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

Issued by the Department of Transportation
On the Nineteenth day of October, 2011

Petition for Rulemaking and Complaint of **Donald L. Pevsner** **Violations of 49 U.S.C. § 41712**	**Served October 19, 2011** **OST 2011-0078**

Petition for Rulemaking and Request for Sanctions against Delta Air Lines, Inc., of **Donald L. Pevsner**	**Served October 19, 2011** **OST 2011-0079**

ORDER DISMISSING PETITIONS AND COMPLAINT

On April 15, 2011, Donald L. Pevsner ("Petitioner") filed a document entitled a Petition for Rulemaking and an Unfair Practice Complaint relating to practices of Delta Air Lines and, by inference, other carriers (Docket OST 2011-0078). Mr. Pevsner also filed on the same date a second document entitled Petition for Rulemaking and Request for Sanctions against Delta Air Lines, Inc. (Docket OST 2011-0079).

Docket OST 2011-0078

Mr. Pevsner alleges in his petition and complaint that, as a result of air carrier alliances, carriers limit routings offered to consumers on round-trip itineraries to carriers that are members of their respective alliances. In order to get the advantages of lower round-trip pricing, Petitioner asserts, consumers often have to accept circuitous routings on flights

operated by code-share partners within a single alliance.[1] In order to purchase the more convenient routings involving non-stop flights involving carriers of different alliances, Mr. Pevsner asserts that a consumer must purchase two full-fare one way tickets. Mr. Pevsner alleges that this situation should be considered an unfair and deceptive trade practice in violation of 49 U.S.C. 41712 and he urges the Department to require carriers to allow consumers to construct "open-jaw" itineraries, as if they were the lower cost roundtrip, regardless of each carrier's alliance affiliation. Similarly, in a strictly domestic context, Mr. Pevsner urges the Department to require carriers to permit consumers to combine outbound and return flights operated by different carriers, at the option of the consumer, while still receiving generally available round-trip excursion fares.

In support of his requests, Mr. Pevsner cites 14 CFR 302.16, relating to initiation of rulemaking proceedings, and 14 CFR 302.502, relating to initiation of investigations related to rates and charges in foreign air transportation. Despite this cited authority, Mr. Pevsner does not explicitly request a rulemaking proceeding, rather, he appears to advocate that the Department find the practice of "forcing" consumers to purchase itineraries on member carriers of a single alliance in order to obtain the most convenient routing and lowest fare to violate section 41712, in which case, Mr. Pevsner asserts, the Department is obligated to "order" the carriers involved to cease the practice in question.

Docket 2011-0079

In his second petition, Mr. Pevsner asks the Department to initiate a rulemaking that would explicitly require carriers, in instances of flights cancelled for reasons related to "force majeure," to "arrange for [alternative air] transportation . . . if such action will result in such passenger's trip being completed earlier than the ticketed trip."

In cancellations not involving "force majeure," Mr. Pevsner urges that the Department adopt a rule that would require a carrier to arrange for alternative air transportation on another carrier if available. Mr. Pevsner's suggestion apparently stems from an experience in which his flight, operated by Delta, was cancelled for air traffic control reasons and the carrier did not provide him with substitute transportation acceptable to him. Delta's relevant policy, stated in its rule 240(c) of its contract of carriage,[2] provides that "if acceptable to the passenger, Delta may arrange for the passenger to travel on another carrier or via ground transportation." (emphasis added)

---

[1] In his petition and compliant, Mr. Pevsner cites as an example an itinerary from Chicago to Rome, with an open-jaw between Rome and Zurich, and a return to Chicago from Zurich. He states that the only non-stop between Chicago and Rome is operated by Alitalia and the only non-stop between Zurich and Chicago is operated by Swiss International Airlines. Petitioner points out that, because the two carriers are not members of the same carrier alliance, to obtain the lowest round-trip price (which is available only on allied carriers) a consumer would have to accept flights that were not nonstops in at least one direction.

[2] Rule 240(c) appears in the Legal Notices section of the Delta website as a Domestic Rules Tariff.

In the second portion of the pleading, Mr. Pevsner bases his request for the imposition of sanctions on Delta on his experience on an April 12, 2011, flight for which he held a ticket that was scheduled to operate from Charlotte to Buffalo, by way of Atlanta. Delays in Atlanta caused the first flight to be held at Charlotte. At some point, when it was clear that he would not make his connection at Atlanta, Petitioner deplaned and asked Delta to re-route him, on another carrier if necessary. According to the Petitioner, Delta was unwilling to do so although he claims that alternative flights were available. In view of this incident, the petitioner asserts that the Department should impose an unspecified civil penalty on the carrier.

