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DOT Enforcement of its Prohibitions on Unfair and Deceptive Practices, 2009

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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 any "unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."[1] Indeed, DOT's authority over these matters is exclusive; states and local jurisdictions are preempted from imposing their own requirements "related to a price, route, or service of an air carrier."[2] 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, ticket agents, and other entities involved in air transportation.

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

DOT has several regulatory tools at its disposal for responding to allegedly unfair and deceptive practices, including a private warning or cease-and-desist 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 enforcement policies for advertising and other practices, and can issue new regulations via rulemaking proceedings. 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.[3] In 2009, DOT issued 29 consent orders – the most in five years, and the third-highest total in DOT history.

In the past year, DOT's Office of Aviation Enforcement and Proceedings continued to closely monitor and investigate practices by air carriers, ticket agents, and other entities involved in the sale of air transportation (including package tours that include air transportation). Although DOT's greatest area of concern in the past year appears to have been the "full fare rule" for advertising by air carriers and ticket agents, DOT also continued to take enforcement

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

[2] 49 U.S.C. § 41713. See, e.g., Kalick v. Northwest Airlines Corp., 2009 WL 2448522 (D.N.J. August 7, 2009) (plaintiff alleged that involuntary denial of boarding by carrier had violated New Jersey law).

[3] 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). Since the report was issued, DOT has entered into more than 80 additional consent orders; the penalties assessed in 2009 are noted throughout this article.

action – and adopt new requirements – regarding an array of practices, ranging from "passenger rights" issues to the requirements governing the carriage of passengers with disabilities. This article briefly summarizes the consent orders and other public guidance that were issued by DOT in 2009, as well as certain related agency actions and court decisions.

Tarmac Delay at Rochester International Airport

On August 8, 2009, a regional airline flight bound for Minneapolis/St. Paul (MSP) was diverted to Rochester, Minnesota (RST), due to weather conditions; because neither the regional operator nor the mainline carrier served RST, the operator requested that the station personnel of a third carrier assist with the diversion. The aircraft landed at 12:30 am but the passengers were not allowed to deplane until 5:45 am; each of the air carriers offered various explanations and assigned blame to the other carriers involved, but DOT concluded that all had mishandled the situation and thus committed an "unfair or deceptive practice." Specifically, the mainline ticketing carrier was held to be bound by and to have violated its customer service policies regarding tarmac delays;[4] the operating regional carrier was held to also be bound by and to have violated the mainline carrier's customer service policies;[5] and the third carrier (which had assumed ground handling responsibilities when it assisted with the diversion) was held to have "demonstrat[ed] an indifference to passengers" which amounted to a statutory violation.[6]

Passenger Rights

In 2007, DOT initiated a rulemaking proceeding to adopt new regulations "enhancing airline passenger protections," pursuant to its general authority to prohibit unfair or deceptive practices.[7] In 2009, after two rounds of public comments, DOT announced the final rules, which will take effect on April 29, 2010.[8] Generally, the new requirements apply to U.S. carriers that operate scheduled or charter service using aircraft with 30 or more passenger seats, and include:

- *Tarmac Delay Contingency Plans.* U.S. carriers are required to develop and implement contingency plans for lengthy tarmac delays, with certain standards for the content of such plans having been specified by DOT. The carriers also are required to post information about their contingency plans on their websites, and to retain records about tarmac delays.

[4] Continental Airlines, Inc., Order 2009-11-17 (November 24, 2009) (assessing a penalty of $50,000, up to half of which could be offset by expenses to develop training materials and train personnel on tarmac delay procedures).

[5] ExpressJet Airlines, Inc., Order 2009-11-18 (November 24, 2009) (assessing a penalty of $50,000, up to half of which could be offset by expenses to develop training materials and train personnel on tarmac delay procedures).

[6] Mesaba Airlines, Order 2009-11-16 (November 24, 2009) (assessing a penalty of $75,000, up to half of which could be offset by expenses to develop training materials and train personnel on tarmac delay procedures).

[7] "Enhancing Airline Passenger Protections," 72 Fed. Reg. 65233 (November 20, 2007).

[8] "Enhancing Airline Passenger Protections," 74 Fed. Reg. 68983 (December 30, 2009). Most of the new requirements will be codified at 14 C.F.R. Part 259. DOT also stated that it planned to consider additional requirements in a future rulemaking proceeding.

- *Response to Consumer Problems.* For scheduled services, U.S. carriers are required to: (1) designate an employee to monitor the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers; (2) make available the email and postal contact information about the department at the carrier with which complaints can be filed; and (3) acknowledge receipt of complaints within 30 days of receipt and send a substantive response within 60 days of receipt.

- *Chronically Delayed Flights.* For U.S. carriers that are already required to report detailed operational data to DOT,[9] DOT will consider the operation of a "chronically delayed flight" for more than four consecutive one-month periods to be an unfair and deceptive practice. A flight is defined to be "chronically delayed" if it is operated at least 10 times per month and arrives more than 30 minutes late (including cancelled flights) more than 50% of the time.

