

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

**ENHANCING AIRLINE PASSENGER
PROTECTIONS**

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) **Docket No. OST-2007-0022**
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**COMMENTS OF THE
AMERICAN SOCIETY OF TRAVEL AGENTS, INC.**

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The American Society of Travel Agents, Inc. (ASTA) submits these comments in response to the Advance Notice of Proposed Rulemaking (NPRM) issued by the Department in the referenced proceeding. 72 Fed. Reg. 65233 (November 20, 2007).

ASTA is the world's largest association of professional travel agencies. Its membership includes travel agency companies of the traditional, on-line and hybrid varieties, as well as individual travel agents and many others engaged in aspects of retail and wholesale distribution of transportation services.

As a representative of the professional facilitators who still place the majority of passengers in airline seats, ASTA has a long-standing interest and leadership role in the government's response to the continuing problem of airline treatment of consumers. This long overdue initiative by the Department is welcomed and appreciated. At the same time the subject matter is extremely important and complex. We believe certain aspects of the proposed rules need to be reworked.

We begin with the Department's caution to commenters regarding the Department's responsibility to strike the proper balance between protecting consumers and affording carriers as much leeway as possible to choose their own responses to consumer treatment issues. 72 Fed. Reg. at 65234. To this we say that there is a market failure in the air transportation marketplace when, due to constraints on capacity, among other things, consumers have no practical place to turn when treated inappropriately by one or more airlines. In conditions of market failure, talk of competitive freedom is somewhat misplaced. If the past 9 years (since the 1999 winter tarmac disasters) have proved nothing else, they have demonstrated that market forces like competition are, by themselves, not going to assure that air travel consumers are treated properly. It is therefore incumbent upon the federal government to make right that which has failed, and that requires strong and clear regulatory intervention.

I. CONTINGENCY PLANS FOR TARMAC DELAYS SHOULD BE REQUIRED AND SHOULD BE INCORPORATED INTO CONTRACTS OF CARRIAGE.

ASTA strongly encourages the Department to adopt a rule requiring the filing of contingency plans for tarmac delays and to require that such plans be incorporated into the airlines' contracts of carriage. ASTA recommended incorporation of passenger service commitments in its April, 2007, testimony to the House Aviation Subcommittee as a key element in establishing passenger protection and lifting the veil of federal preemption when such commitments are not fulfilled.¹ This a critically important step in putting meaning into the airlines passenger service commitments published back in 1999.²

¹ See Testimony of the American Society of Travel Agents, Inc. Before The United States House of Representatives Committee On Transportation And Infrastructure, Subcommittee On Aviation, on "Aviation Consumer Issues," April 20, 2007 at 4.

² See Customers First 12 Point Customer Service Commitment at http://www.airlines.org/customerservice/passengers/Customers_First.htm.

It is also vital that the contingency plans have content that means something concrete. The description in the ANPRM refers to the plans having “assurance(s)” regarding components of passenger protection. An assurance is not a plan; it is, at best, an aspiration. Aspirational plans are not enough, as demonstrated by the failure of the so-called voluntary passenger service commitments adopted by many airlines in 1999.³ While it is surely impossible to predict everything that can or will occur to disrupt air travel in the future, there are a number of scenarios that have repeated frequently enough that specific action plans should be possible to address them.

Closely related to specificity is the question of review by the Department. The ANPRM indicates that there will be no review of filed plans. This means that the public cannot be assured that the plans actually require very much in the way of enforceable commitments. Without enforceable commitments, consumers will have no actual rights in court, the Department’s own enforcement office will have little or nothing to work with and the entire exercise will be a charade. We suggest that the rules adopted require very specific plans in the general mode of “if this happens, we will take the following specific steps to assure proper care of passengers.” This approach should reduce the number of instances in which consumers are actually forced to sue airlines for breach of the contract of carriage and will make the Department’s enforcement work easier and more effective. It will also help airline personnel understand and execute their responsibilities.

With respect to required record-keeping, ASTA believes that three hours is a more meaningful threshold for invoking this obligation. While there are cases of eight, nine and more hours of tarmac detentions, three hour delays are more common and, when coupled with

³ The evidence for this resides in the multiple reports issued by the Department’s Office of Inspector General wherein the failure of the airlines to live up to their aspirational promises is thoroughly documented.

requirements that passengers remain seated, are sufficiently unpleasant to justify triggering the record-keeping requirement.

ASTA also believes that while there are unlikely to be as many meaningful tarmac delay issues at the smallest airports defined as “primary,” i.e., down to 10,000 passengers annually, it is going to be hard to explain to the passengers on aircraft stuck at those airports why they did not either get the protections afforded them elsewhere or why the protections were not delivered due to the absence of an airline-airport coordination requirement in the regulations. The better path, in ASTA’s view, is to require coordination at all primary airports.

