributed to airlines.²²

An additional issue with the data collected by DOT is that the reporting standards are vague. For example, it is not clear if an airline must file a report if a lost animal is recovered within the same month.²³ Indeed, the terms “death,” “injury,” and “loss” are undefined; *i.e.*, it is not clear if an animal’s emotional distress constitutes an “injury” if it is not accompanied by physical distress,²⁴ nor is it clear if an incident should be categorized as an “injury” or “death” if an animal dies after its removal from an aircraft.²⁵ Further, the figures collected by DOT also lack context, since they do not establish how many animals in total were transported by the reporting airlines, and thus what percentage of the total are reflected by the incident reports.²⁶

Moreover, it cannot be determined if animal incidents are truly uncommon, as the reports to date suggest, or if the figures collected by DOT are merely the tip of the iceberg.²⁷ Congress

²⁰ DOT publishes a summary of the animal incident reports filed by airlines, with hyperlinks to redacted copies of the reports, in its monthly Air Travel Consumer Report, <http://airconsumer.ost.dot.gov/reports/index.htm>.

²¹ DOT’s presentation of the data does comply with 49 U.S.C. § 41721(d). But in order to improve the utility of the data, the Author has created a web page which includes not just monthly but ongoing figures for, as well as links to, the airline animal incident reports collected by DOT. See <http://www.thirdamendment.com/animals.html>.

²² In addition, in one case a cat was killed by a dog that had escaped from an inadequate kennel; the airline reported that its owner had been taken into police custody and had been banned from the airline for 12 months, while the dog had been banned permanently.

²³ In one case, an airline reported that a cat that was lost during a previous reporting cycle had been recovered.

²⁴ The Author has been advised by DOT that an incident in which a baggage handler threw a kennel into an aircraft was not reportable because the owner subsequently described the dog as “shaking and panting and afraid to go back into his crate” but “uninjured.” See Cheryl Phillips, “Baggage handlers’ latest gaffe: Dog tossed aboard jet,” *Seattle Times* (Jan. 10, 2006), http://seattletimes.nwsourc.com/html/localnews/2002730539_flyingdog10.html.

²⁵ In two cases, DOT counted incident reports as “injuries” even though the animals died at veterinary clinics shortly after arrival.

²⁶ Continental Airlines in particular has emphasized how uncommon incidents are, by noting how many animals it carried in each month for which it was required to file a report with DOT. Continental has never been required to submit reports for more than .047% of the animals transported – *i.e.*, less than 1 in 2000 animals. In contrast, in 2005 passengers filed more than three million mishandled baggage reports with the 19 U.S.-flag airlines that provide baggage data to DOT, which computes to reports for approximately 0.6% of enplaned passengers or 12 per 2,000 enplaned passengers. See <http://airconsumer.ost.dot.gov/reports/2006/february/0602atcr.pdf>.

²⁷ DOT has asserted that two million animals are transported annually, but does not cite a source for the figure. See *supra* footnote 12. In the 1990s, a press release from the Air Transport Association (“ATA”) asserted that 500,000 dogs and cats were transported annually, and that 99% arrived “without any problems”; however, airlines have asserted that ATA’s statement should not be read to mean that 5,000 animals die or are injured or lost each (*continued...*)

is partly at fault; section 710 of AIR 21 as enacted requires that DOT collect reports only from U.S.-flag airlines that operate scheduled passenger services.²⁸ But DOT also circumscribed the reporting obligations to be even more restrictive than Congress’ mandate, without adequate explanation.

Most notably, as discussed above, DOT has limited the reporting obligation to incidents involving a “pet” instead of an “animal.” But this distinction is anchored in a brief passage of a conference report, which stated the managers’ intent that DOT should:

[w]ork with airlines to improve the training of employees so that (1) they will be better able to ensure the safety of animals being flown and (2) they will be better able to explain to passengers the conditions under which their pets are being carried. People should know that their pets might be in a cargo hold that may not be air-conditioned or may differ from the passenger cabin in other respects.²⁹

DOT fails to establish how the above discussion of DOT’s obligation to assist with the training of airline employees pursuant to § 41721(b) – which in any case refers to both “animals” and “pets” – has any bearing on the reporting obligations for “the loss, injury, or death of an animal” (emphasis added) pursuant to § 41721(a).³⁰ In fact, in regard to the latter, the conference report explicitly states that “scheduled U.S. airlines will be required to provide monthly reports to DOT describing any incidents involving animals that they carry” (emphasis added).³¹

year, as opposed to that they experience much less significant “problems,” such as lack of proper documentation. See Gregg Pittelkow, “Advertorial: Your Pet’s Safety: A Northwest Priority,” AKC Gazette (January 2005).

