



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

Issued by the Department of Transportation
on the 26th day of March, 2004

Complaint of

**Irvin Rosenfeld v.
Delta Air Lines, Inc.**

Violations of 49 U.S.C. § 41705

Served: March 26, 2004

OST 2003-14808

ORDER DISMISSING COMPLAINT

On March 25, 2003, Irvin Rosenfeld (the Complainant) filed a third-party enforcement complaint under section 302.401 of the Department's Procedural Rules (14 CFR 302.401) against Delta Air Lines, Inc. (Delta), alleging that the carrier discriminated against him as a disabled passenger. Mr. Rosenfeld states that, to relieve pain associated with a chronic bone condition, he has been enrolled in a special federal program since 1983 which allows him to obtain marijuana cigarettes for use under medical supervision. In March 2001, according to the complaint, Delta refused to allow Mr. Rosenfeld to board a flight on which he held a confirmed reservation because he insisted on retaining in his possession a quantity of what he describes as "federally prescribed medical-marijuana." The incident, Mr. Rosenfeld claims, represents a violation of various provisions of 14 CFR Part 382, the Department rule which prohibits discrimination against travelers with disabilities.¹

In his complaint, Mr. Rosenfeld claims to be a "qualified disabled person" under Part 382, and asserts that Delta's action in denying him boarding was related to his disability. According to the complaint, Mr. Rosenfeld notified Delta agents shortly after he made his reservation that he would be traveling with "federally prescribed" marijuana. When he arrived at the gate, however, Delta agents at Ft. Lauderdale refused to allow him to board

¹ The complaint alleges that Delta's actions violated the following provisions of 14 CFR Part 382: section 382.7 by refusing to transport Mr. Rosenfeld for reasons related to his disability; section 382.45(a)(2) by failing to provide adequate information regarding its limitations "on the ability of the aircraft to accommodate qualified individuals with disabilities;" section 382.31 by refusing to provide transportation to an otherwise qualified disabled person; section 382.31(e) by failing to provide a written explanation of its refusal to transport; section 382.61 by failing to provide adequate training to its personnel on disability-related matters; and section 382.65 by failing to provide a complaint resolution official or provide a written response to the complaint.

the aircraft. Mr. Rosenfeld claims that he produced written evidence confirming that he is one of a small group of individuals that received exemptions from federal drug prohibitions to use marijuana pursuant to medical supervision. Nonetheless, the carrier's representatives, according to the complaint, insisted that Mr. Rosenfeld provide written evidence of the lawfulness of his possession of marijuana from state authorities in all states over which the flight would pass. Mr. Rosenfeld claims, furthermore, that contrary to the requirements of section 382.65, Delta never provided a Complaint Resolution Official (CRO) to assist in settling the dispute, nor did the carrier provide the required written explanation of its decision to deny Mr. Rosenfeld boarding. The incident also reveals, according to Mr. Rosenfeld, a lack of appropriate training of Delta staff in treating disabled passengers in violation of section 382.61. Eventually Mr. Rosenfeld purchased a ticket on another carrier for his travel to Washington.

Delta, in its response of May 1, 2003, claimed that Mr. Rosenfeld was prevented from boarding for reasons related to his personal deportment and not because of his alleged disability. Delta asserts that the incident was provoked by Mr. Rosenfeld's "affirmative declarations and grandstanding regarding his intent to carry marijuana on the Delta flight." (Delta Answer May 1, 2003, at 2) Barring Mr. Rosenfeld from the flight, according to Delta, resulted in no significant disruption in the complainant's travel plans and the "confusion at the airport caused by Mr. Rosenfeld's declarations" (Delta Answer at 5) does not constitute discriminatory conduct against the complainant. In subsequent submissions, Delta claimed that it failed to summon a CRO to the scene because it did not believe the dispute involved the rights of a disabled traveler. Finally Delta drew attention to what it termed the questionable nature of Mr. Rosenfeld's purported exemption, which relies on a 1983 letter which states that his use of marijuana "to our knowledge [that of the Food and Drug Administration office issuing the letter] violates no federal law."² Delta further states that in light of recent Supreme Court rulings and the history of the Investigational New Drug program, under which Mr. Rosenfeld receives his marijuana, the continuing validity of Mr. Rosenfeld's exemption is debatable.

In reviewing the merits of Mr. Rosenfeld's complaint, we have consulted with both the Food and Drug Administration (FDA) and the Drug Enforcement Administration (DEA) concerning the validity of Mr. Rosenfeld's Investigational New Drug (IND) exemption for the use of U.S. government-issued marijuana cigarettes. FDA confirms that Mr. Rosenfeld's IND exemption was issued under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 355(i)) as an exemption from that statute's premarket approval requirements. By way of background, Mr. Rosenfeld received his exemption under an IND program which was initiated in the 1970's but was terminated in 1992. The FDA, in terminating the program, agreed to continue to supply the small number of original participants, including Mr. Rosenfeld, with marijuana pursuant to single-patient IND exemptions but announced that no further exemptions would be granted.³ The DEA strongly emphasized to the Department that the marijuana use under the IND program is intended not for "medical purposes" but for experimental research as a Schedule I controlled substance under the Controlled Substances Act. (CSA) (21 U.S.C. §§801-971).