Finally, the Department asks several questions about the costs and benefits of the proposed rules. There certainly will be some costs, but air travel should not be a form of reverse roulette in which some unlucky passengers suffer helplessly while the larger remainder go about their business untouched by the latest weather or other disruption. Taking care of passengers in irregular but foreseeable disturbances to the normal smooth flow of the system should be seen as a necessary cost of doing business. If all carriers are required to maintain meaningful response plans, passenger uncertainty and discomfort will decrease and consumer attitudes toward air travel will improve. There should be no competitive consequences to this form of regulation.⁴

II. THE REGULATIONS SHOULD IMPOSE SPECIFIC REQUIREMENTS REGARDING AIRLINE RESPONSE TO CONSUMER PROBLEMS.

The proposal in this area relates to disparate issues and we will address each separately.

A. Responsible Employee

The Department’s suggestion is to require each airline to designate a responsible employee at its system operations center and at each airport dispatch center to monitor the effects

⁴ This subject is raised again at the end of the ANPRM, 72 Fed. Reg. 65236, with respect to “customer service plans” as, presumably, distinct from “contingency plans.” ASTA believes all such plans, however labeled, should be incorporated into contracts of carriage for the reasons given above.

of flight schedule disruptions on passengers and make input on response decisions by the carrier. On its face this seems like a sensible approach, though we wonder if the same results could be obtained using fewer people and the latest communications technology that virtually all airlines use. What is most important about this idea is that there be “some one person” somewhere with the job of staying informed and that this person have sufficient stature in the airline ranks to make his views count in the decisions that the carrier must make. How this can be assured is unclear, but it is very important.

B. Complaint Procedures & Response Time

Distributing information about complaint procedures is a pretty harmless idea and should be adopted. What is much more important is that there be a required response time and that (1) the response be substantive (not “we have your complaint and will get back to you”) and (2) that it happen relatively quickly. Thirty days seems the right amount of time to permit the airline to gather necessary information and formulate a response.

As to means of making complaints, this should not be left up to individual carriers to decide. We would end up with a varying collection of rules that would likely confuse consumers and deter the filing of complaints. Limiting the method to any one or two of the choices will inevitably disadvantage someone. The better approach is to require acceptance of complaints by all three methods and let the consumer decide. When there are incidents and especially when there are multiple incidents, the volume of complaints will peak as stranded passengers try to communicate in real time with the airline. Making more open channels available will reduce the likelihood that communication will be frustrated. Phone systems used for this purpose should be configured so that consumers can leave a fairly long message describing their situation. Otherwise, the reality is that most will get a recording or a busy signal and the frustration will

continue as the belief is reinforced that there is nobody home to take the information promptly and seriously.

III. CHRONICALLY DELAYED FLIGHTS SHOULD BE DECLARED AN UNFAIR PRACTICE.

ASTA believes the proposal to explicitly define chronically-delayed flights as an unfair and deceptive practice is an essential element of any regulation to enhance passenger protections.

We have a few suggestions to make the rule better.

First, the threshold for a “chronically-delayed flight” should be 50 percent rather than 70 percent. A flight falling right at that threshold is a flight for which a consumer would, if aware of the facts, conclude accurately that it had a 50-50 chance to being on time. Stated differently, such a flight would have the same chance of being on time as one would have of tossing a coin in the air and having it come up heads.

Many passengers may not be concerned about this degree of risk of delayed arrival. To the extent that is so, the airlines have nothing to be concerned about, especially if they have an opportunity to reschedule in the future and correct performance. But many passengers, including business travelers and people connecting to cruises or tours with fixed departure times, would be very interested to know that their chance of arriving on time was only 50-50. And, of course, it could be much worse. The 50 percent threshold means that many of the flights with that number had serious delays, because the 50 percent threshold would include flights that were late 60, 70 or more percent of the time, a major reason for concern by consumers.

The proposed declaration will have several consequences. Airlines will know in advance that a flight with that much trouble being on time is a flight that must be adjusted in some way. This frequency of delay is most unlikely to result from isolated weather aberrations. It more likely will be a product of regular conditions at one of the involved airports and, as such, should

not continue to be publicized on a schedule that cannot be met half the time or more. If, however, the airline does not take corrective action, either by adjusting the published schedule or by changing operations to improve the flight's on-time performance, it will face enforcement action by the Department. And, if appropriate disclosures are required, the flight will be rejected by some, perhaps many, consumers because of its poor performance.

This raises the issue of how long an airline should have to take corrective action before the flight becomes an unfair practice. The Department's proposal is to define correction in a "timely manner" as the end of the second quarter following the quarter in which the flight first becomes chronically delayed. This means that some chronically delayed flights could be operated for six months or even more before the correction must be finalized. For example, a flight that starts service on January 1 and quickly becomes a routinely late flight faces an adjustment deadline of September 30 of that year.

Permitting chronically-delayed flights to operate for that long is not acceptable. And if enforcement action becomes the only way to discipline these operations, that will take still longer. ASTA believes that the adjustment to a chronically-delayed flight should be mandated to be the end of the quarter immediately following the quarter in which the flight become "chronically-delayed." That gives the airline three months to solve the problem and that should be sufficient. If the airlines need a waiver for some special situation, a waiver procedure could be built into the rules, but waivers should be dispensed carefully and infrequently.

