



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

Issued by the Department of Transportation
on the 6th day of June, 2005

Petition of

JetBlue Airways, Inc.

**for an Exemption from
the Requirements of 14 CFR 382.21(a)(2)**

OST Dkt. 2004 - 19626

Served: June 6, 2005

ORDER DENYING EXEMPTION

This matter is before the Department of Transportation (DOT) on a petition for an exemption from 14 CFR 382.21(a)(2) filed by JetBlue Airways, Inc., (JetBlue). Additionally, other interested parties have filed comments regarding this petition. For the reasons discussed below, JetBlue's petition is denied.

Background

On November 8, 2004, JetBlue filed a petition for an exemption from section 382.21(a)(2) for its new fleet of Embraer E-190 (E-190) 100-seat aircraft, scheduled to begin revenue service by late 2005. Section 382.21(a)(2) requires that "[a]ircraft with 100 or more passenger seats shall have a priority space in the cabin designated for stowage of at least one folding wheelchair."¹ The term "wheelchair" refers to a standard-size wheelchair.²

In support of its petition, JetBlue states that the cost of accommodating a "standard" size wheelchair in the cabin of its aircraft, as required by DOT,³ would pose an undue burden

¹ Section 382.21(a) explains that this requirement applies to "new aircraft operated under 14 CFR Part 121 and ordered by the carrier after April 5, 1990 or delivered to the carrier after April 5, 1992" (hereinafter referred to as "new" aircraft).

² The minimum dimensions for a standard-size wheelchair, when folded, are as follows: 13 inches wide by 36 inches high by 42 inches long. *See, e.g., Southwest Airlines*, Order No. 2003-8-30 (OST Docket 2003-14194), 2003 WL 23097390 (D.O.T.), *AirTran Airways*, Order No. 2003-10-11 (OST Docket 2003-14194), 2003 WL 23097396 (D.O.T.).

³ DOT enforcement policy requires that carriers comply with section 382.21(a)(2) by: (1) establishing sufficient space (e.g. closet space) for the stowage of one passenger's standard-size folding wheelchair; or

and fundamentally alter the nature of JetBlue's commercial aviation service, due to the size and nature of the proposed interior arrangement of JetBlue's E-190 aircraft. Primarily, JetBlue requests an exemption from 14 CFR 382.21(a)(2) based on its belief that the E-190 cannot reasonably accommodate a standard-size folding wheelchair in the cabin. According to JetBlue, there are only two viable ways to accommodate a standard-size adult wheelchair in the cabin – remove galley space or remove one row of two seats. JetBlue states that either of these two options would impose an undue burden upon JetBlue, and, therefore, it should be exempted from the rule and allowed to provide priority wheelchair stowage in the cargo hold. JetBlue also states that the removal of two seats, bringing the E-190 to a 98-seat aircraft, would remove it from the parameters of the rule.

Additionally, according to JetBlue, an exemption from section 382.21(a)(2) for its E-190 aircraft is in the public interest and within the spirit and intent of the Air Carrier Access Act (ACAA) and its implementing regulation in 14 CFR Part 382. JetBlue states that the purpose of Part 382 is to “. . . allow a wheelchair user to quickly retrieve his or her chair near the aircraft door, so that person can use that chair immediately upon exiting the aircraft.”⁴ Thus, JetBlue asserts that the purpose the rule is satisfied by JetBlue's assurance that it will give all wheelchairs priority stowage in the forward cargo compartment on the E-190, and have those chairs brought to the door of the aircraft immediately upon landing before other baggage is taken off the aircraft. As further support for the exemption request, JetBlue submitted numerous communications from consumers who complimented the airline on the customer service it provided to its passengers with disabilities.

A. Comments Received

In response to JetBlue's exemption request, several interested parties submitted comments. As detailed below, the majority of these comments are in opposition to JetBlue's request.

First, on December 6, 2004, a private citizen filed correspondence wherein she expresses concern that wheelchairs that are placed in the cargo hold of aircraft frequently are damaged when cargo shifts during turbulence. In addition, this commenter suggests that JetBlue's exemption request demonstrated the unfortunate treatment of persons with disabilities. The commenter strongly objects to the exemption.

The Paralyzed Veterans of America (PVA) similarly objects to the grant of an exemption to JetBlue. In correspondence submitted on December 9, 2004, PVA expresses some skepticism that JetBlue cannot reasonably designate an in-cabin stowage area for one

(2) securing a passenger's standard-size folding wheelchair across two or three seats using a strap kit or other similar technique as approved by the FAA. See, e.g., Frontier Airlines, Order No. 2003-11-5 (OST Docket 2003-14194), 2003 WL 23097398 (D.O.T.), America West Airlines, Order No. 2003-8-29 (OST Docket 2003-14194), 2003 WL 23097389 (D.O.T.).