- *Delay Data on Carrier Websites.* U.S. carriers that are already required to report detailed operational data to DOT also will be required to include the on-time performance code for domestic flights on their websites, including flights operated by a code-share partner. Upon the initial listing of flights, either on the same page or via a hyperlink, these carriers must provide the on-time performance data for the most recent calendar month reported to DOT, and specifically highlight chronically delayed flights.

- *Customer Service Plans.* For scheduled services, U.S. carriers are required to develop and implement customer service plans. DOT has specified certain matters that carriers must address in their plans, but not how they must be addressed (e.g., the plans must address how passengers will be notified of delays, cancellations, and diversions, but there is no baseline as to how and when they must be notified). The carriers also are required to post information about their plans on their websites, and to annually audit their adherence to their plans.

- *Retroactive Amendments to Contract of Carriage.* U.S. carriers are prohibited from retroactively applying any material amendments to their contracts of carriage with significant negative implications to consumers who have already purchased tickets.

Air Carrier and Ticket Agent Advertising

DOT's "full fare rule" requires that advertising by air carriers or ticket 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."[10] Historically, DOT has interpreted this regulation to allow only government-imposed taxes and fees that are assessed on a per-person basis and that are not ad valorem in nature (e.g., the September 11th Security Fee, federal segment taxes, and airport Passenger Facility Charges)[11] to be listed separately from an advertised fare, as long as the

[9] 14 C.F.R. Part 234 (which requires reporting by U.S. carriers that account for at least 1% of domestic scheduled passenger revenues).

[10] 14 C.F.R. § 399.84.

[11] On December 23, 2009, the IRS announced inflation adjustments for certain air transportation taxes, effective for tickets issued on or after January 1, 2010. International arrival and departure taxes remained unchanged, at $16.10, *(continued…)*

amount of those taxes and fees is clearly stated elsewhere in the advertisement or, for online advertisements, is available via a prominent hyperlink, with a warning signal proximate to the fare. Additionally, substantial conditions, such as blackout dates and restrictions on refunds, must be disclosed prominently.[12] In 2009, DOT sanctioned four air carriers, five ticket agents, and one public charter operator for failing to comply with these requirements.[13]

Government-Imposed Taxes and Fees

A failure to adequately identify government-imposed taxes and fees that were not included in advertised fares was the single most common offense sanctioned by DOT in 2009; two air carriers, three travel agents, and a public charter operator were the subject of consent orders based in whole or in part on this issue. In most cases, there had not been an adequate notice of the amount and/or nature of the excluded taxes and fees starting from the first point at which specific fares were displayed in an online booking process (website, email, or both).[14] In the case of the public charter operator, fares posted on its website and in print advertisements failed to provide appropriate notice at all.[15] In addition, two ticket agents excluded from advertised fares the federal air transportation excise tax,[16] which is computed on a percentage

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but the tax for domestic segments beginning or ending in Alaska or Hawaii increased from $8.00 to $8.10, and the tax for other domestic segments increased from $3.60 to $3.70. See IR-2009-120. In addition, the Animal Plant and Health Inspection Service (APHIS) in 2009 proposed but withdrew an increase in the user fee for international passengers to $5.50; the fee remains $5.00. See "User Fees for Agricultural and Quarantine Inspection Services," 74 Fed. Reg. 49311 (September 28, 2009); 74 Fed. Reg. 50915 (October 2, 2009); and 74 Fed. Reg. 57057 (November 4, 2009). See also 7 C.F.R. § 354.3.

[12] On December 2, 2009, Robert Menendez (D-NJ) proposed the "Clear Airfares Act of 2009" (S. 2823) which would restrict the separate listing of taxes and fees in air carrier and ticket agent advertising. Notably, it would require the amount of each tax/fee that is listed separately to be specifically identified; DOT currently requires only that a lump sum be stated (although a TSA regulation, 49 C.F.R. § 1510.7, separately requires that the September 11th Security Fee to be identified by name). To date, no action has been taken on the bill.

[13] DOT's authority over unfair or deceptive practices, including taxes and fees, is discretionary, and there is no private right of action, nor can DOT be required to investigate a carrier's compliance. See, e.g., Kalick v. Northwest Airlines Corp., 2009 WL 2448522 (D.N.J. August 7, 2009) (plaintiff alleged that carrier had violated DOT's oversales regulations); Greenstein v. Peters, 2009 WL 654044 (C.D.Cal. March 10, 2009) (plaintiff alleged that carrier had erroneously collected from him a tax to which he was not subject).

