

**SERVED: November 23, 2021**

**U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
WASHINGTON, DC**

In The Matter Of: )  
 ) Docket No. OST-2021-0073  
Air Canada )  
 ) (Enforcement Proceeding)  
Respondent )

**ORDER APPROVING SETTLEMENT AGREEMENT**

On November 22, 2021, the parties filed a Joint Motion for Approval of Proposed Settlement Agreement (“Joint Motion”), which included the parties’ signed Settlement Agreement as an attachment. The Settlement Agreement would dispose of all pending issues in this case.

Pursuant to 14 C.F.R. § 302.417(a), the parties “may agree to settle all or some of the issues in an enforcement proceeding at any time before a final decision is issued.” Further, “the Administrative Law Judge shall approve the proposed settlement, as submitted, if it appears to be in the public interest.”<sup>1</sup>

Pursuant to 14 C.F.R. § 302.417(c), **IT IS HEREBY FOUND:**

The Settlement Agreement appears to be in the public interest.

**AND ORDERED:**

1. The Joint Motion is granted.<sup>2</sup>
2. The Settlement Agreement is approved as submitted.
3. The Enforcement Complaint is dismissed with prejudice and the docket is closed.



**DOUGLAS M. RAWALD**  
Administrative Law Judge

Attachment: Service List

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<sup>1</sup> See 14 C.F.R. § 302.417(c).

<sup>2</sup> Because all of the parties to this proceeding have joined in the filing of this motion, the undersigned judge considers the parties to have waived the right to submit written comments under 14 C.F.R. § 302.417(b).

**BEFORE THE  
U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
WASHINGTON, D.C.**

**Air Canada**

**14 CFR Part 259 and 49 U.S.C. § 41712**

**Settlement of Enforcement Proceedings**

**DOT-OST-2021-0073**

**Served November 22, 2021**

**JOINT MOTION FOR APPROVAL OF PROPOSED SETTLEMENT AGREEMENT**

The U.S. Department of Transportation (Department) and Air Canada, pursuant to 14 CFR 302.417, jointly submit for approval by Administrative Law Judge Douglas M. Rawald the Settlement Agreement negotiated in the above-captioned proceeding and attached as Appendix A hereto. The proposed settlement provides for a payment by Air Canada of \$4.5 million in compromise of potential civil penalties sought by the Department pursuant to 49 U.S.C. § 46301.

Air Canada agrees to the terms of the proposed Settlement Agreement to avoid protracted litigation, as it focuses together with all stakeholders on rebuilding itself and doing its part to support the recovery of the airline industry. Accordingly, this agreement is being entered into for settlement purposes only and does not constitute any admission whatsoever by Air Canada of any violation of any statute, law, or regulation including as alleged, or the truth of any facts alleged during this proceeding (which are expressly denied). The Department agrees to the compromise specified in the proposed Settlement Agreement and recommends its approval as in the public interest. Both parties, therefore, jointly move that the settlement embodied in the attached Appendix A be approved under an Order pursuant to 14 CFR 302.417(c) in the form of the proposed draft Order attached hereto as Appendix B and that the enforcement proceeding be terminated.

Respectfully submitted,

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DATE: November 22, 2021

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**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
WASHINGTON, D.C.**

Appendix A

**Air Canada**

**DOT-OST-2021-0073**

**14 CFR Part 259 and 49 U.S.C. § 41712**

**Settlement of Enforcement Proceedings**

**SETTLEMENT AGREEMENT**

On June 15, 2021, the U.S. Department of Transportation’s (DOT or the Department) Office of Aviation Consumer Protection (OACP) filed a Notice of Enforcement Proceeding and Enforcement Complaint against Air Canada. OACP contended that Air Canada failed to provide prompt refunds to passengers for flights to and from the United States that were cancelled or significantly changed by Air Canada, in violation of 49 U.S.C. § 41712 (Section 41712) and 14 CFR Part 259. Air Canada denied these allegations and contended that its actions in this regard were lawful and fully in compliance with all applicable DOT and Canadian aviation consumer protection regulations, as well as the terms of Air Canada’s General Terms and Conditions of Carriage (Conditions of Carriage) and International Tariff (Tariff), as they existed at the relevant time. The parties have now agreed to settle this matter, as set forth below.