²⁸ As previously noted, the USDA has, on its own initiative, expanded the coverage of the Animal Welfare Act to foreign airlines. See supra footnote 9. Notably, DOT’s overall data collection authority is broad. See generally 49 U.S.C. § 329. Although the Air Carrier Access Act (49 U.S.C. § 41705) (“ACAA”) has applied to foreign-flag airlines only since it was amended by section 707 of AIR 21, DOT previously applied the standards of its regulations for passengers with disabilities (14 C.F.R. Part 382) to foreign-flag airlines. See In re Lufthansa German Airlines, Consent Order, DOT Order 98-9-23, at 4 n.4 (Sept. 23, 1998); In re Air Canada, Consent Order, DOT Order 2000-8-18, at 1 n.1 (Aug. 22, 2000).

²⁹ 68 F.R. at 47798-99, quoting House Report 106-513, at 197 (March 8, 2000). Section 710 originated as an amendment to AIR 21 by Senator Frank Lautenberg (D-NJ). As originally proposed, the “Boris Bill” (named for a dog who had been lost on a 1996 Delta Air Lines flight) would also have made airlines, if at fault for an incident, liable for twice the amount due for mishandled baggage and liable for one year of veterinary expenses, among other provisions. See Congressional Record, vol. 145, pp. S12145-46 (Oct. 6, 1999).

³⁰ Additionally, more than six years after AIR 21 was enacted, DOT has made no apparent efforts to actually implement § 41721(b) by assisting airlines “to improve the training of employees with respect to the air transport of animals and the notification of passengers of the conditions under which the air transport of animals is conducted.”

³¹ Various parties argued that DOT had underestimated the costs of compliance, especially to the extent that the requirements would encompass shipments of animals that were routinely not expected to all survive, such as chicks and turtles. See, e.g., Comments of Continental Airlines, Inc., at 3-7 (Dec. 27, 2002). But even if some animals should be excluded, DOT has not explained why all animals other than pets – i.e., horses and primates, as well as domestic animals shipped by dealers rather than owner/guardians – should not be included in the reporting requirements. In 1994, Delta Air Lines was fined \$140,000 by USDA after 32 dogs being transported by a dealer suffocated in a single incident after they were placed in a cargo compartment with inadequate ventilation; 52 additional dogs required veterinary treatment. See supra footnote 7.

Moreover, DOT has not defined “pet in a family household” – but based on other definitions utilized by DOT and other federal agencies, it appears to exclude working animals such as guide dogs.³² Thus, by DOT’s interpretation of the statute, incidents involving service animals are not to be reported.³³ Indeed, given the emphasis that DOT places on the quotation from the conference report, it appears that the only reportable incidents are those that occur in an aircraft’s cargo hold, and not in the cabin – in which airlines must allow service animals to be carried,³⁴ and may allow other animals to be carried. DOT has not offered any explanation for these distinctions.³⁵

Finally, an issue that appears to have received minimal consideration from DOT is privacy. Incident reports are required to identify an animal’s owner. Although DOT to date has redacted that information from its monthly reports, it has not established whether it considers that identifying information to be public, and available through a Freedom of Information Act (“FOIA”) request or by other means.³⁶ Additionally, although animals themselves have no privacy rights under FOIA,³⁷ DOT should be alert that the information in a report about an animal may be sufficient to identify its owner, and thus defeat the purpose of redacting personal information. For example, the report of a whippet lost at John F. Kennedy International Airport (JFK) in February 2006 can be used to identify the dog’s owner, based on public reports at that time of just such a dog being lost at JFK after the 2006 Westminster dog show.³⁸ As a general principle, DOT has stated that “privacy is an important value in our Nation’s social, political, and

³² *Id.* In a proposed annex to its regulations for passengers with disabilities (14 C.F.R. Part 382), DOT provides that a passenger may be asked if an animal “is a service animal and not a pet.” 69 F.R. 64364, 64392 (Nov. 4, 2004). *See also* 24 C.F.R. § 5.306 (defining “common household pet” for purposes of public housing regulations so as to exclude “animals that are used to assist persons with disabilities”); 9 C.F.R. § 1.1 (defining “animal” for purposes of animal welfare regulations); 28 C.F.R. § 36.104 (defining “service animal” for purposes of public accommodation-related disabilities regulations); 49 C.F.R. § 37.3 (defining “service animal” for purposes of transportation-related disabilities regulations).

³³ Nor has DOT explained why only pets in U.S. households are covered by the reporting requirement to the extent that the air transportation is performed by a U.S.-flag airline. *See* 14 C.F.R. § 234.13(c)(2). Generally, discrimination based on national origin is prohibited by DOT. *See, e.g., In re Air Canada*, Consent Order, DOT Order 2000-8-18, at 1 n.1 (Aug. 22, 2000); “Nondiscrimination concerning religion and national origin,” <http://airconsumer.ost.dot.gov/rules/20010921.htm>.

³⁴ *See* 14 C.F.R. § 382.55.

