



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

Issued by the Department of Transportation
On the Sixth day of November, 2012

**Petition for Rulemaking and
Third-Party Complaint of
Donald L. Pevsner, Esq.**

DOCKET DOT 2012-0109

ORDER DENYING PETITION AND DISMISSING COMPLAINT

On July 2, 2012, Donald L. Pevsner (Petitioner) filed a Petition for Rulemaking requesting that the Department require U.S. and foreign carriers to refund the total price of a ticket if the carrier unilaterally changes its flight schedule between the time a ticket is purchased and the time of travel, or allow a passenger to reschedule the flight without the imposition of any “change penalty.” Mr. Pevsner also requests that the Department open a formal investigation pursuant to 49 U.S.C Chapter 415 into the lawfulness of what he characterizes as the “standard \$250 change penalty” he claims is currently imposed by most air carriers and foreign air carriers on nonrefundable tickets in foreign air transportation. By this order, we are denying the petition for rulemaking and dismissing the third part complaint.

The Petition and Third-Party Complaint

In support of his request for a Petition for Rulemaking, Mr. Pevsner alleges that the Domestic General Rules Tariffs of Delta and similar tariffs of other air carriers and foreign air carriers are causing “great economic harm to passengers” by forcing them to accept airline schedule changes on nonrefundable tickets or to pay a “rapacious” change penalty that is typically \$150 in air transportation and \$250 in foreign air transportation. As evidence of this practice, Mr. Pevsner cites his experience on June 29, 2012, when Delta moved up the departure time of his flight by approximately 30 minutes and would not allow him to change his flight without paying a \$150 domestic change penalty since the schedule change was less than 90 minutes, citing Rule 240 of its Domestic Rules Tariff.¹ Mr. Pevsner argues that the schedule in effect when a passenger purchases his or

¹ Delta Rule 240 states that “In the event of a flight cancellation, diversion, delays of greater than 90 minutes ... (Delta) will provide a full refund on a nonrefundable ticket).”

her ticket forms an integral part of the contract of carriage between the passenger and the carrier and that, therefore, “it is a **prima facie** breach of contract for the carrier to change its schedule unilaterally without simultaneously providing the passenger with the right to obtain a **full refund** in such case, if the new schedule is unacceptable to him for any reason whatsoever.” (Petition, at p. 2, emphasis in original) Although, he recognizes that the Department does not have the authority to regulate fares and charges in domestic air transportation, he urges the Department to use “whatever tactics stand a reasonable chance of prevailing” to outlaw the \$150 change fee in domestic air transportation.

In support of his request for a formal investigation into the lawfulness of the \$250 international change fee, Mr Pevsner argues that the fee violates 49 U.S.C § 41501 since there is no relationship between that amount and the legal mandate of a “reasonable” charge for a change penalty.² In his opinion, the change fee is at least ten times more than a truly reasonable charge for a change fee.

Delta’s Reply

On July 16, 2012, Delta Air Lines, Inc., (Delta) filed an answer requesting that the petition be denied and the third party complaint be dismissed. Delta claims that Mr. Pevsner’s real complaint is set forth in the last paragraph of his pleading in which he laments the fact that the Department does not have the authority to regulate fares and charges in domestic air transportation. Delta claims that the carrier’s contract of carriage provisions are not unfair or deceptive and that its handling of his complaint has been fair and reasonable. Therefore, Delta asserts that the petition should be denied.

In support thereof, Delta asserts first that Mr. Pevsner is wrong in claiming that its schedules are part of the carrier’s contract of carriage and cites its domestic contract of carriage, Rule 240(a), which explicitly states that “published schedules, flight times, aircraft type, seat assignments and similar details reflected in the ticket or Delta’s published schedules are not guaranteed and form no part of this contract. Schedules are subject to change without notice.” (Delta answer, at p.1, emphasis omitted.).