**Factual and Procedural Background**

Beginning on or about March 19, 2020, Air Canada offered multi-use and fully-transferrable vouchers with no expiration date and other options to affected passengers for flights to or from the United States that were cancelled or significantly changed by it in response to the impact of the COVID-19 pandemic, unless the passenger had specifically purchased a “refundable” ticket. Thousands of consumers complained to OACP through the Department’s complaint portal that Air Canada failed to provide requested refunds for flights that the carrier cancelled or significantly changed due to the COVID-19 pandemic and associated governmental restrictions. Air Canada received more such complaints directly from consumers. In addition, consumers filed 89 formal complaints on the Department’s docket.

In April and May 2020, OACP issued two public notices reminding airlines of the Department’s position that it is unlawful for a carrier to cancel or significantly change a flight to or from the United States and then refuse to provide a refund. In its May 2020 notice, OACP indicated that it “will use its enforcement discretion and not take action against airlines for not processing refunds within the

required timeframes if, under the totality of the circumstances, they are making good faith efforts to provide refunds in a timely manner.”<sup>1</sup>

In addition to these public notices, throughout 2020 and early 2021, OACP repeatedly contacted Air Canada directly regarding its refund policy. OACP made clear that it viewed Air Canada’s refusal to provide refunds to be a violation of U.S. law and that it would pursue enforcement action if Air Canada continued to refuse to provide such refunds to consumers holding non-refundable tickets whose flights Air Canada cancelled or significantly changed. Air Canada continued to provide multi-use and fully-transferrable vouchers with no expiration date instead of refunds to such consumers, arguing that refunds were not due as a matter of law and vouchers were an acceptable alternative.

On April 12, 2021, Air Canada announced that it had secured a financial package from the Government of Canada.<sup>2</sup> On April 13, 2021, Air Canada further announced it would begin offering refunds to holders of non-refundable tickets for flights that were cancelled or significantly changed due to COVID-19.<sup>3</sup> Nevertheless, by the time Air Canada began providing refunds, many affected consumers had waited many months for their refunds, well beyond the time the Department maintains that Air Canada was required to provide prompt refunds under the Department’s aviation consumer protection requirements.

On June 15, 2021, OACP filed a Notice of Enforcement Proceeding and Enforcement Complaint before an Administrative Law Judge against Air Canada stating that “for over a year, Air Canada as a matter of practice refused to refund consumers for non-refundable flights between United States and Canada that the carrier cancelled or significantly changed.”<sup>4</sup> OACP sought an order declaring Air Canada’s practice to be in violation of the statutes and regulations enforced by the Department and assessing a significant civil penalty. Air Canada filed a Verified Answer and Motion to Dismiss on June 30, 2021. OACP filed an Answer in Opposition to the Motion to Dismiss on July 19, 2021.

As of the date of this agreement, Air Canada states that it has provided refunds (or is processing refunds) to: (1) those passengers who further to its refund offer properly requested refunds for flights to or from the United States that Air Canada cancelled or significantly changed since March 22, 2020 due to circumstances related to the COVID-19 pandemic, representing an aggregate amount of refunds paid to date of approximately CAD\$730.4 million;<sup>5</sup> and (2) a significant number of passengers who were not entitled to refunds under U.S. law (e.g., passengers who decided not to fly after March 22, 2020 despite their flight still being scheduled to operate at the time the voluntary cancellation occurred), representing an aggregate amount of refunds paid to date exceeding CAD\$10 million.

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<sup>1</sup> [https://www.transportation.gov/airconsumer/FAQ\\_refunds\\_may\\_12\\_2020](https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020).

<sup>2</sup> <https://aircanada.mediaroom.com/2021-04-12-Air-Canada-and-Government-of-Canada-Conclude-Agreements-on-Liquidity-Program>.

<sup>3</sup> <https://aircanada.mediaroom.com/2021-04-13-Air-Canada-to-Offer-Refunds-for-All-Fares-for-Flights-Affected-by-COVID-19-since-February-1-2020>.

<sup>4</sup> See p.2 of OACP’s Notice of Enforcement Proceedings and other related materials, which can be found at [www.regulations.gov](http://www.regulations.gov), docket DOT-OST-2021-0073.

<sup>5</sup> As of October 22, 2021.

