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

Issued by the Department of Transportation
on the 15th day of October, 2024

Deutsche Lufthansa AG	**Docket DOT-OST-2024-0001**
Violations of 49 U.S.C. §§ 40127, 41310, and 41712	**Served October 15, 2024**

CONSENT ORDER

This order concerns violations by Deutsche Lufthansa AG (Lufthansa) of the statutory prohibition against discrimination in 49 U.S.C. §§ 40127 and 41310 and the statutory prohibition against unfair practices in air transportation codified at 49 U.S.C. § 41712. The Department finds that Lufthansa violated these statutes with respect to its treatment of 128 passengers on Lufthansa flight 1334 from Frankfurt International Airport (FRA) to Budapest Ferihegy International Airport, Hungary (BUD) on May 4, 2022.

On May 3, 2022, 131 passengers began a journey from New York City (JFK) to BUD to attend an annual memorial event to honor an Orthodox rabbi. The passengers booked their tickets on flights operated by Lufthansa, with a planned connection at FRA.

Based on the misconduct of some passengers on the initial Lufthansa flight from JFK to FRA (Flight 401), Lufthansa prohibited 128 passengers from continuing on to BUD on their originally ticketed flight (LH 1334) [1] delaying and disrupting their travel plans. This order directs Lufthansa to cease and desist from future similar violations and assesses the carrier $4,000,000 in civil penalties.

[1] Based on information submitted to the Department by Lufthansa, it appears that a passenger was permitted to continue his travel and another passenger was permitted to continue travel as he was accompanying him. A third passenger (religion unknown) was permitted to board the second flight to Budapest because the passenger's second flight was under a separate ticket from that used on Flight 401.

Applicable Law

Pursuant to 49 U.S.C. § 41301, a foreign air carrier[2] may provide foreign air transportation[3] 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, among other statutes, 49 U.S.C. §§ 40127, 41310, and 41712. Section 40127(a) prohibits a foreign air carrier from subjecting a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry. Section 41310(a) prohibits a foreign air carrier from subjecting a person in foreign air transportation to unreasonable discrimination. The Department interprets the term "foreign air transportation" to include flight segments between two foreign points, if the itinerary is to or from the United States with brief and incidental stopovers at a foreign point without a break in the journey.[5]

Although a carrier may properly refuse to transport a passenger who presents a safety or security risk under 49 U.S.C. § 44902, Federal law prohibits any carrier from refusing to transport a passenger based on the passenger's race, color, national origin, religion, ethnicity, or sex, and subjecting a passenger to unreasonable discrimination on flights between the United States and foreign points. Courts have found that any refusal of transportation by airlines must be rational and reasonable and not capricious or arbitrary in view of the facts known to the airline at the time.[6]

Section 41712 prohibits an air carrier, foreign air carrier, or a ticket agent from engaging in an unfair or deceptive practice in air transportation or the sale of air transportation. In prior DOT orders, OACP has found that discrimination based on a protected class is "unfair" within the meaning of section 41712.[7] In December 2020, the Department published in the Federal

---

[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] See Refunds and Other Consumer Protections, DOT Final Rule, 89 FR 32760, 32767-68 (April 26, 2024).

[6] See *Williams v. Trans World Airlines*, 509 F. 2d 942 (2nd Cir. 1975).

[7] See, e.g., DOT Order 2012-5-2 (The order notes that 49 U.S.C. § 41712 has been interpreted to prohibit carriers from discrimination on the basis of race, color, national origin, religion, sex, or ancestry.)

Register a final rule titled "Defining Unfair or Deceptive Practices."[8] That 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: 1) it causes substantial harm to consumers; 2) the harm is not reasonably avoidable; and 3) the harm is not outweighed by benefits to consumers or competition.[9] Proof of intent is not necessary to establish unfairness.[10] In August 2022, DOT issued a guidance document to inform the public and regulated entities about DOT's interpretation of the terms "unfair," "deceptive," and "practices" as it relates to its statutory authority to prohibit unfair or deceptive practices.[11] In that document, DOT explained that "[a]s a public policy matter, the Department has found that discriminatory conduct in and of itself constitutes an unfair practice."

Pursuant to 49 U.S.C. § 46301, prior to January 2023, violation of sections 40127, 41310, and 41712 may subject an airline to civil penalties of up to $37, 377 for each violation.[12]

Facts and Conclusions

Lufthansa is a foreign air carrier that 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 Lufthansa's foreign air carrier permit is that Lufthansa must "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."[13] Accordingly, Lufthansa is legally subject to the requirements in 49 U.S.C. §§ 40127, 41310, and 41712.