² Delta response of July 16, 2003, at 4.

³ See *Kuromiya v. United States*, 78 F.Supp.2d 367 (E.D. Pa. 1999).

As the DEA has pointed out to us, under the CSA, the use or carriage of marijuana is illegal outside a limited exemption for FDA-approved and DEA-registered experimental research.⁴ Moreover, according to DEA, recent state law provisions that allow medical use of marijuana do not supercede the broad prohibitions of the CSA. While the FDA and DEA distinguish between Mr. Rosenfeld's exemption and a typical prescription medication, it is clear in this instance that his participation in the FDA's IND program, under which he received and used marijuana, was related to his disability, a congenital bone condition. Although Mr. Rosenfeld's exemption is not a medical prescription, he appears to have been entitled to have the marijuana he received in accordance with the single-patient IND program in his possession during his domestic travel, absent evidence of any state laws prohibiting such possession.⁵ Even if Mr. Rosenfeld's conduct may be properly termed "grandstanding," it appears, on the basis of documentation and information made available in the course of our investigation, that Mr. Rosenfeld should have been allowed to board the flight on which he held confirmed reservations, but that such documentation and information was not available to the Delta employees involved in the incident.

Based on a number of circumstances, we do not believe the pursuit of enforcement action to be in the public interest here. The incident stemmed from circumstances that were highly exceptional, particularly since exemptions similar to Mr. Rosenfeld's are held by fewer than ten individuals in the U.S. In view of the rarity of Mr. Rosenfeld's exemption, the ambiguity of the legal rights under the exemption, and the nature of the documentation that Mr. Rosenfeld presented to Delta's agents at the time of his travel, it is understandable that Delta's employees were reluctant to allow him to board and were unable to confirm promptly that he was entitled to travel with his marijuana.⁶ While we advise Delta and other carriers that they must transport disabled passengers who are carrying with them lawfully prescribed medications, this general obligation does not apply to cases in which an individual claims a right to carry a Schedule I controlled substance such as marijuana for reasons ostensibly related to a disabling condition unless, as is pertinent here, the individual can adequately document that he or she is entitled to possess marijuana pursuant to the FDA's single-patient IND program. It should be emphasized that, as indicated above, fewer than ten individuals in the U.S. are so entitled. When a passenger claims to be among those covered by FDA's single-patient IND

⁴ DEA has also advised us that state laws governing the carriage or use of marijuana must be complied with by persons who receive marijuana under the FDA single-patient IND program. It is unclear from the record and we are unaware whether any state laws precluding the carriage or use of marijuana by holders of the FDA single-patient IND exemption applied to Mr. Rosenfeld's travel.

⁵ This finding does not imply that carriers have an obligation to provide special services to Mr. Rosenfeld, or similar individuals, apart from those required under Part 382.

⁶ Delta has already voluntarily refunded the cost of the ticket it issued to Mr. Rosenfeld for his March 2001 travel and has informally advised the Enforcement Office that, while it strongly maintains that no violation of Part 382 occurred in its treatment of Mr. Rosenfeld, Delta states that it is willing to reimburse him for the difference between the cost of the air fare he actually paid for his trip between Ft. Lauderdale and Washington and the amount of the original Delta ticket already refunded upon presentation of satisfactory documentation of such additional costs.

Program,⁷ it is the obligation of the passenger to produce at the carrier's request credible substantiating documentation indicating his or her participation in the program.⁸ In this instance, Delta agents made reasonable efforts to confirm Mr. Rosenfeld's status but were unable to do so, in view of the incomplete and ambiguous documentation offered by Mr. Rosenfeld. In these circumstances, we conclude that enforcement action is not in the public interest.⁹

ACCORDINGLY, I dismiss the third-party complaint in this docket.

This order is issued under authority assigned in 14 CFR 302.406(b) and shall be effective as the final action of the Department within 30 days after service.

By:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

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http://dms.dot.gov/reports/reports_aviation.asp*

⁷ In this case, Mr. Rosenfeld announced to the carrier that he was carrying marijuana.

⁸ DEA's admonition through us to airlines and members of the public who may obtain marijuana purportedly for medical purposes under state laws, rather than pursuant to the single-patient IND program, is that such persons are not entitled to carry marijuana with them during interstate air travel because of Federal drug laws.

⁹ Mr. Rosenfeld has also filed a complaint against American Airlines relating to an incident that occurred in April 2003 in which American insisted that Mr. Rosenfeld obtain a medical certificate in order to travel with his marijuana. (OST Dkt 2003-15270). That complaint will be the subject of a separate order.