## DOT's Position

Air Canada holds a foreign air carrier permit to operate flights to and from the United States pursuant to 49 U.S.C. § 41301. Air Canada is engaged in foreign air transportation within the meaning of 49 U.S.C. § 40102. As a foreign air carrier, Air Canada is subject to the Department's adjudicatory authority pursuant to 49 U.S.C. § 40101 et seq. and 14 CFR Part 302. One condition of Air Canada's foreign air carrier permit is that Air Canada "comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States."<sup>6</sup>

As a foreign air carrier, Air Canada is subject to the requirements of Section 41712, which prohibits unfair and deceptive practices in air transportation or the sale of air transportation. Section 41712 authorizes the Department to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation, and to prohibit such practices.<sup>7</sup>

As a carrier that operates flights to and from the United States, Air Canada is engaged in air transportation for purposes of Section 41712.<sup>8</sup> As explained in the April 2020 and May 2020 notices regarding airline refund policies and practices during the ongoing COVID-19 pandemic,<sup>9</sup> the Department has long taken the view that a carrier's refusal to refund passengers in circumstances where the carrier has cancelled the flight, for whatever reason, or has made a significant schedule change or other materially adverse change in the quality of the flight service to be provided to the passenger, and the passenger does not wish to accept a voucher for future travel or the alternative carriage offered by the airline, is an unfair business practice in violation of Section 41712, whether or not the passenger has purchased a non-refundable ticket.<sup>10</sup>

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<sup>6</sup> DOT Order 2008-9-23, September 18, 2008.

<sup>7</sup> OACP adds that the Department's regulations impose obligations on airlines that cannot be avoided through contractual provisions. *See Spirit Airlines vs. DOT*, 687 F.3d 403, 416 (D.C. Cir. 2012) (DOT may implement rule that airlines must change their policies to permit a passenger to cancel a reservation without penalty within 24 hours, based on DOT's finding that existing practices were unfair or deceptive).

<sup>8</sup> 49 U.S.C. § 40102(a)(5) defines "air transportation" as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(23) defines "foreign air transportation" as "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft." 49 U.S.C. § 40102(a)(25) defines "interstate air transportation" as "the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft— (A) between a place in— (i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii."

<sup>9</sup> April 3, 2020 Notice, available at [www.transportation.gov/airconsumer/enforcement\\_notice\\_refunds\\_apr\\_3\\_2020](http://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020); May 12, 2020 Notice, available at [www.transportation.gov/airconsumer/FAQ\\_refunds\\_may\\_12\\_2020](http://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020).

<sup>10</sup> For example, in a rulemaking notice published in 2011, the Department stated: "We reject some carriers' and carrier associations' assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (e.g., greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel. Since at least the time of an Industry Letter of July 15, 1996 (*see* <https://www.transportation.gov/airconsumer/archived-guidance>), the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is cancelled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action." 76 Fed. Reg. 23110, 23129 (Apr. 11, 2011). The Department further explained that it "continue[s] to believe that there are circumstances in which passengers would be due a refund, including a refund of non-refundable tickets and optional fees

OACP recognizes that the preamble language quoted herein, as well as its April and May 2020 notices, represent nonbinding guidance regarding OACP’s longstanding interpretation of Section 41712.<sup>11</sup> The Department intends to issue, in the near future, a rulemaking to codify OACP’s interpretation that Section 41712 requires airlines to provide prompt refunds when a carrier cancels or makes a significant change, including when the ticket purchased is non-refundable. That rulemaking would also address additional protections for consumers who are unable to travel due to government restrictions.<sup>12</sup>

More recently, effective January 6, 2021, the Department issued a binding final regulation titled “Defining Unfair or Deceptive Practices.”<sup>13</sup> The rule defined the terms “unfair” and “deceptive” for purposes of Section 41712. Pursuant to the rule, a practice is “unfair” to consumers within the meaning of Section 41712 if it causes substantial harm to consumers, the harm is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.<sup>14</sup> For the reasons set forth below, it is OACP’s position that the practice of cancelling or significantly changing a flight to or from the United States without providing a refund is “unfair” as that term is defined by regulation, even if the consumer purchased a non-refundable ticket and even if the flight was cancelled due to government restrictions.