[14] Roni Herskovitz and Ultimate Fares, Inc., Order 2009-11-8 (November 9, 2009) (for this and other regulatory violations, assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year, against the individual; prohibiting him from having any interest or involvement in a carrier or ticket agent for one year; and also assessing a penalty of $600,000 against the company); United Air Lines, Inc., Order 2009-8-17 (August 25, 2009) (assessing a penalty of $75,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Continental Airlines, Inc., Order 2009-8-3 (August 10, 2009) (assessing a penalty of $75,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year); Gate 1, Ltd, Order 2009-7-5 (July 7, 2009) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year); Costa Cruise Lines, N.V., Order 2009-2-9 (February 25, 2009) (assessing a penalty of $35,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year).

[15] Holiday Airways d/b/a Holiday Air, Order 2009-5-12 (April 27, 2009) (assessing a penalty of $50,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year).

[16] The same statute which authorizes the collection of a user fee (currently $3.70) for each domestic segment also imposes a 7.5% excise tax "on the amount paid for taxable transportation." See 26 U.S.C. § 4261.

(e.g., ad valorem) basis and not on a per-passenger basis, and thus cannot be listed separately pursuant to the "full fare rule."[17]

Fuel Surcharges

The "full fare rule" generally prohibits air carriers and ticket agents from listing fuel surcharges separate from a fare. In 2009, an air carrier and two ticket agents were sanctioned for failing to include their service fees in fares posted on their websites and in print advertisements.[18] In regard to the ticket agents, both of which specialized in tour packages, DOT added that the "full fare rule" is applicable to all components of a package which includes an air component (e.g., air, hotel and cruise components that are bundled together into a single tour product). In addition, while brochures for packages can warn consumers that fare availability may be limited and refer them to a source of current fare information, fares that are listed online and in newspaper and magazine ads must be current and available.[19]

Service Fees

The "full fare rule" also generally prohibits air carriers and ticket agents from listing a service fee separate from a fare. In 2009, two air carriers and one ticket agent were sanctioned for failing to include their service fees in fares posted on their websites.[20] Additionally, in 2008, an air carrier had entered into a consent order with DOT on the basis that it had improperly listed a "convenience fee" separately from its fares. In 2009, a third-party complaint was filed, alleging that the same air carrier's practices were still non-compliant. DOT dismissed the complaint, explaining that the air carrier's revised displays did comply; specifically, the first display of fares stated a range of total fares (including convenience fee and all other taxes and fees) in close proximity to a matrix of fares which did not include the convenience fee.[21]

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[17] Roni Herskovitz and Ultimate Fares, Inc., Order 2009-11-8 (November 9, 2009), supra n. 14; Liberty Travel, Inc., Order 2009-2-9 (February 25, 2009) (assessing a penalty of $55,000, half suspended on condition of compliance during the subsequent year).

[18] Costa Cruise Lines, N.V., Order 2009-2-9 (February 25, 2009), supra n. 14; SmartTours, Inc., Order 2009-4-4 (April 3, 2009) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year); Condor Flugdienst GmbH, Order 2009-4-1 (April 1, 2009) (assessing a penalty of $22,000 for this and other regulatory violations, half suspended on condition of compliance during the subsequent year).

[19] Costa Cruise Lines, N.V., Order 2009-2-9 (February 25, 2009), supra n. 14; SmartTours, Inc., Order 2009-4-4 (April 3, 2009), supra n. 18.

[20] Roni Herskovitz and Ultimate Fares, Inc., Order 2009-11-8 (November 9, 2009), supra n. 14; Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009) (assessing a penalty of $375,000 for this and other regulatory violations, $160,000 of which was suspended on condition of compliance during the subsequent year); Condor Flugdienst GmbH, Order 2009-4-1 (April 1, 2009), supra n. 18.

[21] Complaint of Donald Pevsner v. Allegiant Air, LLC, Order Dismissing Complaint, Order 2009-12-2 (December 2, 2009). Although not explicitly cited by DOT, the standards set forth in this order parallel those included in an exemption previously granted to a ticket agent, allowing it to display fares without a service fee under certain circumstances. See Application of Orbitz, LLC, Order Granting Conditional Exemption, Order 2001-12-7 (December 7, 2001). This exemption subsequently was extended as a matter of DOT policy to all air carriers and ticket agents. See "Revised Enforcement Policy on Deceptive Practices Regarding Service Fees Charged by Travel *(continued…)*

Each-Way Fares

DOT previously has advised air carriers and ticket agents in consent orders and other guidance materials that they may advertise each-way fares that are only available when bought for roundtrip travel provided that the disclosure of the roundtrip purchase requirement is clear and conspicuous; e.g., prominent and proximate to the advertised fares. In 2009, DOT sanctioned two carriers for failing to adequately warn consumers of a round-trip purchase requirement for fares posted on their websites.[22]

Erroneous Fares

Although DOT has never provided formal guidance as to whether air carriers are required to honor erroneous fares that are offered directly and through ticket agents, DOT issued a press release stating that it had reached an agreement with an air carrier to reimburse consumers for any cancellation penalties and/or other expenses they had incurred due to the air carrier's refusal to honor U.S.-India fares that had been erroneously offered for $40, exclusive of taxes and fees. The air carrier on its own initiative had offered all affected passengers a $300 travel voucher prior to the issuance of the press release.[23]

Passengers with Disabilities

In 2008, DOT substantially amended its regulations[24] which implement the Air Carrier Access Act,[25] and which prohibit discrimination by air carriers against passengers on the basis of disability.[26] One of the most significant changes is that most of the requirements now apply to foreign air carriers.[27] Other notable changes from the prior version of the regulations include:

Agents in the Marketing and Sale of Airfares to the Public Via the Internet," Notice (December 19, 2001) (http://airconsumer.dot.gov/rules/20011219.htm).

