



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

**Issued by the Department of Transportation
on the 18th day of July, 2023**

Scandinavian Airlines System

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

**Dockets OST-2023-0001
 OST-2020-0147**

Served July 18, 2023

CONSENT ORDER and ORDER OF DISMISSAL

The U.S. Department of Transportation’s Office of Aviation Consumer Protection (OACP) has determined that, during the COVID-19 pandemic, Scandinavian Airlines System Denmark-Norway-Sweden (SAS) 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 over 700 informal complaints and one formal complaint¹ alleging that SAS failed to provide refunds after cancelling or significantly changing consumers’ flights to or from the United States. The airline has received thousands of additional complaints and refund requests directly from passengers. It appears that thousands of refund requests took over 100 days to process. Given these facts, OACP is of the view that SAS subjected thousands of consumers to extreme delay in making refunds available for flights to and from the United States that the carrier cancelled.

On July 5, 2022, SAS AB and certain of its subsidiaries, including SAS (collectively, the “SAS Debtors”), commenced voluntary cases under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), captioned *SAS AB, et al.*, Case No. 22-10925 (MEW) (the “Chapter 11 Cases”). The effectiveness of this consent order is subject to the entry of an order of the Bankruptcy Court approving SAS’s entry into the consent order and the terms hereof, as set forth in more detail in ordering paragraphs 5 through 8 of the “Decision” section below. This order directs SAS to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14

¹ *Carrera v. SAS*, docket DOT-OST-2020-0147.

CFR Part 259, assesses the carrier \$750,000 in civil penalties, and dismisses the formal complaint.

Applicable Law

Pursuant to 49 U.S.C. § 41301, a foreign air carrier² may provide foreign air transportation³ only if the foreign air carrier holds a permit from the Department authorizing the foreign air transportation or has a valid exemption from that section.⁴ A foreign air carrier that holds a foreign air carrier permit from the Department is subject to the requirements of Section 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.⁵

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.⁶ Then, in December 2020, the Department published in the Federal Register a final rule titled "Defining Unfair or Deceptive Practices."⁷ 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.⁸ For the reasons set forth below, the practice of cancelling

² 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."

³ 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."

⁴ 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.

⁵ 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).

⁶ "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;

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

⁸ 14 CFR 399.79(b)(1).

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” 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.⁹ 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.¹⁰ 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.¹¹

⁹ See <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

¹⁰ See *id.*

¹¹ 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.

Facts and Conclusions

SAS, a foreign air carrier, holds a foreign air carrier permit and operates flights to and from the United States using at least one aircraft having a designed capacity of more than 30 passenger seats. One condition of SAS's foreign air carrier permit is that SAS "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."¹² Accordingly, SAS is subject to the requirements in Section 41712 and 14 CFR 259.5.

Since March 1, 2020, over 700 consumers complained to OACP that SAS failed to provide requested 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. An investigation by OACP, which included reviewing SAS's refund policies and procedures, data provided by the carrier, and consumer complaint files, among other information, revealed that throughout 2020 and 2021, SAS did not provide timely refunds to thousands of 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. Based on the evidence and data provided by SAS, it appears that the carrier took over a hundred days to process thousands of these refunds. As a result, consumers experienced significant harm from the extreme delay in receiving their refunds.

Response

SAS states that it is Scandinavia's - Denmark, Norway and Sweden's - premier airline, serving over 280 destinations across Scandinavia, Europe, the Americas and Asia. SAS states that, starting in March 2020, a substantial number of SAS's flights were cancelled or rescheduled due to worldwide stay-at-home orders and travel restrictions stemming from the COVID-19 pandemic. SAS states that following those government-mandated travel restrictions and despite the unprecedented nature of the pandemic and its devastating effects on the global airline industry, SAS continued its pre-pandemic practice of issuing refunds and travel credits to many customers who were actually not entitled to any form of compensation.

SAS states that as an extraordinary customer service matter, if a customer complained to SAS that they had not received a refund SAS had previously issued via a travel agent or other third party, SAS often issued a second refund to the customer directly by bank transfer or credit card. SAS states that, additionally, many travel agents filed for bankruptcy or otherwise halted business operations, failing to transfer refunded monies that they received from SAS back to customers.