First, OACP believes the practice imposes substantial harm to consumers because they paid money to the carrier for a service that the carrier did not provide. Consumers incur harm from delays in receiving refunds, as well as from the time, effort, and expense involved in seeking a refund.

Second, OACP maintains the harm is not reasonably avoidable. A consumer acting reasonably would believe that he or she was entitled to a refund under U.S. law if the carrier cancelled or significantly changed the flight whatever the reason for the cancellation or significant change. Moreover, a reasonable consumer would not believe that it is necessary to purchase a more expensive refundable ticket in order to be able to recoup the ticket price when the *airline* fails to provide the service paid for through no action or fault of the consumer. Reasonable consumers understand that “refundable” tickets are valuable because they ensure a refund if the *passenger* cancels the flight.

Third, OACP believes the harm is not outweighed by countervailing benefits to consumers or competition. The Department seeks to regulate practices that are injurious to consumers in their net effects.<sup>15</sup> The Department in enforcing Section 41712, which is modeled on Section 5 of the Federal Trade Commission (FTC) Act, recognizes, like the FTC, that practices may be harmful to consumers

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associated with those tickets, due to a significant flight delay.” *Id.*

<sup>11</sup> OACP states that it made abundantly clear throughout this litigation that it relies not on guidance, but on its interpretation of the term “unfair” in Section 41712, as denied by binding regulation at 14 CFR 399.79. *See, e.g.*, Answer to Motion to Dismiss at 17-18 (“OACP is well aware that regulatory preambles and guidance documents do not have the force of law. ... The Complaint never states or implies that Air Canada violated OACP’s guidance and therefore is subject to civil penalties. Instead, the Complaint makes clear that Air Canada has violated Federal statute and regulations.”).

<sup>12</sup> *See* <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2105-AF04>. OACP assures Air Canada that this rulemaking would not impose less restrictive standards on carriers than described in this Settlement Agreement.

<sup>13</sup> 85 Fed. Reg. 78707 (December 7, 2020).

<sup>14</sup> 14 CFR 399.79(b)(1).

<sup>15</sup> *See* <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

in some ways, but beneficial in others. For example, offsetting benefits may include lower prices or a wider availability of products and services resulting from competition.<sup>16</sup> Here, OACP sees no offsetting benefit to consumers that would outweigh the harm of retaining passengers' funds beyond the time frames allowed by law.

In addition to the general prohibition on unfair and deceptive practices, pursuant to 14 CFR 259.5, U.S. and foreign air carriers operating at least one aircraft having a seating capacity of 30 or more seats (such as Air Canada) must adopt a Customer Service Plan and adhere to the Plan's terms.<sup>17</sup> Customer Service Plans represent a baseline, uniform, minimum level of service to which all covered carriers operating flights to and from the United States must comply. The Customer Service Plan must include certain commitments relating to the payment of refunds to passengers when required by Section 41712. Section 259.5(b)(5) requires: "Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and [Regulation Z, 12 CFR Part 1026] for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation." OACP's position is that refunds are "due" when failure to provide them would constitute an unfair or deceptive practice under Section 41712. Regulation Z states, at 12 CFR 1026.11(a)(2), that for credit card purchases, refunds must be provided within seven days of receipt of a written request from the consumer. Pursuant to 14 CFR 374.3(b), violations of Regulation Z constitute violations of 49 U.S.C. Subtitle VII.<sup>18</sup>

Section 41712 provides that if the Department, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice, the Secretary shall order it to stop the practice. Under 49 U.S.C. § 46301 and 14 CFR Part 383, the Department may assess civil penalties for each violation of Section 41712 or of a regulation prescribed or order issued thereunder of up to: (1) \$34,174 for violations taking place between July 31, 2019 and January 1, 2021; (2) \$34,777 for violations occurring from January 11, 2021 to May 2, 2021; and (3) \$35,188 for violations from May 3, 2021.<sup>19</sup> Under 49 U.S.C. § 46301(a)(2), a separate violation occurs for each day that the violations at issue continued.

