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

Issued by the Department of Transportation
on the 29th day of July, 2002

Served: July 29, 2002

Petition for Rulemaking of the Tall Club of Silicon Valley

DOCKET OST 2001-8991

ORDER OF DISMISSAL

By this order, we dismiss the petition for rulemaking of the Tall Club of Silicon Valley.

The Petition

By petition dated February 21, 2001, the Tall Club of Silicon Valley (Tall Club) has asked us to adopt a rule requiring air carriers to provide special seating accommodations to tall people upon their request. Tall Club initially filed suit in a California state court against 12 domestic air carriers[1] alleging that California unfair business practice statutes and anti-discrimination statutes should be applied to require defendant airlines to take height into consideration when assigning seats to passengers. Its petition for rulemaking was filed with the Department after the California court stayed its proceedings on primary jurisdiction grounds to permit the Department to first review the issue. Specifically, Tall Club wants to require air carriers to set aside certain existing economy class seats that have extra legroom, such as those in exit rows or facing bulkheads, for the use of individuals who represent themselves as being either over 74 inches tall or having a "buttock to knee measurement greater than 95% of the U.S. population" (hereinafter "tall individuals" or "tall people"). Tall Club's proposed rule, which is largely a *verbatim* copy of the Department's rule regarding seating accommodations for certain qualified individuals with disabilities, 14 CFR § 382.38, would require that air carriers comply by using either the "block" or "priority" seating methods described in that rule.

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[1] Alaska Airlines, Allegiant Air, American Airlines, America West Airlines, Continental Airlines, Delta Air Lines, Frontier Airlines, Hawaiian Airlines, Northwest Airlines, Southwest Airlines, Trans World Airlines, and US Airways.

Under the block method, air carriers would have to hold, or block, certain seats with extra legroom until 24 hours before the scheduled departure of the flight. At any time prior to this, these seats could be assigned only to persons who are "tall individuals," as defined above. Under the priority seating method, at any time prior to one hour before departure, air carriers could assign seats with extra legroom to persons of lesser stature under the condition that these seats be reassigned, if necessary, to tall individuals who subsequently request them.

Tall Club's proposed rule would not require air carriers to reconfigure the seats on existing aircraft to create new extra legroom seats, thus, in its estimation, imposing only a negligible cost on air carriers.

Response of the Air Transport Association

On May 30, 2001, the Air Transport Association (ATA) filed a response on behalf of its member passenger air carriers.[2] According to ATA, Tall Club, in its state lawsuit, has requested equitable and injunctive relief that would, in effect, require airlines to treat tall individuals as if they are qualified disabled persons under 14 CFR Part 382. ATA urges us to find that Federal law preempts states from regulating seat assignments aboard aircraft on the basis of state unfair business practice statutes and argues that permitting a state to regulate seating for tall individuals will conflict with the Department's rule governing seating accommodations for certain qualified individuals with a disability, 14 CFR § 382.38. Furthermore, ATA asks that we dismiss Tall Club's petition for rulemaking as unwarranted.

Reply of the Tall Club

On June 22, 2001, Tall Club filed a reply to ATA's response arguing that Federal law does not preempt state regulation of seating assignments on commercial aircraft and that the Department, as a Federal executive agency, does not have the authority to overturn state court rulings. Additionally, Tall Club sought to clarify the nature of its proposed rule, which, it asserts, has been "misrepresented" by ATA. In this connection, Tall Club states that the proposed rule and its justification are not premised on a notion that tall individuals are disabled. Instead, Tall Club asserts that the only relevant question is whether its proposed rule is in the public interest.

Disposition and Analysis

The stated basis of the Tall Club's petition is one of perceived "fairness and common sense," rather than medical necessity or civil rights.[3] Indeed, Tall Club argues that the comfort of tall people entitles them to priority seating accommodations while strenuously asserting that tall

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[2] Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, Hawaiian Airlines, jetBlue Airways, Midwest Express Airlines, Northwest Airlines, Southwest Airlines, United Airlines, and US Airways.

[3] Tall Club Petition at 2.

people are not members of a legally protected class, such as certain disabled individuals, for whom such accommodations are provided by law. Therefore, the Tall Club has, in essence, asked us to create a special right for an additional group of passengers, tall people, to be regulated by the Federal government, based on an assertion that their comfort demands special regulatory protection.