Delta states that Mr. Pevsner complains because he purchased a nonrefundable ticket for travel on a Delta flight which was affected by a minor schedule change that resulted in the flight being scheduled to depart 24 minutes earlier than originally scheduled. Delta claims that it is standard industry practice for carriers typically to publish their schedules almost a year in advance of the date of travel and that the retiming of Mr. Pevsner’s flight occurred as part of Delta’s normal practice of making minor adjustments to its schedules after publication. It states that it would not be feasible to operate an airline if carriers could not do so without breaching their contract of carriage with each passenger that had already bought a ticket on every affected flight.

Delta also states that it does not claim an unfettered right to make any unilateral schedule change it chooses without reasonable accommodations for affected customers. Rather, as

² 49 U.S.C § 41501 states that “Every air carrier and foreign air carrier shall establish, comply with, and enforce...reasonable prices, classifications, rules, and practices related to foreign air transportation.”

stated in the section of Rule 240 cited by Mr. Pevsner in his petition and set forth in footnote 1, the carrier grants full refunds upon request to customers who hold nonrefundable tickets if the schedule change results in a cancellation of their flight or a change of 90 minutes or more in the flight's departure time, or if the change would cause a misconnection for the passenger.³ However, since the schedule change for Mr. Pevsner's flight was only 24 minutes, no exception to the general rule applied. Delta states that if Mr. Pevsner had wanted the convenience of a fully refundable ticket he should have purchased one. Delta states that despite this, Delta offered to waive half of the \$150 change fee simply as a matter of customer goodwill, but Mr. Pevsner rejected this compromise.

Petitioner's Reply to Delta

On July 17, 2012, Mr. Pevsner filed a reply to Delta's answer. Mr. Pevsner claims that a change making the flight leave 24 minutes earlier is hardly minor and that leaving the decision on whether to grant a refund up to different Delta Agents and supervisors is strictly "gastronomic jurisprudence." and is "repugnant and intolerable." As an example of "gastronomic jurisprudence," Mr. Pevsner cites his experience of going back to a different Delta Air Line Reservation Supervisor than the one who had earlier refused him a penalty-free ticket change and was granted a reservation change without penalty to a more convenient itinerary.

In response to Delta's claim that if Mr. Pevsner had wanted the full convenience of a full refundable ticket he should have purchased one, he points out that a refundable ticket would have cost \$744 extra each way or \$1,488 over and above the base ticket price of \$705 he paid for his original ticket. He claims that the Department should ignore the changes made by Congress in its authority and instead use the "powers that 49 USC has bestowed upon it" to grant his petition; he sums up by stating "If you are precluded by past legislative stupidity from going in via the front door, then damned well use the back door, giving the air carriers your best regard as you sail on by to victory." (Reply to Answer, p. 5.)⁴

Miscellaneous Pleadings

Thirty comments by the public were submitted in support of the Mr. Pevsner's petition. On October 13, 2012, Mr. Pevsner filed a motion to expedite the handling of his petition and complaint in this docket.

³ Delta admits that the language as drafted in Rule 240(b) refers to delays rather than schedule changes, but its policy is in fact to honor customer requests for refunds if a schedule adjustment results in a change of more than 90 minutes in either direction.

⁴ We remind practitioners before the Department of the standards of conduct set forth in 14 CFR 300.6. This section states that practitioners should observe the standards of professional conduct and to avoid offensive and intemperate behavior.

Disposition and Analysis

We have carefully considered the petition and the complaint in Docket 2012-0109, as well as the comments filed in that docket, and have decided to dismiss the petition and deny the complaint. We reject Petitioner's invitation to go beyond our statutory authority and impose the rule he proposes.

In 2003, we dismissed a petition for rulemaking asking us to impose the same relief that is now requested by Mr. Pevsner. In so doing, we stated:

“Congress deregulated domestic airfares more than 20 years ago and this Department consequently has extremely limited powers with respect to domestic airfares and related conditions. Absent compelling evidence of consumer deception or unfair methods of competition, we have allowed the marketplace to govern carrier decisions regarding fares and their associated conditions.”⁵

Nothing in Mr. Pevsner's petition would lead us to reach a different decision here. We agree with Delta that schedules are not part of its or any other carrier's contract of carriage and that it would not be feasible to operate an airline if carriers could not make minor adjustments in schedules after publication without breaching their contract of carriage with each passenger who had already bought a ticket. To find otherwise would represent an unwarranted intrusion into the operational decision-making of an air carrier.