When taking enforcement action under the authorities described above, OACP's goals are to deter the violator and others from breaking the law and to provide for the fair and equitable treatment of the regulated community. OACP considers many factors including, but not limited to: (1) the number of violations; (2) how long the violations continued, especially after the entity became aware of them; (3) the harm caused to consumers by the violations, as well as steps taken to reimburse consumers or otherwise correct the harm; (4) whether the violations were inadvertent or deliberate; (5) the history of OACP's prior enforcement actions against the entity; (6) the entity's compliance disposition (*e.g.* did the entity have procedures in place to prevent such violations, did the entity provide training to employees in the area, how quickly was the problem corrected after the OACP's notification, what resources did the entity expend to correct the situation, was the entity responsive and forthcoming

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<sup>16</sup> *See id.*

<sup>17</sup> This obligation is separate from the requirements in section 259.6 relating to posting the Customer Service Plan on the covered carrier's website. Under 14 CFR 259.6(b), "each U.S. air carrier that has a website and each foreign air carrier that has a website marketed to U.S. consumers, and that is required to adopt a customer service plan, shall post its current customer service plan on its website in easily accessible form."

<sup>18</sup> In enforcement orders, DOT has clarified that violations of section 259.5 are violations of Section 41712 specifically, not just 49 U.S.C. Subtitle VII generally. *See, e.g., American Airlines*, DOT Order 2017-7-9.

<sup>19</sup> Revisions to Civil Penalty Amounts, 84 Fed. Reg. 37059 (July 31, 2019); 86 Fed. Reg. 1745 (January 11, 2021) and 86 Fed. Reg. 23241 (May 3, 2021).

during the Department’s investigation, etc.); (7) the alleged ability to pay the civil penalty; (8) the Department’s history in assessing penalties for similar violations within a given period of time (adjusting for statutory penalty increases and inflation); (9) the alleged violator’s business experience level (e.g., new airline or established carrier), size, and breadth of U.S. operations; (10) the need to eliminate/disgorge any profits attributable to the violations; and (11) whether the potential violations were beyond the alleged violator’s control. These factors may not all apply to each violation, and some factors are weighed more or less heavily than others, as circumstances warrant. Only those factors that are relevant to a violation are considered in determining a sanction for a violation.<sup>20</sup>

### **Air Canada’s Position**

In response, Air Canada begins by acknowledging the disruption that its passengers suffered because of the difficult, but necessary, decisions that were taken because of the COVID-19 global pandemic and related government actions and their impact on the worldwide airline industry and on its operations beginning in early 2020. Air Canada further states that it respectfully disagrees with the Department’s assertions and positions for the reasons set out below. Air Canada notes that unlike U.S. carriers, it was subject to U.S. and Canadian government measures that entirely prohibited or severely restricted travel between the United States and Canada, as well as between Canada and third countries. This resulted in numerous network-wide cancellations and significant flight delays, which were outside of Air Canada’s control. Air Canada adds that, in responding to this unprecedented global pandemic and its effects, it provided passengers of cancelled or significantly delayed flights who held non-refundable tickets with industry-leading travel vouchers that did not expire (as stated in Air Canada’s Contractual Refund Policy)<sup>21</sup> many of which have since been used by customers. Air Canada states that its Contractual Refund Policy was fair and entirely consistent with its Conditions of Carriage and Tariff, which govern the contractual relationship with its passengers<sup>22</sup> and was consistent with all applicable DOT and Canadian aviation consumer protection regulations.<sup>23</sup> Air Canada observes that its Conditions of Carriage and Tariff did not create a right to a cash refund of a non-

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<sup>20</sup> According to OACP, pursuant to 5 U.S.C. § 701(a)(2), an agency action is not subject to judicial review when it “is committed to agency discretion by law.” Because an agency’s decision not to take enforcement action is “generally committed to an agency’s absolute discretion,” that decision is “presumed immune from judicial review under § 701(a)(2).” *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). This presumption “may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.” *Id.* at 833. But “if the statute in question does not give any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another and if it provides no meaningful guidelines defining the limits of the agency’s discretion, then enforcement is committed to the agency’s discretion.” *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011).

<sup>21</sup> Air Canada states that the vast majority of Air Canada’s flights were cancelled due to government restrictions. For purposes of this Settlement Agreement, the Contractual Refund Policy refers to Air Canada’s policy with respect to non-refundable flight reservations that were cancelled on or after March 19, 2020 and prior to April 13, 2021 due to events outside of Air Canada’s control (including, but not limited to, government-mandated border restrictions caused by COVID-19). While the majority of customers were fully satisfied with this remedy, following a global social media campaign against Air Canada, certain passengers, as noted above, complained to DOT regarding Air Canada’s Contractual Refund Policy.