Facts about the flight

On May 3, 2022, 131 passengers flew on Lufthansa Flight 401 from JFK to FRA, with a final destination of BUD.

Despite the 131 passengers having a common destination, most of the passengers did not know each other and did not book their flights as a single group. Rather, many of the passengers purchased their tickets as individuals, or in small groups. In addition, while some passengers booked their tickets using frequent flyer miles, or on Lufthansa's website, many of the passengers booked their flights through specific travel agents who specialize in arranging travel

[8] 85 Fed. Reg. 78707 (December 7, 2020).

[9] 14 CFR 399.79(b)(1). Pursuant to 14 CFR 399.79(e)(2), "when a regulation issued under the authority of section 41712 does not apply to the practice at issue, then the Department shall articulate in the order the basis for concluding that the practice is unfair or deceptive to consumers as defined in this section."

[10] 14 CFR 399.79(c).

[11] 87 Fed. Reg. 52677 (August 29, 2022).

[12] 87 Fed. Reg. 15839.

[13] *See* https://www.regulations.gov/document/DOT-OST-2007-0030-0003.

of this type. Those travel agents generally purchase a block of seats in advance from Lufthansa and then alert Lufthansa of the names of the passengers who booked those seats. While a substantial majority of the passengers booked their tickets through two travel agencies, each travel agency had booked the passengers under multiple reservation numbers.

A significant majority of the 128 passengers were male. Most wore the distinctive garb typically worn by Orthodox Jewish men (black hats, black jackets, white shirts, black pants, and black dress shoes). The passengers on Flight 401 to FRA who were interviewed by OACP identified themselves as Jewish, and some reported that Lufthansa flight attendants informed them about the requirement to wear a face mask during the flight and to not assemble in the aisles, galleys and emergency exits.[14] The passengers also stated that they did not observe any passengers failing to comply with crew member instructions.

Although the Lufthansa crewmembers onboard Flight 401 did not identify any specific passengers who failed to comply with crewmember instructions to wear face masks or to return to their seats, the Captain of Flight 401 alerted a Lufthansa Security Duty Manager (SDM) about the misbehavior of passengers onboard the flight and informed the SDM that the passengers were connecting to another flight to BUD based on one or more of the Jewish passengers informing a flight attendant about their destination. As a result, the SDM placed a High Priority Comment (HPC) on the itineraries of all passengers that the SDM identified as connecting on Flight 1334 to BUD and who were booked and checked in as groups (i.e., two or more passengers traveling together). This resulted in 123[15] passengers' itineraries being flagged with an HPC. Every one of the passengers with an HPC was Jewish.

The HPC, which is a feature of Lufthansa's internal booking system, prevents a passenger from boarding a flight until a gate agent acknowledges reading the comment. The HPC applicable to the passengers connecting from LH 401 to LH 1334 instructed the gate agent in FRA to contact the flight manager about a group of passengers. OACP's investigation revealed that Lufthansa ground staff handling LH 1334 observed the HPC on the passengers' itineraries and alerted the Captain of that flight. The Captain of LH 1334 called the Security Desk directly. The Security Desk told the Captain that a "group" on LH 401 had caused significant problems onboard LH Flight 401 by not following crew requests to comply with regulations. The Security Desk did not provide details about the specific individuals or seats. A Lufthansa report recognized that approximately 120 passengers were traveling to Budapest and surmised that the airline's refusal to transport the entire group could also mean a blanket exclusion of bystanders who behaved

[14] The Act on the Prevention and Control of Infectious Diseases in Humans (Infection Protection Act—IfSG) provided, in relevant part, that "air transport . . . may only be used by passengers or airline staff . . . if these persons wear a respiratory protection mask (FFP2 or comparable) or a medical face mask (mouth-nose protection) during transport." Lufthansa's Conditions of Carriage in effect at the time of the flight stated that passengers "are required to wear a face mask which entirely covers mouth and nose during boarding, throughout the flight and when leaving the aircraft." In addition, U.S. and German law prohibited (and continue to prohibit) passengers from assembling in the aisles, galley area and emergency exits during flight.

[15] While 123 passengers received an HPC in their reservation, an additional 7 passengers were not boarded on Flight 1334 for reasons that are not known to Lufthansa.

peacefully and were compliant with the applicable laws onboard Flight 401. Lufthansa acknowledged that the crew of LH 1334 did not have personal knowledge of the situation, and at that time Lufthansa concluded that it was not practical to address each passenger individually. As a result, Lufthansa prohibited 128 passengers from continuing on to BUD as planned.