⁴ JetBlue Exemption Request, Docket 2004-19626-1. See also Federal Register 55 FR 8008 (1990).

standard-size folding wheelchair in the interior of an aircraft that as yet has not entered service and has not been fully configured. Further, PVA notes that although the DOT may not have contemplated JetBlue's business model when the rule was first enacted in 1990, DOT certainly considered the design process for bringing new aircraft into service and the concomitant costs in requiring accessibility components on newly designed aircraft. PVA states that this consideration was evidenced by DOT's intention to "strike a reasonable balance between disability groups' concerns about sufficient accommodations being provided and carriers' concerns about the costs of those accommodations." PVA also notes that the specific purpose of section 382.21(a)(2) is twofold: to provide convenience to the passenger in having his or her wheelchair available immediately upon exiting the plane, and to ensure that a passenger's wheelchair is not subject to damage or loss of parts in the cargo hold. PVA states that the primary complaint it hears from its members regarding air travel is damage to wheelchairs. In closing, PVA remarks that it believes if DOT grants JetBlue the requested exemption, DOT would set a dangerous precedent under the ACAA. Accordingly, PVA asks DOT to deny JetBlue's request.

On January 7, 2005, the National Organization on Disability (NOD) filed its objection to JetBlue's exemption request. NOD states that if JetBlue is granted the requested exemption, this action could result in disenfranchisement among the 250,000 wheelchair users in the United States. Specifically, NOD asserts that an exemption for JetBlue would discourage an entire class of people with disabilities, those who use manual wheelchairs, from traveling by air and may have negative implications beyond the ACAA. Further, NOD states that if JetBlue is granted the exemption, and damaged wheelchairs result from cargo stowage, disabled passengers might be forced to utilize unsuitable "loaner" wheelchairs. NOD strongly urges the DOT to deny JetBlue's exemption request.

The United Spinal Association (United Spinal) submitted comments on January 7, 2005, stating that it supported the grant of an exemption to JetBlue, if the only in-cabin stowage area available on the E-190 is the bulkhead seating area. United Spinal notes that if JetBlue blocked bulkhead seats for in-cabin wheelchair stowage, then its aircraft would have 98 seats, effectively taking the plane out of the parameters of the rule. Also, United Spinal states that bulkhead seats are prime seating locations for passengers with disabilities, and reserving the area for wheelchair stowage would reduce the number of bulkhead seats available to disabled persons who require bulkhead seating. Accordingly, United Spinal states that JetBlue should be allowed an exemption from section 382.21(a)(2).

On January 18, 2005, Delta Airlines (Delta) filed an Answer in response to JetBlue's exemption request, stating that it strongly opposed the exemption. Delta asserts that any economic or loss-of-revenue burden that JetBlue faces in complying with section 382.21(a)(2) is the same as that faced by all other Part 121 carriers, and thus JetBlue will not be unduly burdened by compliance. Further, Delta argues that an exemption would unfairly disadvantage all other Part 121 carriers who currently operate with reduced revenue generating space as a result of their compliance with current wheelchair stowage requirements. Delta notes that the 100-seat threshold for determining which aircraft must provide in-cabin wheelchair stowage has provided consistency for more than a decade,

and a deviation from this rule would result in arbitrary treatment of on-board stowage requirements for the future. In closing, Delta states that if DOT accepts JetBlue's assertion that allowing priority stowage of wheelchairs in the forward cargo compartment on the E-190 and delivery to the door of the aircraft immediately upon landing will accommodate the purpose of the rule, then DOT must accept this statement as valid in every case, regardless of the number of seats on the aircraft. In the event that JetBlue is granted the exemption it seeks, then Delta asks that the same exemption be granted to all Part 121 carriers in order to eliminate the unfair competitive advantage that an exemption to JetBlue would create.