<sup>22</sup> Air Canada maintains that it is well-settled that this contractual relationship governs in matters of refunds and schedule changes. See, e.g. *Arif Naqvi v. Saudi Arabian Airlines, Inc.*, 123 F. Supp. 3d 129, 132 (D.D.C. 2016) (“The ticket and tariff constitute the contract of carriage... Tariff provisions are binding on the passenger, even if the passenger does not actually know of the provisions.”); *Seisay v. Compagnie Nationale Air France*, No. 95 CIV. 7660 (JFK), 1997 WL 431084, at \*3 (S.D.N.Y. July 30, 1997) (“It is well established that tariffs on file with the DOT constitute the contract of carriage between the passenger and the airline that governs the rights of airline passengers.”).

<sup>23</sup> See CTA, APPR, Date modified: 2019-07-08, <https://laws.justice.gc.ca/eng/regulations/SOR-2019-150/page-2.html#h-1129787>; see also, CTA, FAQs: Statement on Vouchers, <https://otc-cta.gc.ca/eng/faqs-statement-vouchers> (Apr. 22, 2020).



refundable ticket for a flight that is cancelled due to circumstances outside of Air Canada's control.

Air Canada has maintained that, (1) because the Department has no rule explicitly requiring cash refunds instead of vouchers for non-refundable tickets in instances of flight cancellation or significant delay that are beyond a carrier's control, the instant action is both unwarranted and beyond the authority of the Department; (2) its Contractual Refund Policy is not an unfair practice under Section 41712; (3) there was no substantial harm to consumers as it provided passengers with non-refundable tickets a suite of options to best fit their individual needs including flexible, multi-use, and fully-transferable travel credits with no expiration date, bonus offers of Aeroplan miles that could be redeemed for cash equivalent gift cards, and the ability to turn travel credits into cash; (4) it offered fully refundable ticket options for those passengers who opted to mitigate the risk of their flight being cancelled or delayed, reasonably allowing any purported harm to be avoided;<sup>24</sup> and (5) its Contractual Refund Policy resulted in numerous and meaningful benefits to consumers and competition, such as enabling Air Canada to continue to maintain its network operation and offer critical connectivity to passengers and shippers even in the face of severe economic hardship and a lack of government support.

Moreover, Air Canada maintains that, (1) OACP cannot rely on alleged non-compliance with non-binding and unenforceable industry guidance which will be the subject of future rulemaking as a basis for claiming violations of Section 41712;<sup>25</sup> (2) certain positions taken by the OACP are an improper extraterritorial exercise of its jurisdiction; and (3) its Contractual Refund Policy did not violate 14 CFR 259.5.

Notwithstanding what it believed in good faith to be a fully compliant and fair and reasonable position, Air Canada avers it was prepared to change its policy to accommodate customers who would prefer refunds to their original form of payment (OFOP) instead of vouchers if it could responsibly do so, and informed OACP on several occasions that it would voluntarily provide such refunds for non-refundable tickets as soon as it secured a financial package from the Government of Canada. As early as summer 2020, Air Canada began discussions with the Government of Canada about a potential financial package, which would, among other things, allow it to refund customers in cash and thus meet the expectations of OACP (which was apprised repeatedly that such discussions were underway).<sup>26</sup> By November 2020, Air Canada states that airlines in the U.S. and elsewhere in the world had received significant aid from their governments, aggregating more than \$160 billion<sup>27</sup> globally and contributing significantly to their financial stability during the worst of the pandemic. Air Canada notes that it hoped the Government of Canada would similarly support the Canadian airline industry but did not control the likelihood or timing of any such support. Air Canada states that, once a financial package was finalized in April 2021, it immediately offered and processed full

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<sup>24</sup> Air Canada further maintains that DOT has routinely recognized a carrier's ability to offer a range of fare types as being in the public interest. *See, e.g.*, Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq., DOT-OST-2012-0109, Order 2012-11-4 at 10 ("To require carriers, as the petitioner urges, to offer full refunds or a penalty-free ticket change for any schedule change would represent an unwarranted intrusion into the operational decisions of air carriers and *would not be in the public interest*. ... Passengers can choose whether to buy a refundable or nonrefundable ticket at the time of purchase and can choose between carriers offering different fare products.") (emphasis added).

