U.S. Department of Transportation
Office of the Secretary of Transportation

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Certified Mail – Return Receipt Requested

September 30, 2015

Evelyn D. Sahr
Eckert Seamans Cherin & Mellott, LLC
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Washington, D.C. 20006

Dear Ms. Sahr:

This letter is to inform Kuwait Airways Company (KAC) that we have concluded our investigation of Mr. Eldad Gatt's complaint challenging KAC's policies and practices toward passengers traveling on Israeli passports. We have reviewed KAC's July 28, 2015, and August 29, 2015, letters in response to the Department's supplemental questions and appreciate the carrier's cooperation to date.

Mr. Gatt's complaint alleged that KAC discriminated against him, an Israeli citizen traveling on an Israeli passport, in violation of 49 U.S.C. § 40127(a) by preventing him from purchasing a ticket for travel on KAC from John F. Kennedy International Airport (JFK) to London Heathrow Airport (LHR). Upon notice of our initial decision finding no unlawful discrimination in this matter, Mr. Gatt filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit. We subsequently reopened our investigation and reconsidered the matter anew. As part of our reconsideration, we considered Mr. Gatt's claim upon an alternative ground, i.e. 49 U.S.C. § 41310, which holds that, "[a]n air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination." After a thorough review of the information provided by the parties, we find that KAC unreasonably discriminated against Mr. Gatt in violation of 49 U.S.C. § 41310 by refusing to sell him a ticket on its flight from JFK to LHR. Our conclusion that KAC unreasonably discriminated against Mr. Gatt is based on the history and intent of 49 U.S.C. § 41310, case law, and the permit authority granted to KAC to engage in scheduled foreign air transportation.

Section 41310, formerly 49 U.S.C. § 1374(b), was adapted from its predecessor statutes—*i.e.*, section 404(b) of the Federal Aviation Act of 1958, section 404(b) of the Civil Aeronautics Act of

1938, and section 3 of the Interstate Commerce Act (ICA) of 1887. Section 3 of the ICA stated, in relevant part:

> [I]t shall be unlawful for any common carrier subject to the provision of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, *or to subject any particular person,* company, firm, corporation, or locality, or any particular description of traffic, *to any undue or unreasonable prejudice or disadvantage* in any respect whatsoever.

Interstate Commerce Act of 1887, sec. 3, 24 Stat. 379, 380 (1887) (emphasis added); *see also* Federal Aviation Act of 1958, Pub. L. No. 85-726, sec. 404(b), 72 Stat. 731, 760 (1958); Civil Aeronautics Act of 1938, Pub. L. No. 75-706, sec 404(b), 52 Stat. 973, 993 (1938).

Given its relation to the ICA, Congress intended the prohibition against "unreasonable discrimination" in 49 U.S.C. § 41310 to extend common carrier obligations to airlines. A common carrier is "obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal." *Pearson v. Duane*, 71 U.S. 605, 615 (1866); *see also Pittman v. Grayson*, No. 93 Civ. 3974, 1997 WL 370331, at *2 (S.D.N.Y. July 2, 1997) (finding that airlines are common carriers), *aff'd*, 149 F.3d 111, 123 (2d Cir. 1998), *cert. denied*, 528 U.S. 818 (1999).

In cases interpreting the common law non-discrimination duty of common carriers, the Supreme Court has upheld the common carrier duty not to discriminate on the basis of race using the unreasonable discrimination standard under the Interstate Commerce Act. *See Mitchell v. U.S.*, 313 U.S. 80 (1941) (finding that requiring African-Americans to sit in a second-class train car while the train passed through a state that required segregated cars because the train did not have a first class car for African Americans was unreasonable discrimination under the ICA); *see also Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499 (2d Cir. 1956) (finding the airline's refusal to allow passengers to take their reserved seats for racial reasons constituted unlawful discriminatory treatment under 49 U.S.C. § 1374(b), predecessor statute to 49 U.S.C. § 41310, in light of "recent Supreme Court decisions," which held the separate-but-equal treatment of racial minorities to be both unreasonable and unconstitutional).