Under our regulation implementing the Air Carrier Access Act and guaranteeing the civil rights of disabled air travelers, 14 CFR Part 382, air carriers are required to provide the same priority seating accommodations sought by the Tall Club to only two *very* narrow subsets of disabled individuals: those with fused or immobilized legs and those traveling with service animals. Significantly, the regulation excludes the vast majority of qualified disabled individuals who might, like Tall Club members, simply be more comfortable if they were provided more legroom. Similarly, it excludes groups of non-disabled individuals, such as persons of wider than normal girth or the elderly, for whom additional room might also be highly desirable. Thus, were we to promulgate the proposed rule, we would create a regime in which certain individuals who are not members of a protected class would be entitled to special seating accommodations, but other individuals with equally compelling arguments[4], both disabled and non-disabled, would not.[5]

Furthermore, we disagree with Tall Club's assumption that the cost of the proposed rule would be negligible simply because it would not require air carriers to reconfigure the seats in their aircraft. In our view, the cost to air carriers of changing their computer reservation systems and training their personnel in compliance procedures, as well as the concomitant loss of the good will of other groups who perceive themselves as equally needy of more room and for whom access to the most desirable seats would be greatly curtailed, would be considerable. We are particularly reluctant to impose additional costs of this kind on the passenger airlines, most of which have been incurring substantial losses that are expected to continue for some time.

With respect to ATA's request that we rule that Federal law preempts state regulation of seating assignments, we agree with Tall Club that we, as a Federal executive agency, do not have the authority to "overturn" the decisions of a state or Federal court.[6] However, we have a responsibility for administering and interpreting the Congressional statutes governing the

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[4] We note that families traveling with small children could make a legitimate claim that they need extra room, especially that afforded by bulkhead seats, to be more comfortable and to make other passengers more comfortable.

[5] In issuing our disability rule, Part 382, we considered requests that we require carriers to either upgrade obese passengers to available business or first class seats, or provide available adjoining seats free of charge to such passengers. We rejected these requests on the basis that carriers are not required to provide more than one seat to a passenger per ticket and stated that if obese passengers desired more seating room, carriers were free to charge them for such accommodation. 63 Fed. Reg. 10,534 (March 4, 1998). Similarly, tall individuals are free to purchase adjoining seats or business or first class seats if they desire greater legroom. They may also choose to fly an airline that provides more legroom in coach.

[6] Reply of Tall Club at 1.

airline industry, including the preemption provision.[7] We therefore wish to state our view that the Airline Deregulation Act (ADA) preempts states from imposing regulatory schemes, such as the one sought by the Tall Club, that relate to seating accommodations on board commercial aircraft.[8] We believe that, provided access for qualified disabled individuals is not unduly restrained, permitting air carriers to adjust services, such as seat size or seating accommodations, free of government interference and in accordance with the dictates of the marketplace, is exactly what was envisioned by the Airline Deregulation Act. Some airlines have used greater seat size and pitch as a way of gaining customers, while other airlines compete on the basis of lower fares made possible in part by omitting service features offered by other airlines, such as more legroom or meals on long-haul flights.

In sum, Petitioner Tall Club has failed to support its request that we find that it is unfair for airlines not to provide preferential seating for tall individuals and that it is in the public interest to regulate seating services as requested.

ACCORDINGLY, we dismiss the petition for rulemaking of the Tall Club of Silicon Valley in Docket OST 2001-8991.

By:

Read Van De Water
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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[7] *See, e.g., Love Field Service Interpretation Proceeding*, Order 98-12-28 (December 22, 1998) at 6-8, *aff'd, American Airlines v. U.S. Dept. of Transportation*, 202 F.2nd 788 (5th Cir. 2000).

[8] In *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), the Supreme Court held that the Airline Deregulation Act (ADA) preempted consumer protection guidelines adopted by the National Association of State Attorneys General in an effort to regulate airline advertising insofar as the regulations had a "connection or reference to" rates, routes, or services. We agree with a plethora of lower courts that have held that the term "services" encompasses many aspects of the air traveler experience, including seating issues, and not merely the number of flights an air carrier provides in a given market. *See, e.g., Hodges v. Delta Air Lines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (air carrier service includes, *inter alia*, ticketing procedures); *Diefenthal v. C.A.B.*, 681 F.2d 1039 (5th Cir. 1982) (holding that the term "service" under the ADA not only refers to the number of flights a carrier provides, but also encompasses the type or quality of service as well); *Kay v. USAir, Inc.*, WL 406548 (E.D. Pa. 1994) (holding that the legislative history of the ADA indicates that Congress sought to prevent states from mandating that carriers provide certain services, and from prescribing certain aspects of services, such as the number and placement of seats in an aircraft); *Butcher v. City of Houston*, 813 F. Supp. 515 (S.D. Tex. 1993) (holding that the term "services" in the Federal Aviation Act necessarily pertains to distinctive airline services, such as providing conditions for preferential seating); *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399 (D. Colo. 1989) (holding that Federal law preempts state laws regulating the provision of computerized reservation system services).