<sup>25</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2105-AF04>.

<sup>26</sup> *See, e.g.*, November 8, 2020, public announcement by Marc Garneau (then Minister of Transport) confirming the Canadian Government was preparing a package for financial assistance to airlines which as a condition would require airlines to issue refunds, available at <https://www.canada.ca/en/transport-canada/news/2020/11/statement-by-minister-garneau-on-measures-to-protect-canadians-from-the-impacts-of-covid-19-on-the-air-travel-sector.html>.

<sup>27</sup> [https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/en/quarterly-result/2020/2020\\_q3\\_release.pdf](https://www.aircanada.com/content/dam/aircanada/portal/documents/PDF/en/quarterly-result/2020/2020_q3_release.pdf).

cash refunds for eligible passengers to the OFOP, regardless of the terms of each ticket when it was purchased. Air Canada further states that it expended more than \$2.7 million dollars to develop a unique and industry-leading website refund solution allowing for quick and easy refunds to consumers' OFOP – including those who voluntarily cancelled their itineraries and those who wished to exchange credits for cash. This initiative was not funded by the government financial package. Air Canada even went so far as to encourage processing of refunds by third party agents, and was one of the only carriers to have waived its right to claim back the commission paid on each refunded and cancelled ticket.

As of the date of this agreement, Air Canada states that it has provided cash refunds (or is processing refunds) to (1) those passengers who further to its refund offer properly requested refunds for flights to or from the United States that Air Canada cancelled or significantly changed since March 22, 2020 due to circumstances related to the COVID-19 pandemic, representing an aggregate amount of refunds paid to date of approximately CAD\$730.4 million;<sup>28</sup> and (2) a significant number of passengers who were not entitled to refunds under U.S. law (e.g., passengers who decided not to fly after March 22, 2020 despite their flight still being scheduled to operate at the time the voluntary cancellation occurred), representing an aggregate amount of refunds paid to date exceeding CAD\$10 million. Air Canada stresses that this CAD\$10 million in refunds goes beyond any DOT or Canadian requirements, was voluntarily paid out as a goodwill gesture to passengers who cancelled their itineraries, and was not funded by the government financial package.

Air Canada also states that effective April 13, 2021, it modified its Conditions of Carriage and Tariff to provide for cash refunds and other options to passengers purchasing non-refundable tickets whose flights are cancelled or significantly changed by Air Canada, including for reasons beyond its control.

For the foregoing reasons, Air Canada disagrees with the Department's claims and maintains that this enforcement action is not warranted and is beyond OACP's authority. However, in the interest of resolving this matter, Air Canada has agreed to this Settlement Agreement and the terms and conditions enumerated herein. This agreement is being entered into for settlement purposes only and does not constitute any admission whatsoever by Air Canada of any violation of any statute, law, or regulation including as alleged, or the truth of any facts alleged during this proceeding (which are expressly denied).

### **Resolution**

OACP views seriously what it maintains are Air Canada's violations of 14 CFR Part 259.5 and 49 U.S.C. § 41712. Accordingly, after carefully considering all the facts in this case, including those set forth above, OACP believes that enforcement action with a civil penalty is warranted.

To avoid litigation and without any admission whatsoever by it of any violation of any statute, law, or regulation including as alleged, or the truth of any facts alleged during this proceeding (which are expressly denied), Air Canada consents to this Settlement Agreement and agrees to the payment or credit of \$4,500,000 in compromise of potential civil penalties otherwise allegedly due and payable pursuant to 49 U.S.C. § 46301.

In agreeing to the terms of this settlement, Air Canada has explicitly relied upon, and been materially induced by, the Department's representations and warranties that OACP has acted in good faith and made best efforts throughout the course of this investigation, to ensure that, (1) OACP has treated Air Canada in a fair, equitable, and balanced manner; and (2) the terms of this agreement are, and will remain in the future, in the public interest, fair, equitable, and balanced, and consistent with the Department's positions taken in rulemakings, other enforcement investigations or actions, and consent

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<sup>28</sup> As of October 22, 2021.

orders or settlement agreements relating to ticket refunds involving other U.S. or foreign air carriers, based on the factors enumerated above that are considered in enforcement decisions. The parties agree that Air Canada expressly reserves the right to move for modification of the order approving this agreement and this agreement pursuant to 14 CFR 302.419.