[22] United Air Lines, Inc., Order 2009-8-17 (August 25, 2009), supra n. 14; Continental Airlines, Inc., Order 2009-8-3 (August 10, 2009), supra n. 14.

[23] "Department Ensures British Airways Offers Reimbursements Following Erroneous Fare Offer," DOT 183-09 (November 30, 2009).

[24] 14 C.F.R. Part 382.

[25] 49 U.S.C. § 41705.

[26] As for other laws and regulations enforced by DOT, the Air Carrier Access Act and Part 382 do not create a private right of action. See, e.g., Kerner v. Mendez, 2009 WL 1226998 (N.D.Calif. May 1, 2009); Jackson v. United Airlines, Inc., 2009 WL 1036068 (E.D.Va. April 17, 2009).

[27] Foreign carriers may file requests for a waiver if a DOT requirement directly conflicts with a foreign law requirement. Additionally, both U.S. and foreign air carriers also may file requests for an equivalent alternative determination, to allow them to use procedures different than those set forth by DOT. See 14 C.F.R. §§ 382.9, 382.10. To date, three U.S. carriers and 43 foreign carriers have filed conflict of law and/or equivalent alternative applications. Most are still pending in whole or part. Notably, DOT has denied various requests that have asserted a conflict between Part 382 and European Union rules, but has exempted various carriers from requirements for movable armrests if it has been shown that passengers can be transferred from an aisle chair to a seat without being lifted over an armrest. See Dockets DOT-OST-2008-0272 and DOT-OST-2008-0273.

- Carriers must ensure that terminal facilities that they own, lease, or control are accessible to disabled passengers (e.g., by providing captioned television/audio-visual displays and providing relief areas for service animals).

- Carriers must provide assistance to disabled passengers throughout terminals, and not just in enplaning and deplaning (e.g., reasonable assistance to access ticket and baggage locations and rest rooms).

- Carriers must allow the use of electronic respiratory assistance devices that meet the applicable FAA and/or foreign requirements for such devices, although a carrier may require advance notice and/or advance check-in.

- Carriers must continue to allow passengers to be accompanied by service animals, but carriers may require documentation and/or advance notice for "emotional support" and "psychiatric service" animals, and unusual service animals (e.g., miniature horses, pot-bellied pigs, and monkeys) may be evaluated on a case-by-case basis.

Most of the new disabilities requirements became effective on May 13, 2009.[28] In 2009, before the effective date, DOT issued a set of corrections to the final rule,[29] as well as a list of "Frequently Asked Questions" about the final rule.[30] In the latter, DOT addressed various inquiries that it had received since the rule had been published. Some of DOT's guidance was procedural – such as what information should be included in an equivalent alternative application. Other guidance was substantive; for example, DOT emphasized that to the extent that air carriers acquire personal medical information from passengers, measures should be taken to safeguard the privacy of that information.

Subsequently, DOT issued a notice providing additional guidance as to what electronic respiratory assistive devices (e.g., ventilators, respirators, continuous positive airway pressure (CPAP) machines, and portable oxygen concentrators (POCs)) can and cannot be used aboard aircraft, as well as what documentation can be required by an air carrier for POCs.[31] DOT also issued a notice soliciting public comment as to whether it should modify its rules for psychiatric service animals (PSAs); a petition filed by an advocacy group argued that PSAs are trained, unlike emotional support animals, and should not be subject to documentation and/or advance notice requirements, which cannot be required for other service animals.[32]

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[28] "Nondiscrimination on the Basis of Disability in Air Travel," 73 Fed. Reg. 27614 (May 13, 2008).

[29] "Nondiscrimination on the Basis of Disability in Air Travel," 74 Fed. Reg. 11469 (March 18, 2009). DOT also stated that it planned to further address certain issues – such as the requirements applicable to code-share flights operated by foreign carriers and the deadline for foreign carriers to provide in-cabin wheelchair stowage space – in a future rulemaking proceeding.

[30] "Answers to Frequently Asked Questions Concerning Air Travel of People with Disabilities Under the Amended Air Carrier Access Act Regulation" (May 13, 2009).

[31] "Use of Passenger-Supplied Electronic Respiratory Assistive Devices on Aircraft" (October 28, 2009). DOT also stated that it planned to clarify the documentation requirements for POCs in a future rulemaking proceeding.