Further Pleadings

On April 28, 2011, Delta filed an answer to Mr. Pevsner's petition in Docket 2011-0079. In its answer, Delta admitted the basic facts about Mr. Pevsner's flight, including the fact that Petitioner's flight was delayed by an air traffic control-imposed ground-stop, but denied that he was treated in an unreasonable manner. To the contrary, according to Delta, it was prepared to follow its contract of carriage in transporting Mr. Pevsner to Buffalo, which would have entailed putting him on the next available Delta flight on which space was available, but Mr. Pevsner insisted on being transported to Buffalo on another carrier's non-stop flight. Delta points out that Mr. Pevsner elected initially to buy a ticket on a Delta Charlotte-Atlanta-Buffalo flight at a price of about $94, instead of traveling on another carrier's Charlotte-Buffalo non-stop flight at a cost of more than $400, and that his demand to be rerouted on the other carrier was unreasonable. According to Delta, while it does have a ticketing agreement with the other carrier, Delta would have had to pay the other carrier about $134 to re-accommodate Mr. Pevsner, or more than 40 percent more than Mr. Pevsner had paid Delta for his original flight. The carrier asserts that requiring such mandatory re-routing at a passenger's convenience would have a chilling effect on carriers and deter low fare competitive pricing options, which the carrier points out generally benefit all passengers.

Mr. Pevsner filed a rebuttal to this response, reiterating his contention that Delta's employees gave him contradictory advice and demonstrated neither courtesy nor competence. In its surreply, Delta restates its argument that the delays in Charlotte were the result of weather delays and TSA requirements, and that the carrier did provide the petitioner with a full refund as its contract of carriage required.

Two comments were filed by members of the public in Docket 2011-0079 in support of Mr. Pevsner's petition. Ms. Kathleen Gemmell states that when an airline's flight is cancelled or delayed by more than one hour it should be obligated to rebook the passenger on any available seat on a flight operated by any other airline serving the passenger's destination city which would get the passenger to their destination sooner than the delayed flight's anticipated arrival. Ms. Gemmel urges that this requirement should apply even if the only available seat is in a higher fare category and should be provided at no cost to the passenger.

Mr. Edward Perkins asserts that a mandatory and universal "Rule 240" would be a major benefit to consumers. An airline facing a delay or cancellation should, Mr. Perkins

argues, be required to provide reasonable remedies to make the consumer whole, including, where necessary, mandatory transfer to another airline that is able to get that consumer to his or her final destination earlier. Mr. Pevsner argues this is a necessary remedy, which the Department should require to be applied across all domestic airlines, whether or not they have existing interline agreements.

Mr. Perkins also supports Mr. Pevsner's suggestion, in Docket 2011-0078, that carriers ought to be required to offer routings on carriers outside their respective code-share alliances without any fare penalty. Before deregulation, Mr. Perkins states, such ticketing was standard, and he asserts that consumers should not be denied a useful travel option because of supposed consumer "benefits" or because major airlines have decided to coalesce into a few monopolistic alliances.

Conclusion

We have carefully considered the petition and the complaint in Docket 2011-0078, as well as the comments filed in that docket, and have decided to dismiss the petition and complaint. The Petitioner asks, in the face of the Department's longstanding mandate to deregulate fares, and while suggesting no specifics, that carriers be required to allow passengers to cobble together their own itineraries that in some unspecified way would incorporate round-trip pricing discounts, without regard to a particular carrier's fare structure or relationship with other carriers in the passenger's preferred round-trip itinerary. Aside from the Petitioner's failure to address the Department's lack of authority to regulate domestic fares[3], the petition, we conclude, suggests an impractical and unworkable mandate that would unduly interfere with the business discretion of carriers in establishing fares and reaching code-share or alliance agreements.

We have also decided, after careful consideration of all comments, to dismiss the petition and request for sanctions in Docket 2011-0079. The Petitioner offers virtually no support for his request that the Department reverse its long-standing policy of permitting the marketplace to govern carrier decisions involving re-routing of passengers affected by flight irregularities caused by weather. To require carriers, as the petitioner urges, to provide re-routing arrangements on the carrier of the consumer's choice regardless of the cost of that alternate transportation would, in the absence of a more compelling public interest showing, represent an unwarranted intrusion into the operational decisions of air carriers. Delta offered to reroute Petitioner and alternatively offered him a full refund of the ticket price, as required by its published contract of carriage and section 253.5 of the Department's rules, 14 CFR 253.5. The Department imposes no further independent obligation on carriers in the case of cancelled flights.

---

[3] Under 49 U.S.C 41507 *et seq*., the Department has authority to ensure that joint fares in foreign air transportation are not unreasonable, and may suspend or adjust tariffs that fail to meet this criterion. Similar authority does not exist with respect to any fares charged in interstate air transportation.

ACCORDINGLY, I dismiss the third-party complaints and petitions for rulemaking[4] in dockets OST 2011-0078 and OST 2011-0079.

This order is issued under authority assigned in 14 CFR 302.406(b) and shall be effective as the final action of the Department within 30 days after service.

By:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov//reports/reports_aviation.asp

[4] The Department's Assistant Secretary for Aviation and International Affairs has delegated her authority to dismiss these rulemaking petitions to the Assistant General Counsel for Aviation Enforcement and Proceedings.