Similarly, on January 25, 2005, United Airlines (United) submitted an Answer to JetBlue's request, opposing the exemption. United states that JetBlue should not be granted the exemption because JetBlue has failed to demonstrate that an exemption would be consistent with the public interest. United also asserts that unfairness comes not from applying a regulatory scheme uniformly to all similarly situated industry participants, but from imposing different requirements on companies similarly situated. United notes that every Part 121 carrier has known for nearly 15 years that any new aircraft (i.e. aircraft operated under 14 CFR Part 121 with 100 seats or more and ordered after April 15, 1990, or delivered after April 15, 1992) must have space available in the cabin for the stowage of at least one folding wheelchair. United states that in order to comply with this requirement, it and other Part 121 carriers have been required to make significant accommodations that reduce the revenue-generating capacity of the aircraft. Further, United states that nothing in JetBlue's petition for an exemption suggests that exempting it alone from section 382.21(a)(2) is justified because the cost for it to comply would outweigh the rule's benefits. United argues that granting an exemption to JetBlue essentially would repeal the existing rule. Finally, United states that if DOT grants an exemption to JetBlue, then due process and equal protection considerations mandate that similar relief be granted to all similarly situated carriers, including United.

Subsequently, on January 27, 2005, JetBlue submitted a Reply to the comments submitted by Delta and United. JetBlue states that the E-190, "the world's first 100-seat mainline jet," is entirely different from any other aircraft currently operated by Part 121 carriers, and should be considered a small aircraft such as was contemplated in the rule. JetBlue argues that because there currently are no other aircraft operating with a 100-seat capacity, DOT should not be concerned with any negative precedent in granting the exemption request. Moreover, JetBlue states that it would support a similar exemption for any future aircraft that may be developed with a 100-seat capacity. JetBlue states that its new aircraft and business model could not have been anticipated in 1990, when the in-cabin stowage requirement for a passenger's folding wheelchair was enacted. Further, JetBlue states that given the completely different financial environment facing the airline today, aircraft design, capacity, and configuration are now critical components of an airline's business model. Thus, the carrier asserts that the removal of one row of seats or part of the galley would cause a significantly undue burden on JetBlue.

Also on January 27, 2005, the Air Carrier Association of America (Association) submitted its Answer in opposition to JetBlue's exemption request. The Association notes that the selection of 100 seats as a threshold for the regulatory requirement for in-

cabin stowage of a passenger's wheelchair created a clear line from which all Part 121 carriers can base their business decisions and competitive strategies. Further, the Association states that multiple carriers have made significant accommodations to meet the wheelchair stowage requirement, including modifying aircraft and at times utilizing revenue generating seats to meet the mandate. The Association states that JetBlue was fully aware of the in-cabin stowage requirement when it purchased the E-190. Additionally, the Association states that the E-190 is not much different in size from the Boeing 717 and other similar aircraft, nor is the E-190 a "new" sized aircraft. Nevertheless, carriers utilizing the Boeing 717 have met the on-board stowage requirements for a standard size folding wheelchair. The Association remarks that all carriers have incurred "revenue" impacts in complying with the rule, and that the economic impact of this rule on carriers operating Boeing 717s is in the tens of millions of dollars. The Association states that JetBlue has provided no information to explain how the E-190 is unique compared to other aircraft of similar size or reasons it cannot take similar actions as those taken by other carriers to comply with the in-cabin stowage requirements. The Association suggests that if JetBlue is granted an exemption from the current regulation based on an arbitrary departure from the 100-seat rule, then there would be no reason to deny a similar request to a carrier operating a 101, 105, or 110 seat aircraft. In closing, the Association notes that if DOT accepts JetBlue's claim that priority stowage of wheelchairs in the forward cargo compartment on the E-190 and delivery to the door of the aircraft immediately upon landing "will accommodate the purpose of the rule as written," then the rule needs to be amended so that all wheelchairs are handled as proposed by JetBlue.

B. Meeting between DOT and JetBlue

On January 6, 2005, at JetBlue's request, DOT met with the carrier to discuss its petition for an exemption from the in-cabin stowage requirements in section 382.21(a)(2). At that meeting, and in a subsequent letter, JetBlue provided DOT with additional reasons as to why it believes DOT should grant its exemption request. JetBlue contends that its situation is unique because the E-190 is a new aircraft that cannot reasonably accommodate a standard-size folding wheelchair. JetBlue also states that, while the work of configuring the interior of the E-190 has been ongoing since purchasing the aircraft in June 2003, it remains to be seen whether or not the technical difficulties in securing one standard size wheelchair safely in the cabin of the E-190 can be overcome. JetBlue also indicates that the designation of bulkhead seating for wheelchair stowage is not in the best interests of disabled passengers who require bulkhead seating, as noted by the United Spinal Association. Further, JetBlue stated that the grant of an exemption is in the public interest because JetBlue intends to bring new low-fare service to underserved markets, and an exemption will further its ability to do so.