Further, the common carrier duty not to unreasonably discriminate is not limited to discrimination on the basis of race. The courts have permitted air carriers to refuse passage if "the carrier decides [a passenger or property] is, or might be, inimical to safety." 49 U.S.C. § 44902. In *Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975), the Second Circuit decided that the bar on unreasonable discrimination, then codified as 49 U.S.C. § 1374(b), did not prevent a carrier from exercising its discretion to refuse passage to passengers it deemed to be safety risks so long as its "opinion and decision were rational and reasonable" in view of "the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision." 509 F.2d at 948 (holding T.W.A. acted reasonably in refusing passage to passenger who had been subject of F.B.I. warning).[1] Furthermore, in *Cordero v. Cia Mexicana de Aviacion, S.A.*, a case adopting and applying the *Williams* test, the appellant ticket-holder claimed that the airline's denial of transportation was unjust discrimination under 49 U.S.C.S. § 1374(b), the predecessor statute to 49

[1] There is nothing in the record to indicate or demonstrate that Mr. Gatt represented a safety or security risk who would justify a denial of carriage triggered by the provisions of 49 U.S.C. § 44902, or any other provision of law.

U.S.C. § 41310. *See* 681 F.2d 669 (9th Cir.1982). The Ninth Circuit held that the test of whether or not the airline properly refused passage to an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision, and whether or not the opinion and decision is rational and reasonable in the light of those facts and circumstances. *Id.* at 672. The court further stated that "[a] requirement of reasonableness … is consistent with section 1374(b), which was for the benefit and protection of persons using the facilities of air carriers." *Id.*

We have applied these principles to determine whether KAC' refusal to sell a ticket to Mr. Gatt from JFK to LHR on the basis of his Israeli citizenship is unreasonable discrimination. KAC contends that its denial of transportation to Mr. Gatt from JFK to LHR is reasonable because Kuwaiti law prohibits the carrier from selling a ticket to an Israeli passport holder. KAC emphasizes that the statutory penalties for violation of the Kuwaiti law include imprisonment with hard labor, in addition to a fine, as evidence that it cannot comply with U.S. law. This is not a proper justification for the denial of transportation as the penalties that allegedly have compelled KAC's conduct are part of a discriminatory statutory scheme. We know of no authority that would allow an airline to discriminate based simply on penalties that might be imposed under the foreign law that is said to have mandated the discriminatory conduct. Moreover, this complaint does not involve travel to a country where the complainant is not allowed to disembark based on the laws of that country. There is no question that a person holding a valid Israeli passport can depart the U.S. and enter the United Kingdom. As such, we find that it is unreasonable discrimination for KAC to refuse transport to Israeli citizens between the U.S. and a third country where their passports are recognized as valid travel documents and they are allowed to disembark based on the laws of that country.

In our application of the "reasonableness" test, we also considered the permit authority KAC was granted to engage in scheduled foreign air transportation of persons from points behind Kuwait via Kuwait and intermediate points to a point or points in the United States and beyond. Its permit states that the carrier is "subject to the provisions of Title 49 of the U.S. Code and the orders, rules and regulations of the Department of Transportation." *Permit to Foreign Air Carrier, KAC Corporation*, Order 2011-3-30, (March 24, 2011), *available at* www.regulations.gov, Docket DOT-OST-2010-0246. Additionally, KAC must be in compliance "with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department [of Transportation]." *Id*. Accordingly, based on explicit language in KAC' grant of permit authority by the Department, the carrier must comply with all provisions of Title 49 of the U.S. Code, including 49 U.S.C. § 41310, which prohibits foreign air carriers from engaging in unreasonable discrimination.