[32] "Nondiscrimination on the Basis of Disability in Air Travel," 74 Fed. Reg. 47902 (September 18, 2009).

Additionally, in 2009 DOT dismissed a complaint filed by four employees of a contractor that provided wheelchair services at airports, on the basis that it had not been served correctly.[33] DOT also sanctioned an air carrier for failing to produce a copy of Part 382, which is required to be available at airport ticket counters, when DOT investigators so requested [34]

Baggage Liability

In 2009, DOT issued policy statements regarding air carrier liability for lost, damaged, or delayed baggage for both international and domestic flights. For international flights, DOT took the position that the Montreal Convention[35] did not permit air carriers to disclaim liability for the loss, damage, or delay of valuable items – or for the loss or delay of fragile items – in checked baggage. Accordingly, DOT indicated that air carrier tariffs and contracts of carriage which denied liability for electronics, cameras, jewelry, etc. must be modified.[36]

For domestic flights, DOT stated that exclusions of liability for valuable and fragile items were permitted – but in a separate notice provided new guidance for the reimbursement of expenses incurred as a result of the loss, damage, or delay of baggage on domestic flights. DOT warned that under such circumstances, its baggage liability rules[37] require air carriers to assume liability for all direct or consequential damages. Accordingly, air carriers may not limit their liability (e.g., by setting a maximum amount per day or providing reimbursement for incidental expenses only on the outbound leg of a roundtrip), and should cover all reasonable, actual, and verifiable expenses related to the loss, damage, or delay of baggage on domestic flights.[38]

Subsequently, DOT sanctioned an air carrier for violating both of its newly-announced standards. For domestic flights, the carrier entertained claims for consequential damages due to delayed baggage only if a passenger was on the outbound leg of a roundtrip, and only for purchases made more than 24 hours after flight arrival. For international flights, the carrier had refused to accept liability for items, such as a laptop, that had been lost or damaged while in its

[33] Abraham Cruz, Wendy Fong, Emmanuel Foronda, and Maria Luisa Sarte, Order of Dismissal, Order 2009-1-3 (January 9, 2009). DOT also noted that their allegations were directed against their employer and not air carriers, which are the entities over which DOT has jurisdiction.

[34] Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009), supra n. 20.

[35] Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on May 28, 1999.

[36] "Providing Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries," 74 Fed. Reg. 14837 (April 1, 2009). Although not explicitly cited by DOT, the CAB advised that the Warsaw Convention – the Montreal Convention's predecessor – similarly did not allow air carriers to deny liability for valuable or fragile items carried on international flights. See Trans International Airlines, Inc. Enforcement Proceeding, Order on Petition for Discretionary Review of Initial Decision, Order 77-8-116 (August 23, 1977).

[37] 14 C.F.R. Part 254.

[38] "Guidance on Reimbursement of Passenger Expenses Incurred as a Result of Lost, Damaged or Delayed Baggage" 74 Fed. Reg. 53309 (October 16, 2009). However, air carriers may cap their liability for baggage on domestic flights to $3300 per passenger. See 14 C.F.R. § 254.4.

custody. Additionally, the carrier on "numerous" occasions had failed to resolve baggage claims within a reasonable period of time.[39]

DOT also reminded air carriers and ticket agents that the liability limits for international travel under the Montreal Convention would be adjusted for inflation effective December 30, 2009. Specifically, the limit for destruction, loss, damage, or delay of cargo would be 19 Special Drawing Rights (SDRs)[40] per kilogram (previously 17 SDRs); the limit for destruction, loss, damage or delay of baggage, per passenger, would be 1131 SDRs (previously 1000 SDRs); the limit for delay in carriage of passengers would be 4694 SDRs (previously 4150 SDRs); and the limit for death or bodily injury would be 113,100 SDRs (previously 100,000 SDRs).[41]

Finally, DOT previously had cautioned air carriers and ticket agents to provide prominent and timely notice if passengers were limited to fewer than two free checked bags of the size and weight that generally have been free in the past.[42] In 2009, DOT noted that a carrier's disclosure of its baggage charges on its "tools" page as a "frequently asked question" as well as towards the end of the booking process before any charges are applied fulfilled this requirement.[43]

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.[44] In 2009, DOT sanctioned three indirect air carriers which specialized in air ambulance services; DOT noted that the CAB in 1983 had issued a blanket exemption which allowed an air ambulance service to hold out services in its own right,[45] but did not permit it to make representations which would lead the public to conclude that it was a direct air carrier with operational control over flights.[46] DOT concluded that each of these indirect air carriers had exceeded the boundaries of the exemption for air ambulance services.[47] DOT also issued a

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[39] Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009), supra n. 14.

[40] Special Drawing Rights are used as a unit of account by the International Monetary Fund; currently 1 SDR is defined as the sum of 0.6320 U.S. Dollars, 0.4100 Euro, 18.4 Japanese Yen, and 0.0903 U.K. Pounds.