Decision

After carefully taking into account all the information available to us at this time, we find that inadequate justification exists for granting JetBlue's request for an exemption. There

are two methods for obtaining relief from DOT regulations. Any person affected by a regulation may petition for an exemption from an existing rule or petition for a rulemaking to change an existing rule. Under both of these approaches, the petitioner must demonstrate that the proposed action would be in the public interest. At this juncture, we are not convinced that it would be in the public interest to grant JetBlue an exemption from section 382.21(a)(2) on the basis that it is allegedly the only U.S. air carrier proposing to use 100-seat aircraft, and that compliance with the rule would unduly burden JetBlue.

As JetBlue noted in its petition for an exemption, carriers are not required to make modifications that would constitute an undue burden or fundamentally alter the nature of the carrier's service. Of course, what constitutes an undue burden or a fundamental alteration is a judgment that must be made on the facts of a specific situation. *See* 63 FR 10528. In its submission, JetBlue acknowledged that in order to bring its fleet of Airbus A320 jets into compliance with section 382.21(a)(2), it designated the last row of seats in the cabin for wheelchair stowage, and made this space available for wheelchair stowage even if it means involuntarily denying boarding to other customers.⁵ This method could impact the revenue generating capacity of JetBlue's Airbus A320. JetBlue argues that this same stowage option is not reasonably possible on the E-190. However, JetBlue has not adequately demonstrated reasons that the same stowage option is not feasible,⁶ nor has it sufficiently demonstrated that the grant of an exemption is in the public interest.

Additionally, JetBlue asserts that its promise to designate priority wheelchair stowage space in the front cargo hold and, upon landing, immediately bring wheelchairs to the door of the aircraft before removing other baggage satisfies the purpose and intent of Part 382 – to allow a wheelchair user to quickly retrieve his or her chair, so that person can use that chair immediately on exiting the aircraft. This suggestion disregards the other purpose and intent of the rule – to lessen the chance for wheelchair loss and/or damage.⁷ The provision of in-cabin stowage space for a passenger's wheelchair also enables that passenger to feel secure in the knowledge that his or her wheelchair is safely stowed and within close proximity.

JetBlue's assertion that the purpose and intent of the rule would be satisfied simply by designating priority cargo stowage and then promptly returning a passenger's wheelchair

⁵ *See id.*

⁶ It is worth noting that JetBlue most recently acknowledged that it remains to be seen whether or not the E-190 can be configured in such a way as to allow space for in-cabin wheelchair stowage, presumably without removing a row of seats or removing galley space. *See* OST Docket 2004-19626-11 (Letter from Robert C. Land, Vice President for Government Affairs and Associate General Counsel, to Dayton Lehman, Deputy Assistant Chief Counsel, U.S. DOT (Jan. 12, 2005)).

⁷ “. . . [G]iven that the consequences of loss or damage to a wheelchair are greater to its user than the consequences to other passengers of the loss of or damage to a garment bag, and that there is a real benefit to being able to use one's own wheelchair as soon as possible after a flight concludes, handicapped passengers probably have better reason than most for wanting in-cabin stowage.” 55 FR 8008, Preamble to Section 382.41 (Mar. 6, 1990).

to him or her upon landing necessarily impugns the very need for section 382.21(a)(2). Certainly, if JetBlue's assertion were true, then this rationale would apply to all Part 121 carriers, regardless of aircraft seating capacity. However, after consideration of public comment during the initial rule-making phase, the Department determined that simply requiring priority cargo space and swift return of a passenger's wheelchair upon landing did not sufficiently meet the needs of the disability community. In striking a reasonable balance between disability groups' concerns about sufficient accommodations being provided and carriers' concerns about the costs of those accommodations, the Department enacted section 382.21(a)(2) to ensure that aircraft with a seating capacity of 100 seats or more would provide in-cabin stowage for at least one folding wheelchair.⁸ For this reason, the Department cannot accept JetBlue's contention that designating space in the cargo for wheelchairs and bringing wheelchairs to the aircraft door immediately upon arrival satisfies the intent and purpose of the ACAA or Part 382.

JetBlue also suggests that by removing a row of seats in the E-190 to allow for in-cabin stowage of a passenger's wheelchair, the aircraft would then be outside the parameters of section 382.21(a)(2). However, an aircraft's seating capacity, as opposed to the actual number of seats, provides the most straightforward approach to applying section 382.21(a)(2).⁹ In this instance, for example, we understand that the E-190 can be configured with as many as 106 seats. If carriers were permitted to remove seats in an attempt to bring an aircraft outside the parameters of Part 382, such actions would undermine the purpose of the rule and the ACAA.