OACP believes the compromise is appropriate considering the nature and extent of the alleged violations described herein and the unprecedented impact of the COVID-19 pandemic on air travel. OACP believes that this Settlement Agreement serves the public interest by establishing a strong deterrent to future similar alleged unlawful practices by Air Canada and other carriers.

The Department enters into this Settlement Agreement pursuant to its authority contained in 49 CFR Part 1.27(p).

### **ACCORDINGLY,**

1. Based on the above recitations outlining their respective positions and their proposed resolution of these proceedings, the parties believe this Settlement Agreement is in the public interest;
2. The Department maintains that Air Canada violated its refund obligations under 49 U.S.C. § 41712 and 14 CFR 259.5 as interpreted by OACP by (a) significantly delaying the payment of refunds to passengers for flights to or from the United States that the carrier cancelled or significantly changed; and (b) failing to provide refunds within the time frame set forth in 14 CFR 259.5;
3. Air Canada disagrees with the Department's position above. However, without any admission whatsoever by Air Canada of any violation of any statute, law, or regulation including as alleged, or the truth of any facts alleged during this proceeding (which are expressly denied), Air Canada and its successors and assigns will comply going forward with the OACP's current interpretation of Section 41712 and 14 CFR Part 259.5 by refunding airfare to passengers who purchase nonrefundable tickets to or from the United States whose flights are cancelled or significantly changed by Air Canada, until such time as a Final Rule addressing refunds for nonrefundable tickets is issued in accordance with the Administrative Procedure Act as described above. Air Canada further accepts that failure to materially comply with this paragraph shall render any due and unpaid amounts in paragraph 4 (a) and (b) below immediately payable, and shall subject Air Canada to further enforcement action, including the imposition of civil penalties under 49 U.S.C. § 46301. Prior to initiating further enforcement action against Air Canada for an alleged violation of this provision, OACP agrees to notify Air Canada of the alleged violation and permit Air Canada 30 days to correct and/or address the alleged violation. Should Air Canada respond within the prescribed timeframe, the parties shall make a good faith effort to resolve the dispute;
4. Air Canada undertakes to pay or be credited the agreed \$4,500,000 in compromise of all civil penalties that might have been assessed for violations alleged by the Department. Of this amount,
  - (a) \$1,000,000 shall be due and payable within 30 days of the service date of the order approving this Settlement Agreement;
  - (b) \$1,000,000 shall be due and payable within 12 months of the service date of the order approving this Settlement Agreement; and
  - (c) \$2,500,000 shall be credited to Air Canada upon the service date of the order approving this agreement in consideration of refunds that it provided to passengers with non-refundable tickets for flights to or from the U.S. who chose not to travel and were not entitled to refunds under U.S. law so long as Air Canada was not reimbursed for these funds by the Government of Canada;

5. Air Canada agrees to pay the amounts in paragraph 4 (a) and (b) above as described in this Settlement Agreement. Air Canada will pay through Pay.gov to the account of the U.S. Treasury and in accordance with the instructions contained in the Attachment to this Settlement Agreement. Air Canada accepts that failure to pay the amounts under 4 (a) and (b) above as undertaken shall subject Air Canada to the assessment of interest, penalty, and collection charges under the Debt Collection Act and to further enforcement action for failing to comply with this agreement;
6. The parties agree that the enforcement action will be terminated and the Enforcement Complaint dismissed with prejudice, each party to bear its own costs and fees; and,
7. This Settlement Agreement is entered pursuant to the authority set forth in 302.417(c) and the order approving it shall become a final order of the Department 30 days after its service unless a timely petition for review is filed or the Department takes review on its motion.

**BY:**

For the U.S. DEPARTMENT  
OF TRANSPORTATION

*Blane A. Workie*

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Blane A. Workie  
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DATE: November 22, 2021

For AIR CANADA

*Evelyn D. Sahr*

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Washington, DC 20006

DATE: November 22, 2021