[41] "Inflation Adjustments to Liability Limits Governed by the Montreal Convention Effective December 30, 2009," 74 Fed. Reg. 59017 (November 16, 2009). The adjustments were calculated by the International Civil Aviation Organization (ICAO), as authorized by the treaty, and were based on inflation between 2003 and 2008 in the countries whose currencies comprise the SDR. DOT's notice observed that as of October 28, 2009, 1 SDR was equivalent to $1.58.

[42] "Guidance on Disclosure of Policies and Charges Associated with Checked Baggage," 73 Fed. Reg. 28854 (May 19, 2008).

[43] See Complaint of Donald Pevsner v. Allegiant Air, LLC, Order Dismissing Complaint, Order 2009-12-2 (December 2, 2009).

[44] 49 U.S.C. § 41101.

[45] In the Matter of a Blanket Exemption to Indirect Air Carriers Serving as Air Ambulance Operators, Order Granting Blanket Exemption, Order 83-1-36 (January 12, 1983).

[46] 49 U.S.C. § 41101.

[47] Medjet Assistance, LLC, Order 2009-6-19 (June 23, 2009) (assessing a penalty of $25,000); Air Ambulance Worldwide, Inc., Order 2009-6-18 (June 23, 2009) (assessing a penalty of $12,000, half suspended on condition of *(continued…)*

warning to an air taxi operator – which by DOT regulation may operate no more than four flights per week in any market according to a "published flight schedule"[48] – that the term "schedule" is not limited to a written format but may include scheduling information provided to prospective passengers over the telephone.[49]

Foreign carriers are required to obtain authority from DOT before they can engage in services to/from the U.S.[50] In 2009, DOT sanctioned three Canadian operators for conducting trans-border operations without DOT authority.[51]

Additionally, an air carrier must meet continuing "fitness" requirements,[52] which DOT historically has defined to include its financial wherewithal, managerial competence, and compliance disposition. In 2009, a federal appeals court upheld DOT's revocation of the authority of an air carrier on the basis of its poor financial position, and further because its ex-general counsel had submitted false financial information to DOT, which the agency had concluded directly reflected upon the air carrier's managerial competence and/or compliance disposition.[53]

Charter Flights

Since 2004, DOT has entered into numerous consent orders with air charter brokers (e.g., entities that link prospective charter customers with direct air carriers). DOT takes the position

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compliance during the subsequent year); Angel Medflight Worldwide Air Ambulance Services, LLC, Order 2009-4-17 (April 27, 2009) (assessing a penalty of $10,000).

[48] 14 C.F.R. § 298.3.

[49] Letter from Samuel Podberesky to Hank Myers, Docket DOT-OST-2008-0318 (March 17, 2009). In the same docket, DOT subsequently noted that it would not investigate whether the air taxi operator had properly remitted passenger excise taxes to the IRS: "Generally, when an air carrier's compliance with laws and regulations that are beyond the scope of the Department's regulatory responsibility come into question, the Department defers to the agency with oversight responsibility for those rules." Application of Air Excursions, LLC, Final Order, Order 2009-11-5 (November 3, 2009).

[50] Foreign carriers also are prohibited from carrying local traffic between points in the U.S. ("cabotage"). See 49 U.S.C. § 41703. In 2009, DOT's Assistant General Counsel for International Law issued a letter to counsel for Air Canada, stating that the carrier should not market and operate season-long charter contracts with U.S. sports teams because "there appears to be no practical means to ensure that there would not be carriage of U.S. domestic-only traffic." See Letter from Donald H. Horn to Anita M. Mosner (August 11, 2009). DOT subsequently backed away from this position; in a letter to Canada's Department of Foreign Affairs and International Trade, the Director of DOT's Office of International Aviation explained that Canadian carriers would be permitted to enter into such contracts, so long as certain measures were taken to ensure compliance with U.S. cabotage requirements. See Letter from Paul L. Gretch to Robert Ready (November 16, 2009) (http://ostpxweb.dot.gov/aviation/X-40%20Role_files/U.S.%20Letter.pdf).

[51] Canadian Helicopters Limited, Order 2009-9-10 (September 18, 2009) (assessing a penalty of $125,000, half suspended on condition of compliance during the subsequent year); 3095-7633 Quebec, Inc., d/b/a Univair Aviation, Order 2009-8-12 (August 20, 2009) (assessing a penalty of $15,000, half suspended on condition of compliance during the subsequent year); Pascan Aviation, Inc., Order 2009-1-9 (January 27, 2009) (assessing a penalty of $20,000, half suspended on condition of compliance during the subsequent year).

[52] 49 U.S.C. § 41110(e).

