



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

**Issued by the Department of Transportation
on the 22nd day of November, 2022**

Swoop

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

**Docket OST-2022-0001
Docket OST-2020-0152**

Served November 22, 2022

CONSENT ORDER AND ORDER OF DISMISSAL

The U.S. Department of Transportation's Office of Aviation Consumer Protection (OACP) has determined that Swoop routinely failed to provide timely refunds to passengers for flights to and from the United States that the carrier cancelled or significantly changed in violation of 49 U.S.C. § 41712 (Section 41712) and 14 CFR Part 259. Since March 2020, the Department has received approximately 250 complaints alleging that Swoop failed to provide refunds after cancelling or significantly changing consumers' flights to or from the United States. Swoop was unable to provide the Department information regarding the length of time that it took to process the thousands of refund requests that it received directly from consumers. It appears that Swoop took more than 100 days to process many of these refunds. Swoop has acknowledged that it did not offer refunds to all consumers holding non-refundable tickets on flights to and from the United States that were cancelled or significantly changed by the carrier until on or about October 22, 2020. This order directs Swoop to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and assesses the carrier \$175,000 in civil penalties.

Applicable Law

Pursuant to 49 U.S.C. § 41301, a foreign air carrier¹ may provide foreign air transportation² only if the foreign air carrier holds a permit from the Department authorizing the foreign air

¹ 49 U.S.C. § 40102(a)(21) defines a "foreign air carrier" as "a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation."

² 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

transportation or has a valid exemption from that section.³ A foreign air carrier that holds a foreign air carrier permit from the Department is subject to the requirements of 49 U.S.C. § 41712, which prohibits an air carrier, foreign air carrier, or a ticket agent from engaging in an unfair and deceptive practice in air transportation or the sale of air transportation. Section 41712 authorizes the Department to investigate and decide whether a carrier or ticket agent is engaging in an unfair or deceptive practice, and if so, to prohibit such a practice.⁴

In April and May 2020, in response to the high volume of air travel service complaints received, many of which concerned refunds, OACP issued notices to help consumers understand their rights and emphasize to airlines that the unprecedented impact COVID-19 has had on air travel has not changed the airlines' obligation under Section 41712 to refund passengers for flights that airlines cancel or significantly change.⁵ Then, in December 2020, the Department published in the Federal Register a final rule titled "Defining Unfair or Deceptive Practices."⁶ 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.⁷ For the reasons set forth below, 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, irrespective of the reason for the cancellation.

First, 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, 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"

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."

³ The authority required by Section 41301 is separate and distinct from the operations specifications and approvals that such an entity must obtain from the Federal Aviation Administration (FAA) for operations to and from the United States.

⁴ 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).

⁵ "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" (April 3, 2020), available at https://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020; "Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" (May 12, 2020), available at https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020;

⁶ 85 Fed. Reg. 78707 (December 7, 2020).

⁷ 14 CFR 399.79(b)(1).

tickets are valuable because they ensure a refund if the *passenger* cancels their own flight reservation.

Third, 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.⁸ In enforcing Section 41712, which is modeled on Section 5 of the Federal Trade Commission (FTC) Act, the Department recognizes, like the FTC, that practices may be harmful to consumers 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.⁹ Here, there are no offsetting benefits to consumers that would outweigh the harm of retaining passengers' funds for lengthy periods of time.

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 designed seating capacity of 30 or more seats must adopt a Customer Service Plan and adhere to the Plan's terms. 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 business 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.¹⁰

Facts and Conclusions

Swoop, a foreign air carrier, holds a foreign air carrier permit to operate flights to and from the United States pursuant to 49 U.S.C. § 41301. Swoop uses at least one aircraft having a designed capacity of more than 30 passenger seats. One condition of Swoop's foreign air carrier permit is that Swoop "[c]omply 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."¹¹ Accordingly, Swoop is subject to the requirements in 49 U.S.C. § 41712 and 14 CFR 259.5.

⁸ See <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁹ See *Id.*

¹⁰ 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.

¹¹ DOT Order 2018-10-10 (October 10, 2018), paragraph 11.

An investigation by OACP revealed that beginning on or about March 13, 2020, Swoop did not provide refunds to consumers for flights to or from the United States that were cancelled or significantly changed by the carrier in response to the impact of the COVID-19 pandemic, unless the passenger had specifically purchased a “refundable” ticket, instead providing travel credits to all impacted consumers. Approximately 250 consumers complained to OACP that Swoop failed to provide timely refunds for flights to or from the United States that the carrier cancelled or significantly changed due to the COVID-19 pandemic and associated governmental restrictions. Thousands more consumers contacted Swoop directly for refunds. In addition, consumers filed two formal complaints on the Department’s docket.¹² Swoop has acknowledged that from March 13, 2020 to October 22, 2020, it was Swoop’s policy to only provide “Travel Bank Credit” to passengers for flights to and from the United States that the carrier cancelled or significantly changed. It appears that Swoop took more than 100 days to process many of these refunds. Accordingly, Swoop did not provide timely refunds to many consumers for flights to or from the United States that were cancelled or significantly changed by the carrier in response to the impact of the COVID-19 pandemic. OACP has determined that many consumers experienced significant harm from the extreme delay in receiving their refunds.