We have evaluated the interest in applying 49 U.S.C. § 41310 against this background. The application of the statute in question takes place within the sovereign territory of the United States. The connection of that activity to Kuwait is significantly diminished relative to its application to a flight entering the sovereign territory of Kuwait. The activity is critical to U.S. law and policy in this field, which has prioritized "wiping out discrimination…of all types." *U.S. v. Baltimore & Ohio R.R. Co.*, 333 U.S. 169, 175 (1948). This law is not novel; it has been well-established both in the aviation context as well as in other common carrier contexts for decades. *See generally id.*; *Fitzgerald*, 229 F.2d 499. This should have been understood by KAC, as the airline acknowledged the applicability of relevant laws when it accepted its foreign air carrier permit in 2011. Given these factors and the general importance of protecting against unreasonable discrimination specifically by

"foreign air carrier[s]" as expressed in Congressional enactment of 49 U.S.C. § 41310, we find its application reasonable in these circumstances.

Furthermore, Kuwait's refusal to sell air transportation to Israeli citizens on a route between the U.S. and another point may also be in violation of U.S. anti-boycott laws and regulations, which are designed to prohibit and/or penalize cooperation with international economic boycotts in which the U.S. does not participate. The Kuwait law at issue here was enacted pursuant to the Arab Leagues' boycott against persons doing business with Israel. U.S. policy has opposed such economic boycotts. Sec. 3 of the U.S. Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503, describes the policy of the United States to "oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States…" 50 App. U.S.C. 2402(5)(A). The Department of Commerce's Office of Anti-Boycott Compliance has promulgated regulations in this area. *See* 15 C.F.R. 760 (outlining Department of Commerce's anti-boycott regulations). These regulations include provisions specifically prohibiting entities, including offices or branches of foreign concerns in the U.S. from refusing to do business with nationals or residents of a boycotted country when such refusal is pursuant to a requirement of the boycotting country. *See* 15 CFR 760.2 (a) (1). As such, we find KAC' actions, which are inconsistent with and possibly in violation of U.S. anti-boycott laws, to be unreasonable as a matter of U.S. policy.

Finally, we do not find the interest of Kuwait in the enforcement of its laws in this case to be greater than the interest of the United States in the enforcement of its laws. An agency balancing of interests is necessarily built into the statutory standard of unreasonable discrimination in 49 U.S.C. § 41310, permitting the Department to apply its expertise in this area to make a determination about the relative public interests implicated in a conflict between domestic law and foreign law. In balancing the interests of the U.S. and Kuwait with respect to the application of 49 U.S.C. § 41310, it is our view that the U.S. interest in providing nondiscriminatory access to air transportation to an individual traveling from the U.S. to a third country that allows that individual's entry is greater than Kuwait's interest in applying its economic boycott of Israel.

For all the aforementioned reasons, we conclude that KAC unreasonably discriminated against Mr. Gatt in violation of 49 U.S.C. § 41310 by refusing to sell him a ticket on a KAC flight from JFK to LHR. KAC has chosen to operate an air route between the U.S. and the United Kingdom. In so doing, the airline has availed itself of the facilities and benefits of the U.S. and must comply with its laws. One of those laws is 49 U.S.C. § 41310, which prohibits "unreasonable discrimination" in foreign air transportation. Our determination that KAC' decision to refuse to sell Mr. Gatt a ticket on its flight from JFK to LHR is not rational or reasonable in light of the facts and circumstances is consistent with the letter and spirit of that provision.

Based on the foregoing, by refusing to transport Israeli passport holders to and from the U.S. and a third country that accepts Israeli citizens, KAC is in violation of 49 U.S.C. § 41310. To avoid enforcement action, we expect KAC to sell tickets to and transport Israeli citizens between the U.S. and any third country where they are allowed to disembark based on the laws of that country. We request that KAC provide a response within 15 days of the date of this letter outlining the steps KAC plans to take to comply with 49 U.S.C. § 41310 with regard to its route between the United States (New York- JFK) and United Kingdom (London- LHR), the only route that KAC operates between the U.S. and a third country. I am also available to meet with you regarding this matter.

If you have any questions, please contact me at (202) 366-9342.

Sincerely,

/s/

Blane A. Workie
Assistant General Counsel for
Aviation Enforcement and Proceedings