On the ground at FRA, Lufthansa staff did not conduct a conventional boarding process for the LH 1334 flight. Instead, the Integrated Operations Control Center ("IOCC"), a group of Lufthansa's ground operations management personnel stationed in Frankfurt Airport, made the decision to board only those passengers who did not have an HPC affixed to their itineraries in the electronic reservation system. None of the IOCC staff members had any interaction with the passengers of LH 401 or LH 1334, as their decision was based entirely upon information from the SDM, who also had no interaction with the passengers, and the HPC notations in the reservation system. Accordingly, the alternative boarding procedure was implemented by the gate staff, as they called to the gate by name those passengers without an HPC notation. The remaining passengers waited in the gate area, confused and upset. LH 1334 then departed without them. Lufthansa rebooked the majority of the passengers who were denied boarding on LH 1334 on other Lufthansa Group flights on the same day, and some passengers made their own arrangements to travel to Budapest or surrounding cities on other airlines.

Most passengers who were interviewed by OACP stated that Lufthansa treated them all as if they were a single group, and denied boarding onto LH1334 to BUD to everyone for the apparent misbehavior of a few, because they were openly and visibly Jewish.

Legal conclusions

By operating a flight from the United States to Budapest, with an incidental stopover in Frankfurt, Lufthansa engaged in foreign air transportation and is therefore subject to sections 40127 (prohibiting foreign air carriers from subjecting a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry), 41310(a) (prohibiting a foreign air carrier from subjecting a person in foreign air transportation to unreasonable discrimination), and 41712 (prohibiting unfair or deceptive practices in air transportation). The 128 passengers in this matter held tickets for, and expected to engage in, a continuous journey from New York to Budapest, with an expected short layover in Frankfurt of mere hours. While this is sufficient to find that jurisdiction attaches, we also find that the chain of events leading to the passengers' denied boarding all took place on the flight from New York to Frankfurt, or in Frankfurt itself, immediately upon the passengers' disembarking. The denial of transport in Frankfurt was a continuation of a pattern of discriminatory behavior that began on a flight that originated in the United States.

Lufthansa's decision to affix an HPC to the reservations of nearly every passenger traveling in a group to Budapest without limiting such affixation to those passengers who Lufthansa verified failed to follow crew instructions on LH 401, which did not comport with Lufthansa's own boarding procedures, directly resulted in the inability of the passengers to travel on the flights they purchased. As such, Lufthansa took action that had an adverse effect on these passengers whose only affiliation with each other was that they were of the same religion and/or ethnicity. Lufthansa's actions impacted passengers who did not engage in problematic conduct. OACP

finds that, under the totality of the circumstances, Lufthansa's treatment of the 128 Jewish passengers as a collective group, based on the alleged misconduct of a smaller number of those individuals, constitutes discrimination based on religion in violation of 49 U.S.C. § 40127.

Based on our review of available evidence, we find that Lufthansa's staff made no meaningful effort to specifically identify and track the individuals who failed to follow crew instructions to abide by the applicable laws and regulations, and to tailor the consequences accordingly. Those efforts could have included obtaining the names and likenesses of the misbehaving passengers and linking them to the seats they were sitting in. To the extent that misbehaving passengers were out of their seats, Lufthansa staff could have tracked which seats were empty and then identified which passengers took those seats. While these processes may not have been perfect, they would have resulted in tracking the individuals about whom Lufthansa had concerns and would have significantly reduced the likelihood that innocent passengers would be denied boarding for discriminatory reasons. Instead, Lufthansa has failed to show that its crew took any action to document the identities of specific passengers who engaged in misconduct.

We recognize that the SDM who placed the HPC on the passengers' itinerary, as well as the other staff members of the IOCC were not onboard the flight and never saw or came into contact with any of the passengers. However, it is also undisputed that the flight crew of Flight 401 alerted the SDM about the "misbehavior" of passengers onboard the flight and informed the SDM that the passengers were connecting to another flight to BUD. Given the totality of the circumstances, this does not alter our conclusion that Lufthansa behaved in a discriminatory manner.

OACP also finds that because Lufthansa discriminated against passengers on the basis of religion, as set forth above, Lufthansa also subjected these passengers to "unreasonable discrimination" in violation of 49 U.S.C. § 41310.

For the reasons set forth below, OACP finds that Lufthansa's practice of preventing the 128 passengers from continuing on their connecting flight based on the conduct of a smaller number of similarly situated passengers is "unfair" in violation of 49 U.S.C. § 41712. First, the practice imposed substantial harm. Lufthansa's passengers were unable to use the service that they paid for, while being forced to incur delay to complete their journey, which caused considerable stress on the affected passengers. Second, the harm was not reasonably avoidable, as a number of Lufthansa passengers on inbound Flight 401 were denied boarding for conduct that they did not commit. Third, the harm is not outweighed by countervailing benefits to consumers or competition.