Mr. Pevsner's complaint is really that the alternative to avoiding the change fee for a nonrefundable fare is to pay a substantially higher fare for the convenience of being able to get a refund without paying the change fee. However, as we observed in 2003, “the lower price for nonrefundable tickets is a trade-off for passengers agreeing to a restriction that allows a carrier to manage its inventory and cash flow. The public benefits in low fares found to exist under our present deregulated fare environment could be undone by the government intrusion requested by petitioner.”⁶ Indeed, the extent of public benefits in savings afforded by restricted fares is amply demonstrated by Mr. Pevsner's example, cited above, which shows that even after paying the \$150 change penalty, he still would have saved \$1338 over purchasing a fully refundable ticket.

The Department does require airlines to give consumers specific advance notice of all conditions that would restrict refunds or impose any monetary penalties for cancellation. (14 CFR 253.7). Delta's rules tariff does provide that notice. Rule 240 of its domestic rules tariff states that the carrier grants full refunds upon request to customers who hold nonrefundable tickets if the schedule change results in a cancellation of their flight or a change of 90 minutes or more in the flight's departure time, or if the change would cause a misconnection for the passenger. The Department imposes no further independent obligation on carriers in the case of cancelled flights or delayed departures.

⁵ *Petition of Joel Kaufman re Ticket Change Penalties*, Order 2003-3-11, 2. March 18, 2003.

⁶ *Id.*

Mr. Pevsner's dispute is not with Delta's disclosure of the \$150 change penalty, but is with the carrier's use of discretion in enforcing the rule. As long as the condition or rule is properly disclosed to a passenger, we do not agree that the use of discretion by Delta or any other carrier by choosing not to enforce the condition or rule as Delta did in this case amounts to what he characterizes as "gastronomic jurisprudence" that would justify our exceeding our statutory authority by imposing the rule proposed by Petitioner. To do so, would amount to our unwisely precluding non-discriminatory relaxation of carrier rules when found to be appropriate by the carrier. To require carriers, as the petitioner urges, to offer full refunds or a penalty-free ticket change for any schedule change would represent an unwarranted intrusion into the operational decisions of air carriers, and would not be in the public interest.

We have also further decided to dismiss Petitioner's request that we open a formal investigation pursuant to 49 U.S.C Chapter 415 into the reasonableness of the \$250 change penalty imposed by most carriers and foreign air carriers on nonrefundable tickets in foreign air transportation. 49 U.S.C § 41501 requires carriers to establish reasonable rates and rules in foreign air transportation and the Department is authorized pursuant to 49 U.S.C § 41509 to cancel a rule that is unreasonable after notice and hearing. However, in the 34 years since the passage of the Airline Deregulation Act, the Department has declined to use this authority to strike down fare rules in foreign air transportation, but instead has applied the pro-competitive policies cited above for domestic air fares to fares and rules in foreign air transportation. Moreover, Petitioner has not offered any specific evidence that the international change fees are unreasonable or demonstrated why we should deviate from our long-standing policy. Passengers can choose whether to buy a refundable or nonrefundable ticket at the time of purchase and can choose between carriers offering different fare products. If the freedom to change plans without paying a penalty is a contingency for which a passenger wants to plan, refundable tickets are available in foreign air transportation. In our view, the public benefits in low fares found to exist under these policies could be undone by the government intrusion requested by petitioner.

ACCORDINGLY, pursuant to the authority delegated under 49 CFR Part 1, I dismiss the petition for rulemaking and complaint of Donald L. Pevsner, Esq. in Docket OST 2012 - 0109.

By:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

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