[53] Boston-Maine Airways Corp. v. U.S. Department of Transportation, 317 Fed. Appx. 4 (February 4, 2009).

that brokers must act on behalf of either the direct air carrier or the charter customer(s); as a result, a broker must not hold out air transportation in its own right (e.g., as a principal) without DOT economic authority.[54] Further, DOT considers it an unfair and deceptive practice for an air charter broker, even if it acts as an agent of a direct air carrier, to make statements in advertisements which might lead consumers to reasonably conclude that the broker itself is a direct air carrier, if the broker lacks any DOT authority in its own right.[55] In 2009, DOT sanctioned a broker that had made representations which would lead the public to conclude that it was a direct air carrier with operational control over flights.[56]

DOT also imposes various requirements on the operation and sale of public charters, including that a charter prospectus must be submitted to and approved by DOT before any flights are advertised or sold, and that the participants' funds be deposited into separate escrow accounts for each flight.[57] In 2009, DOT sanctioned two public charter operators for failing to comply with these requirements. One tour operator had failed to maintain escrow accounts and also had advanced payments to direct air carriers earlier than allowed by DOT.[58] Another public charter operator had advertised flights before its prospectus was approved by DOT, and also held itself out in a manner which suggested that it was a direct air carrier.[59]

Reporting

In 2009, DOT sanctioned three U.S. carriers that had not filed timely reports about their financial performance and other operational data, as required by 14 C.F.R. Part 241.[60] A foreign carrier also was sanctioned for not filing Origin-Destination Survey data regarding its U.S. services, which had been a condition to a 2007 order that had granted the foreign carrier antitrust immunity with a U.S. carrier and other foreign carriers.[61]

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[54] 49 U.S.C. § 41101.

[55] 14 C.F.R. § 399.80(a).

[56] V1 Jets International, Inc., Order 2009-10-11 (October 21, 2009) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year). Subsequently, a charter broker that only arranged air transportation for the U.S. government requested an exemption from DOT which would allow it to hold out services on the GSA schedule; the request remains pending. See Application of CSI Aviation Services, Inc., Docket DOT-OST-2009-0311 (November 25, 2009).

[57] 14 C.F.R. Part 380.

[58] Turismo Tony Perez, Order 2009-4-3 (April 3, 2009) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year).

[59] Holiday Airways d/b/a Holiday Air, Order 2009-5-12 (April 27, 2009), supra n. 15.

[60] Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009), supra n. 20; Miami Air International, Inc., Order 2009-3-19 (March 26, 2009) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year); Virgin America, Inc., Order 2009-1-17 (January 30, 2009) (assessing a penalty of $40,000, half suspended on condition of compliance during the subsequent year).

[61] TAP Portugal, Order 2009-10-6 (October 16, 2009) (assessing a penalty of $10,000, half suspended on condition of compliance during the subsequent year).

U.S. and foreign carriers also are required to file annual reports with DOT regarding disability-related complaints that they had received.[62] One carrier was sanctioned for failing to file a report for 2007 until more than a year after the deadline.[63] Another carrier was sanctioned for not retaining copies of the underlying complaints regarding disabilities issues, as well as other consumer complaints.[64]

DOT also requires U.S. carriers to file monthly reports regarding the death, injury, and loss of pets carried on passenger flights.[65] Although DOT did not issue any consent orders regarding the carriage of animals in 2009, the U.S. Department of Agriculture, which has overlapping jurisdiction pursuant to the Animal Welfare Act,[66] sanctioned two air carriers for unspecified violations thereof.[67]

Oversales

DOT regulations generally require air carriers to compensate passengers who are denied boarding involuntarily (e.g., "bumped"), and set out additional requirements for providing information about denied boarding compensation to passengers and for soliciting volunteers before involuntarily denying boarding to passengers.[68] In 2009, DOT sanctioned two carriers for failing to comply with these requirements. One carrier had failed: (1) to solicit volunteers before involuntarily denying boarding to passengers; (2) to furnish the required written notice to passengers who were involuntarily denied boarding; and (3) to provide the appropriate amount and type of compensation to passengers who were involuntarily denied boarding.[69] Another

[62] 14 C.F.R. § 382.157; formerly 14 C.F.R. § 382.70. In 2009, 167 U.S. and foreign air carriers filed reports; 101 of those carriers reported that they had received disability-related complaints in 2008, and those carriers together received a total of 14,006 complaints. See Annual Report on Disability-Related Air Travel Complaints (July 2009) (http://airconsumer.dot.gov/publications/Gateway1-2008.htm).

[63] Jetstar Airways Pty Limited, Order 2009-10-17 (October 29, 2009) (assessing a penalty of $30,000, half suspended on condition of compliance during the subsequent year). DOT noted that the carrier also had failed to file a report for the prior year, but stated that no action would be taken in light of the fact that its services to and from the U.S. only began on December 26, 2006.

[64] Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009), supra n. 20. Carriers are generally required to retain copies of consumer complaints for three years by 14 C.F.R. § 249.20(8).