SAS states that in summer 2020, it caught up with the extraordinary volume of refund requests through a major investment in new automated solutions and otherwise, dramatically increasing SAS's capacity for handling refunds. SAS states it made such good faith, extensive efforts to provide customers with refunds and come into compliance with the Department's requirements

¹² See <https://www.regulations.gov/document/DOT-OST-2007-0030-0003>.

regarding refunds and related timelines.¹³ Given these and other extraordinary efforts, SAS states that in its view, its response to the overwhelming, unprecedented demands of the COVID-19 pandemic, under the totality of the circumstances, was consistent with the Department's May 2020 guidance which recognized that, because of the pandemic, processing refunds would take longer than normal during the first half of 2020.¹⁴

In regard to the fifty percent credit of \$375,000 applied to the compromise civil penalty of \$750,000, SAS states that, from March 1, 2020, through November 15, 2022, it provided customers with refunds for flights SAS cancelled or significantly changed in the amount of \$122,290,156. SAS states that during that same time period, SAS voluntarily provided customers refunds for flights SAS did not cancel or significantly change in the amount of \$50,676,251. Therefore, during the relevant time period, SAS's voluntary refunds were equal to forty-one percent (41%) of the refunds SAS made to customers for flights SAS cancelled or significantly changed.

SAS agrees to this consent order for settlement purposes only and to avoid further litigation and related transaction costs. SAS makes no admission of fault or violation of any statute, law, or regulation, including as alleged, or of the truth of any facts alleged during this proceeding (which are expressly denied).

Decision

OACP views seriously SAS's violations of Section 41712 and 14 CFR Part 259. Accordingly, after carefully considering all the facts in this case, OACP believes that enforcement action is warranted. In order to avoid litigation, SAS 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 \$750,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. DOT states that the compromise assessment is appropriate considering the nature and extent of the violations described herein, serves the public interest, and establishes a strong deterrent to future similar unlawful practices by SAS 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 Scandinavian Airlines System Denmark-Norway-Sweden cancelled or significantly changed, Scandinavian Airlines System engaged in an unfair practice in violation of 49 U.S.C. § 41712;

¹³ https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020.

¹⁴ OACP does not view SAS's actions as being consistent with the May 2020 guidance.

3. We find that failing to adhere to its customer commitment related to providing prompt refunds, Scandinavian Airlines System Denmark-Norway-Sweden violated 14 CFR 259.5(b)(5) which also constitutes a violation of 49 U.S.C. § 41712;
4. We order Scandinavian Airlines System Denmark-Norway-Sweden and its successors and assigns to cease and desist from further violations of 49 U.S.C. § 41712 and 14 CFR 259.5;
5. The effectiveness of this consent order shall be subject to the entry of an order of the Bankruptcy Court in the Chapter 11 Cases approving Scandinavian Airlines System Denmark-Norway-Sweden's entry into this Consent Order and the terms hereof;
6. We assess Scandinavian Airlines System Denmark-Norway-Sweden \$750,000 in compromise of civil penalties that might otherwise be assessed for the violations described in paragraphs 2 and 3 above, \$375,000 of which shall be credited to Scandinavian Airlines System Denmark-Norway-Sweden in consideration of refunds Scandinavian Airlines System Denmark-Norway-Sweden provided to customers for flights to or from the U.S. that SAS did not cancel or significantly change, or in consideration of refunds that SAS was not otherwise required to provide under U.S. law;
7. The resulting claim of \$375,000 shall be an allowed, unsubordinated, undisputed, non-contingent, liquidated, general, non-priority, unsecured "claim" against SAS, as such term is defined in section 101(5) of the Bankruptcy Code (the "Claim"), and shall be treated in accordance with SAS's chapter 11 plan of reorganization (the "Chapter 11 Plan") confirmed by the Bankruptcy Court in the Chapter 11 Cases;
8. Any distribution under the Chapter 11 Plan on account of the Claim shall be paid by SAS 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 consistent with the Bankruptcy Court's order and approval; and
9. We dismiss the formal complaint at Docket DOT-OST-2020-0147.

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, subject to approval of the Bankruptcy Court as set forth herein.

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