Response

In response, Swoop asserts that U.S. and Canadian federal, state/provincial, and local government measures during the unprecedented ‘force majeure’ COVID-19 global pandemic effectively prohibited or severely restricted travel between the United States and Canada, particularly with respect to discretionary, leisure travelers, who are, by far, the largest segment of Swoop travelers, and these prohibitions and severe restrictions compelled the suspension of all Swoop’s transborder flights as of March 23, 2020. Swoop also states that it disagrees with the Department’s conclusion that “there are no offsetting benefits to consumers that would outweigh the harm of retaining passengers’ funds for lengthy periods.” To this point, Swoop claims that it made refunds within a reasonable period of time and did not retain passenger funds for lengthy periods; and that if it had not conserved cash out-flow (when there was no revenue in-flow) and reduced staff in the immediate aftermath of the pandemic shutdown, Swoop may have faced collapse, which is a compelling, offsetting consumer and public benefit, namely preserving one of the very few transborder ultra-low-cost-carriers (ULCC) during the global pandemic crisis.

Swoop states that it provided travel credits (valid for 24 months) during the COVID-19 global pandemic before November 1, 2020 to travelers whose Swoop flights were cancelled or had a significant schedule change (and who did not accept the alternative transportation offered by Swoop). Swoop adds that in early November 2020, it began offering these travelers refunds. Swoop asserts that it publicly disseminated this information about refunds and even proactively contacted travelers who had already received travel credits. Swoop claims that its decision to provide travel credits complied with (i) applicable Canadian regulations and policy (which, among other things, expressly approved travel credits or vouchers for future travel in this context), (ii) the Department’s regulations (which do not explicitly require cash refunds instead of travel credits), and (ii) Swoop’s tariff. Swoop contends that its actions were not an unfair practice, nor did it fail to adhere to its customer commitment.

¹² *Koch v. Swoop*, Docket DOT-OST-2020-0148; and *Nguyen v. Swoop*, Docket DOT-OST-2020-0152.

Swoop also claims that providing refunds to its travelers in November 2020 was timely and in good faith, particularly given the context that Swoop is a small ULCC that received no sector specific monetary support from its home government, the overriding necessity for Swoop to preserve liquidity and avoid financial collapse, and the need to manually process refunds with a greatly reduced staff as a result of massive workforce reductions resulting from the disastrous pandemic impacts. Swoop notes that the Department itself recognized that pandemic-related issues could affect the timely processing of refund requests.¹³ With respect to the approximately 250 complaints that the Department claims it received alleging that Swoop failed to provide timely refunds, Swoop asserts that it initially provided travel credits to most of these passengers but has now provided them refunds. Lastly, Swoop asserts that it has fully cooperated with OACP throughout this process.

Decision

OACP views seriously Swoop's violations of 49 U.S.C. § 41712 and 14 CFR Part 259. Accordingly, after carefully considering all the facts in this case, including those the formal complaints filed against Swoop, OACP believes that enforcement action is warranted.¹⁴ In order to avoid litigation, and without admitting the violations described above, Swoop consents to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 and 14 CFR Part 259 and to the assessment of \$175,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. The compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It establishes a strong deterrent to future similar unlawful practices by Swoop and other carriers.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that by significantly delaying the payment of refunds to passengers for flights to or from the United States that Swoop cancelled or significantly changed, Swoop engaged in an unfair practice in violation of 49 U.S.C. § 41712;
3. We find that by failing to adhere to its customer commitment related to providing prompt refunds, Swoop violated 14 CFR 259.5(b)(5) which also constitutes a violation of 49 U.S.C. § 41712;

¹³ See "Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" at 3.

¹⁴ OACP reviewed the two formal complaints filed against Swoop for lack of timely refunds and found the *Nguyen* complaint to be meritorious. This complaint was considered in OACP's decision to pursue an order against Swoop and in the civil penalty assessed against Swoop. To promote the efficient use of OACP's resources, OACP is dismissing the *Nguyen* complaint through this Consent Order and concurrently providing notice of the Consent Order to the complainant. OACP found the *Koch* complaint to lack merit because the complainant chose not to travel and cancelled his flight and filed an Order of Dismissal in Docket DOT-OST-2020-0148.

4. We order Swoop and its successors and assigns to cease and desist from further violations of 49 U.S.C. § 41712 and 14 CFR 259.5;
5. We assess Swoop \$175,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above. \$87,500 of the assessed penalty shall be due and payable within 30 days of the issuance of the order. \$87,500 shall be credited to Swoop for refunds that Swoop provided to passengers with non-refundable tickets for flights to or from the United States who chose not to travel and were not entitled to refunds under U.S. law; and
6. We order Swoop to pay within 30 days of the issuance of this order the penalty assessed in ordering paragraph 5, above, through Pay.gov to the account of the U.S. Treasury. Payment shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Swoop 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 order.
7. We dismiss the complaint filed in DOT-OST-2020-0152.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

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for the Office of Aviation Consumer Protection

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