Lufthansa Response

Lufthansa states that it is a major international airline that operates to more than 100 countries and each year welcomes millions of passengers of all religions and ethnicities aboard its aircraft. The carrier also states that as an airline group proud of its mission to connect people, cultures, and economies, its goal is to be a bridge builder. Lufthansa states that it has zero tolerance for any form of religious or ethnic-based discrimination, including antisemitism. Lufthansa states

that it and the entire passenger airline group have had a robust and fruitful relationship with the Jewish communities around the world, especially in the United States. Lufthansa states that it is a trusted choice, to this day, for members of the Orthodox Jewish Community who continue to use the Lufthansa Group for travel throughout Europe as well as to Israel.

Lufthansa states that it regrets and has publicly apologized on numerous occasions for the circumstances surrounding the decision to deny boarding to the affected passengers from LH 1334. Lufthansa, however, denies any suggestion that any of its employees engaged in any form of discrimination. Moreover, Lufthansa strongly disputes that the Department has legal authority to enforce 49 U.S.C. § 41712, 49 U.S.C. § 40127 and 49 U.S.C. § 41310 on an extraterritorial basis with respect to events that occurred in FRA within the territory of the Federal Republic of Germany.

Lufthansa notes that the denied boarding incident at FRA resulted from an unfortunate series of inaccurate communications, misinterpretations, and misjudgments throughout the decision-making process. Lufthansa maintains that these actions, although regrettable, do not support any finding of discrimination and the Department's findings in this case. Lufthansa states that the decision to deny boarding onto the BUD flight was based solely on the reports concerning the non-compliant actions of numerous passengers on LH 401 to FRA. According to the carrier, the decision was made solely on the basis of safety and security concerns by Lufthansa airport management personnel located in an airport operational control center, the IOCC, none of whom ever saw or came into contact with any of the passengers, and without awareness of the passengers' ethnicity or religion. Lufthansa states that these employees made decisions based solely on objective criteria and information contained in Lufthansa's electronic reservation management system, not based on the perceived religion or ethnicity of any of the passengers.

Lufthansa states that the safety and security of flight operations is Lufthansa's highest priority. Lufthansa asserts that a large number of the passengers on LH 401, who were denied boarding at FRA, repeatedly disregarded crew instructions to wear face masks, which at the time was mandated under German law due to the COVID-19 public health emergency. Lufthansa states that, in addition, passengers were requested to avoid gathering in the aisles, galleys, and near emergency exit doors, as required under safety and security regulations under U.S. and German law. Lufthansa steadfastly maintains that the actions of the crew of LH 401 were taken in the interest of safety and security. Lufthansa states that the crew of LH 401 did not discriminate against any passenger on the basis of perceived religion or ethnicity or manifest any intentional malice or ill intent toward any passenger. Lufthansa notes that certain flight attendants on LH 401 permitted and facilitated praying by small gatherings of passengers during the flight, which the carrier asserts underscores the Lufthansa crew's lack of any discriminatory feelings or actions toward any of the passengers. Lufthansa states that a large number of passengers (as many as 60 passengers at any given time during the flight) repeatedly disregarded both in-flight public address announcements from the flight deck and in-person crew instructions. Lufthansa stresses that in some cases, passengers not only refused to comply with safety and security requirements, but argued with Lufthansa flight attendants and other passengers who courteously reminded them of the obligation to wear masks. The conduct of those passengers, according to Lufthansa, placed the crew and other passengers of LH 401 in a difficult situation. The passenger

misconduct on LH 401, Lufthansa states, also obstructed flight attendants in the Economy Class cabin from providing food and beverage service and inconvenienced other passengers. Lufthansa concludes that the LH 401 flight crew was diligent and professional in addressing this situation.

Lufthansa states that the Captain of Flight LH 401 made three separate special announcements over the public address system during the flight after the flight attendants informed him of the problems that they were experiencing. According to Lufthansa, the Captain instructed the passengers to properly wear their masks during flight, to not congregate or block the aisles, and to not gather in galleys or block emergency exits. Lufthansa also states that, when making these announcements, the Captain advised the passengers that a potential consequence for failing to adhere to the rules and follow crewmember instructions could be the possible exclusion from future transportation, including not being permitted to board a connecting flight.