Finally, on this topic, ASTA believes that the concepts being discussed here should apply to international scheduled passenger service by both U.S. and foreign air carriers. We can think of no reason to exempt international travel from the concept of "chronically-delayed flight" and the consequences we have advocated. International travel is no different from domestic flights

when the question is whether an airline should be allowed to operate what is in essence a deceptive schedule indefinitely. There is no way that consumers can fend for themselves here and there is no reason they should be required to try.

IV. A RULE COMPELLING DISCLOSURE OF FLIGHT TIMELINESS SHOULD BE PRECEDED BY OTHER STEPS.

There are a number of reasons to avoid the temptation to take the declaration advocated in the preceding section to the point of compelling disclosure on web sites of some elements of on-time performance data.

First, as proposed the concept is unworkable. We are aware of no technology that could deliver the data for, say, June, to travel agents offering online reservations services for display beginning July 1. The on-time data is not required to be reported to DOT until “15 days after the applicable reporting month, i.e., data for the month of March are due by April 15.”⁵ The Department’s Air Travel Consumer Report is typically published in the first week of the month following the report deadline, which is probably the earliest that this data could realistically end up in online reservation system displays. What happened on a flight two months ago (on average) is not particularly instructive for what that flight will do today, especially if the seasonality factor is considered.

Second, while we are not equipped to estimate precisely the total cost of the programming required to accomplish this, we believe that it would be significant and would risk complicating the web displays of all on-line purveyors of flight services. This unfunded mandate to travel agencies and their suppliers should not be undertaken without exhausting all other possibilities first.

⁵ Bureau of Transportation Statistics, Technical Directive #14 - On-Time Reporting, Section VI-3.

Third, assuming that DOT adopts a rule requiring the identification of certain flights as “chronically-delayed” and labels these in advance as an unfair practice under the Federal Aviation Act, expect two things should happen: (1) DOT will institute enforcement action against airlines that do not take prompt corrective measures to bring flight operations into compliance with scheduling announcements and advertising, and, perhaps more likely, (2) airlines with “chronically-delayed” flights will on their own initiative correct operations so that the designation is removed going forward. In either case, these are preferable first steps to imposing more costly regulation on travel service intermediaries who use the Internet to sell their services.

Finally, we observe that there is a conflict between the proposal to require online disclosure of flights “late more than 50 percent of the time” and the proposal to label as “chronically-delayed” flights that are late more than 70 percent of the time. Whatever is done here, the principles should be the same. 0020

The Department raises a number of other issues, including the possibility of exempting some intermediaries from the disclosure rules. This may make sense, although it is unknown whether this could be a competitive factor in the minds of consumers, thereby forcing all who use Internet sites to sell air travel to comply with the standard mandated for others. The question of consumer interest in the data in question, which has been available in the Department’s Air Travel Consumer Report for many years, remains open. Moreover, the aggressive use of enforcement against chronically-delayed flights may make this issue self-resolving. On the other hand, it is important to prevent self-resolution through manipulation of flight numbers that create breaks in the history of flights operating below acceptable on-time standards. For these reasons, before the Department imposes yet another unfunded obligation on intermediaries, we urge the

Department to convene an industry working group, similar to the Air Carrier On-time Reporting Advisory Committee, to discuss the issues raised by this proposal before it is engrafted into a formal notice of proposed rulemaking. The rest of the material covered by the ANPRM can proceed to conclusion on a parallel track, so the other consumer protections raised in the ANPRM are not delayed.

The same reasoning applies to the suggestion to require airlines to publish complaint data on their web sites. It is far from clear that publishing complaints in various categories, without supporting data or validation, will be of value to anyone. Complaint data is already available through DOT and it is not apparent that much practical use is made of it by consumers. We believe, therefore, that before this is engrafted into a rule, it should be the subject of government-industry-consumer group and intermediary discussions in the context discussed above.

Finally, in this area, we believe that the history of airline non-performance of their customer service commitments, as thoroughly documented by various reports of the DOT Inspector General, suggests a need for some form of mandatory auditing. Auditing, however, implies the existence of specific standards that can be empirically measured and tested. It is not clear how this could work in the context of customer service commitments. Again, this a subject that requires dialogue, not simply expressions of opinion from various quarters followed by an NPRM.

V. THE PREEMPTION FINDING REQUIRES CLARIFICATION.

In the discussion of Executive Order 13132 (Federalism), the ANPRM concludes that “this notice does not propose any regulation that ... preempts state law.” 72 Fed. Reg. 65236. We are surprised by this conclusion and believe it needs explanation and clarification. Does the Department mean, for example, that even if it adopts the rules discussed in the ANPRM, each

state is free to adopt its own rules requiring, among other things, online disclosure of specified information to consumers from that state? While ASTA has advocated for years that the scope of federal preemption should be limited in the area of consumer protection, our position has favored allowing specific remedial solutions at the state level to apply to airline services. We do not believe it is workable, or lawful (from a preemption standpoint), for each state to adopt its own disclosure standards and apply them to intermediaries whose only contact with the adopting state is access through the Internet to the intermediaries' websites.

We strongly urge the Department to clarify what it means by the quoted language.

Respectfully Submitted,

AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

By: _____

Paul M. Ruden