³⁵ Similarly, although § 41721(a) requires reports to be submitted by U.S.-flag airlines that provide scheduled air transportation, DOT has indicated that reports need not be filed for incidents on all-cargo flights, even if those flights are operated by an U.S.-flag airline that also operates scheduled air transportation. *See* 70 F.R. at 9218.

³⁶ *See generally* 49 C.F.R. Parts 7, 10.

³⁷ Lucy Spelman, Director of the Smithsonian Institution’s National Zoo, was widely ridiculed for her refusal of a request for a giraffe’s medical records on privacy grounds. *See* James V. Grimaldi, “National Zoo Cites Privacy Concerns in Its Refusal to Release Animal’s Medical Records,” *Washington Post* (May 6, 2002), <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A37589-2002May5>.

³⁸ Warren Woodberry, Jr. and Leo Standora, “Hunt is on for whippet who took off,” *New York Daily News* (Feb. 16, 2006), <http://www.nydailynews.com/front/story/391896p-332254c.html>. Additionally, since the whippet was a show dog, a question could be raised as to if a report was required at all, since it is not evident that it was “being kept as a pet in a family household in the United States.”

economic life,” but its actions in regard to animals do not appear to quite match the tenor of its words.³⁹

The Regulations as a Cautionary Lesson

Upon initial review, the initial results of DOT’s animal incident reporting requirements are positive: the death, injury, or loss of animals in air transport appears to be rare. However, upon scrutiny, the rules could be described as a “dog [that] did nothing,”⁴⁰ despite their good intentions. Not only are there unresolved issues about the scope of their requirements, but to the extent that their scope is clear, the requirements are so narrow that the true frequency of incidents involving animals in air transport remains unknown. Regrettably, the devil was never exorcised from the details.

The regulations can be understood to offer a cautionary lesson – *i.e.*, of the importance of scrutinizing whether regulations will accomplish their goals, and what side effects they may have – before they are adopted. Moreover, they also warn of the importance of responding to public comments.⁴¹ The limited scope of the animal incident reporting requirements has meant that even if flawed, they have not imposed significant unnecessary burdens on airlines. But other pending rules could have significant consequences, and thus call for careful attention. One example is the pending rulemaking that would revise DOT’s interpretation of the requirement that U.S.-flag air airlines be under the “actual control” of U.S. citizens.⁴² A central issue in the proceeding – and a matter much debated by the parties that have filed comments – is how underlying language adopted by Congress can and should be read by DOT.⁴³

Conclusion

Kant remarked that “[i]f [man] is not to stifle his human feelings, he must practice kindness towards animals, for he who is cruel to animals becomes hard also in his dealings with

³⁹ Third-Party Enforcement Complaint of the Electronic Privacy Information Center against Northwest Airlines, Order Dismissing Complaint, DOT Order 2004-9-13, at 14 (Sept. 10, 2004).

⁴⁰ “Is there any point to which you would wish to draw my attention?”
“To the curious incident of the dog in the night-time.”
“The dog did nothing in the night-time.”
“That was the curious incident,” remarked Sherlock Holmes.

Arthur Conan Doyle, “Silver Blaze,” The Memoirs of Sherlock Holmes (1893).

⁴¹ Many of the comments filed during the rulemaking process for the animal incident reporting requirements warned of problems in the regulatory scheme that have been noted in this article – *i.e.*, the uncertain definitions of “animal” and “household,” and the privacy implications of the rules. See generally footnote 17.

⁴² 70 F.R. 67389 (Nov. 7, 2005); 71 F.R. 26425 (May 5, 2006).

⁴³ Another example of pending rulemaking proceedings that could have significant consequences are proposals to revise DOT’s regulations for passengers with disabilities (14 C.F.R. Part 382). See 69 F.R. 64364 (Nov. 4, 2004); 70 F.R. 53108 (Sept. 7, 2005); and 71 F.R. 9285 (Feb. 23, 2006). As for these proposals, questions have been raised about both the purpose and practicality of certain proposals; *e.g.*, a plan to require that carriers maintain TTY systems worldwide. See 71 F.R. at 9289. Some of the parties that have filed comments have observed that TTY systems do not exist in many foreign countries (especially those that do not use the Roman alphabet), as well as that the proposal also requires careful consideration of DOT’s jurisdiction over aviation-related activities in foreign nations, which may have their own rules for passengers with disabilities.

men.”⁴⁴ DOT’s animal incident reporting requirements are based on the accordingly admirable desire to reduce the incidents of the death, injury, or loss of animals in air transport. But the implementation of the regulations in practice has failed to fulfill their theoretical promise, as the rules are both exceedingly narrow and yet vague in their terms. Most strikingly, they unintentionally – but inexcusably – exclude service animals. Future DOT proceedings should ensure that their proposals are cautiously scrutinized, so that the final rules can accomplish their goals while at the same time imposing the minimal possible burdens on the industry.

⁴⁴ Immanuel Kant, “Lectures on Ethics.”