Lufthansa further states that the crew of LH 401 was unable to identify the specific passengers who engaged in misconduct on the flight because, according to Lufthansa, the infractions were so numerous, the misconduct continued for substantial portions of the flight and at different intervals and the passengers changed seats during the flight. Lufthansa disagrees with the Department's position that the crew could have reasonably identified the passengers at issue. Lufthansa states that the large number of non-compliant passengers and the fact that many traded seats made it impossible to identify them. In such circumstances, Lufthansa maintains that the crew appropriately prioritized addressing the large-scale passenger misconduct, which jeopardized the safety and security of the flight and obstructed the crew from performing their safety and passenger service duties, rather than attempting to develop a list of individual passengers who were violating regulations.

Lufthansa rejects any allegation by the Department that the events in this matter resulted from any form of discrimination and disputes that any employee involved in the decision at FRA to deny boarding manifested bias against the impacted passengers on the basis of the passenger's perceived religion or ethnicity, conduct that is strictly prohibited at Lufthansa. Lufthansa states that, although there had been errors in company procedure and communications, it did not conclude that Lufthansa or its employees discriminated on the basis of perceived religion or ethnicity.

Lufthansa states that it is proud of its role in connecting people, cultures, and communities across the globe, and has zero tolerance for any form of religious or ethnic-based discrimination. The carrier states that following the events of May 4, 2022, Lufthansa enhanced its support of international efforts to combat antisemitism in close cooperation with the Jewish community as well as engaged with the German Federal Government's Commissioner for Jewish Life in Germany and the Fight Against Antisemitism. Lufthansa states that it is the first airline to adopt the principles of the International Holocaust Remembrance Alliance (IHRA), including the IHRA's definition of antisemitism. The carrier also states that, more recently, it has taken a leading role with other German companies in the "Never Again is Now" campaign in Germany which supports Germany's Jewish community. Lufthansa states that it has also implemented an employee training program developed in partnership with the American Jewish Committee covering the IHRA principles to combat racist, xenophobic, and antisemitic behavior. Lufthansa adds that it has implemented changes to its procedures and policies and provided additional

employee training to minimize the likelihood of a reoccurrence. Finally, Lufthansa notes that the Executive Board of Lufthansa appointed a Human Rights Officer, a new senior leadership position of Vice President Human Rights and Discrimination-Prevention, with responsibility for overseeing Lufthansa's efforts to prevent all forms of discrimination, particularly antisemitism.

Lufthansa is entering into this Consent Order to avoid litigation threatened by the Department, despite Lufthansa's belief that the Department lacks jurisdiction over events that occurred outside the United States, and despite disagreeing with the Department's conclusions.

Decision

OACP views seriously Lufthansa's violations of Sections 40127, 41310, and 41712. Accordingly, after carefully considering all the facts in this case, OACP believes that enforcement action is warranted. In order to avoid litigation, and without admitting the violations alleged above, Lufthansa consents to the issuance of this order to cease and desist from future similar violations of 49 U.S.C. §§ 40127, 41310, and 41712, and to the assessment of $4,000,000 in compromise of potential civil penalties. This 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 Lufthansa 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 in May 2022, Deutsche Lufthansa AG took actions that effectively prohibited 128 Jewish passengers, members of a visible and discrete religious minority, from completing their itinerary from New York City to Budapest as planned, based on the misbehavior of some of those passengers on the first segment of their journey (LH 401 from JFK to FRA);

3. We find that by engaging in the conduct described in paragraph 2, above, Deutsche Lufthansa AG discriminated on the basis of religion in violation of 49 U.S.C. § 40127;

4. We find that by engaging in the conduct described in paragraph 2, above, Deutsche Lufthansa AG committed unreasonable discrimination in violation of 49 U.S.C. § 41310;

5. We find that by engaging in the conduct described in paragraph 2, above, Deutsche Lufthansa AG committed an unfair practice in violation of 49 U.S.C. § 41712;

6. We order Deutsche Lufthansa AG and its successors and assigns to cease and desist from further violations of 49 U.S.C. §§ 40127, 41310, and 41712;

7. We assess Deutsche Lufthansa AG $4,000,000 in civil penalties that might otherwise be assessed for the violations described in paragraphs 2-5 above; Of this total amount, $2,000,000 shall be due and payable within 30 days of the issuance date of this order. The remaining $2,000,000 is being credited for compensation Lufthansa paid to affected passengers in this matter beyond that which is required by law; and

8. We order Deutsche Lufthansa AG to pay within 30 days of the issuance of this order the penalty assessed in Ordering Paragraph 7. Payment shall be made through Pay.gov to the account of the U.S. Treasury in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Deutsche Lufthansa AG 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.

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:

BLANE A. WORKIE
Assistant General Counsel
Office of Aviation Consumer Protection

An electronic version of this document is available at
www.regulations.gov