[65] 49 U.S.C. § 41721(a); 14 C.F.R. § 234.13. In 2009, U.S. air carriers reported (for the period November 2008-October 2009) the death of 22 pets, the injury of 6 pets, and the loss of 4 pets. Data from and links to redacted versions of these reports are published in DOT's monthly Air Travel Consumer Report (http://airconsumer.ost.dot.gov/reports/index.htm).

[66] 7 U.S.C. § 2131.

[67] United Air Lines, Inc., Consent Decision, Animal Welfare Act Docket No. 09-0146 (http://www.da.usda.gov/oaljdecisions/090923_AWA-09-0146.pdf) (assessing a penalty of $11,500, $10,000 of which was suspended on condition that the carrier implement a USDA-approved training program); Continental Airlines, Inc., Consent Decision and Order, Animal Welfare Act Docket No. 07-0198 (http://www.da.usda.gov/oaljdecisions/090901_AWA-07-0198.pdf) (assessing a penalty of $35,000, $10,000 of which was suspended on condition that the carrier implement a USDA-approved training program).

[68] 14 C.F.R. Part 250.

[69] Delta Air Lines, Inc., Order 2009-7-7 (July 9, 2009) (assessing a penalty of $375,000, up to $200,000 of which could be offset by expenses to establish automatic systems to notify passengers of oversold flights and to solicit volunteers, as well as to better track consumer complaints).

carrier on "numerous" occasions did not comply with one or more requirements of the rule, and also repeatedly failed to produce a copy of the notice about the rule which is required to be available at airport ticket counters when DOT investigators so requested.[70]

Code-Sharing

DOT requires air carriers and ticket agents to promptly disclose to consumers that a flight involves a code-share arrangement.[71] In 2009, DOT sanctioned three carriers for failing to promptly disclose code-share arrangements in telephone calls,[72] and also sanctioned a ticket agent for failing to promptly disclose code-share arrangements on its website.[73]

In addition, DOT advised carriers that when flights are operated pursuant to code-share arrangements, the ticketing carrier's tariffs and contract of carriage should not simply cross-reference the terms and conditions of the operating carrier's tariffs and contract of carriages The ticketing carrier should itself specify what terms and conditions will apply to code-share flights, for matters such as "check-in time limits, unaccompanied minors, carriage of animals, refusal to transport, oxygen service, irregular operations, denied boarding compensation, and baggage acceptance, allowance, and liability."[74]

Refunds

If a passenger's ticket is refundable (e.g., if a ticket is not subject to any cancellation penalties, or if the carrier failed to operate the flight for which it was purchased), DOT requires carriers to issue refunds of tickets purchased by credit card within seven business days of the receipt of appropriate documentation, and to issue refunds of tickets purchase by cash within 20 days of the receipt of appropriate documentation.[75] In 2009, DOT sanctioned an air taxi for failing to process refunds within these time periods.[76]

Assertions of Compliance

In 2009, DOT sanctioned a carrier for asserting, in response to passenger complaints, that the carrier had operated in accordance with DOT and Federal Aviation Administration (FAA)

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[70] Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009), supra n. 20.

[71] 14 C.F.R. Part 257.

[72] Hawaiian Airlines, Inc., Order 2009-8-4 (August 10, 2009) (assessing a penalty of $50,000, half suspended on condition of compliance during the subsequent year); US Airways, Inc., Order 2009-8-2 (August 10, 2009) (assessing a penalty of $70,000, half suspended on condition of compliance during the subsequent year); United Air Lines, Inc., Order 2009-7-6 (July 9, 2009) (assessing a penalty of $80,000, half suspended on condition of compliance during the subsequent year).

[73] Roni Herskovitz and Ultimate Fares, Inc., Order 2009-11-8 (November 9, 2009), supra n. 14.

[74] "Providing Guidance on Airline Baggage Liability and Responsibilities of Code-Share Partners Involving International Itineraries," 74 Fed. Reg. 14837 (April 1, 2009).

[75] 14 C.F.R. Part 374.

[76] Paragon Air, Inc., Order 2009-7-17 (July 17, 2009) (assessing a penalty of $25,000, all of which would be waived if the carrier issued all outstanding refunds within 90 days).

regulations, when in fact there were either no applicable DOT or FAA regulations and/or the carrier's conduct actually was in violation of DOT regulations.[77]

Conclusion

DOT's authority to regulate the practices of air carriers, ticket agents, and other entities involved in the aviation industry is wide-ranging. Although DOT's historic focus has been on advertising, the agency monitors other areas of industry activity, and in recent years has begun to emphasize "passenger rights" issues, most visibly in response to the Rochester tarmac delay incident. Nevertheless, the full scope of DOT's enforcement powers remain relatively unknown. Those who provide, sell, or otherwise arrange air transportation should take care to familiarize themselves with DOT's regulations and interpretations; to review their practices in light of DOT's guidance; and to keep abreast of new developments, such as those reviewed above.

[77] Spirit Airlines, Inc., Order 2009-9-8 (September 17, 2009), supra n. 20.