It is also important to note that during the time that JetBlue evaluated, selected, and then ordered its E-190 aircraft in June 2003, JetBlue knew or should have known about the requirements of this rule which had then been in effect for over 13 years.¹⁰ Concurrently with the order of its E-190 aircraft, the carrier was the subject of an enforcement action in connection with its entire Airbus fleet for violating the very provision from which it now seeks an exemption. The enforcement action was initiated by the DOT in the fall of 2002, and resulted in an August 28, 2003, Consent Order whereby JetBlue agreed to an assessed civil penalty and "to comply with section 382.21(a)(2) and provide a space to stow one passenger's standard-size folding wheelchair on all its new aircraft with 100 or more passenger seats." JetBlue Airways, Order No. 2003-8-28, at 6 (OST Docket 2003-14194), 2003 WL 23097388. Further, JetBlue was ordered to cease and desist from all further violations of Part 382. Therefore, it is evident that when JetBlue ordered the E-

⁸ Additionally, in recognizing the costs faced by the industry in reaching full compliance with section 382.21, the Department stated that its provisions applied to new aircraft operated under Part 121 and ordered by the carrier after April 5, 1990, or delivered to the carrier after April 5, 1992. 14 CFR 382.21(a).

⁹ This approach is in accord with similar seating thresholds. For example, in 14 CFR 382.70, disability reporting requirements apply to carriers conducting passenger operations with at least one aircraft having a *designed seating capacity* of more than 60 passengers. 14 CFR 382.70 (emphasis added). *See also*, 14 CFR 250.1 (defining large aircraft as any aircraft that has a *passenger capacity* of more than 60 seats) (emphasis added).

¹⁰ *See* OST Docket 2004-19626-11 (Letter from Robert C. Land, Vice President for Government Affairs and Associate General Counsel, to Dayton Lehman, Deputy Assistant Chief Counsel, U.S. DOT (Jan. 12, 2005)).

190 aircraft, it was aware of the requirement that aircraft with 100 or more seats ordered after April 5, 1990, or delivered after April 5, 1992, have a designated priority space for the in-cabin stowage of at least one standard-size folding wheelchair.

Finally, an exemption request is generally not appropriate where the petitioner is seeking a new or different standard to apply to it in situations that are being faced by the entire industry. Here, JetBlue is seeking an exemption from section 382.21(a)(2) primarily because it believes that the E-190 should be considered a small aircraft apparently because of its belief that there are no other aircraft operating with a 100-seat capacity. This plainly raises the question of whether section 382.21(a)(2) should be revised so it no longer applies to aircraft with 100 passenger seats. An exemption is not the appropriate vehicle to establish a new or different industry standard and the issues raised by JetBlue are better addressed by general rulemaking rather than by exemption. Further, granting JetBlue's exemption request would place JetBlue in a preferred regulatory position vis-a-vis other carriers, which are required to have designated in-cabin priority space in new aircraft for the stowage of a standard-size folding wheelchair in aircraft with 100 or more passenger seats.¹¹ We are also not persuaded by JetBlue's argument for granting a similar exemption to any carriers that place 100-seat aircraft into service.

Notably, DOT recently issued a Notice of Proposed Rulemaking (NPRM) proposing to revise its rule requiring nondiscrimination on the basis of disability in air travel. *See* 69 FR 64364. This NPRM, among other things, seeks comments as to whether the dimensions for a passenger's folding wheelchair that have been used in DOT enforcement actions are appropriate. Because JetBlue asserts that its E-190 aircraft cannot reasonably accommodate a standard-size wheelchair, JetBlue, if it wishes, may submit comments on this proposed rulemaking. The deadline for submission of comments expired on March 4, 2005; however, to the extent practicable, the Department will consider any comments submitted past the close of the comment period.

On this basis, we find that granting the requested exemption from the provision requiring the in-cabin stowage of wheelchairs is not in the public interest, and we deny JetBlue's request for an exemption from 14 CFR 382.21(a)(2).

¹¹ Other carriers have recently complied with section 382.21(a)(2), at considerable cost. *See, e.g., ATA Airlines*, Order No. 2004-4-22 (OST Docket 2004-16943), 2004 WL 963909 (D.O.T.), *AirTran Airways*, Order No. 2003-10-11 (OST Docket 2003-14194), 2003 WL 23097396 (D.O.T.).

ACCORDINGLY, acting under the authority of 49 CFR 5.13,

1. JetBlue Airways, Inc., is denied an exemption from the requirement of 14 CFR 382.21(a)(2) as discussed above; and

2. A copy of this order will be served on JetBlue Airlines, Inc.

The action in this order is effective when taken and the filing of a petition for review shall not alter its effectiveness.

By:

NORMAN Y. MINETA
SECRETARY

(SEAL)

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