



Order 2012-5-2

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

Issued by the Department of Transportation
On the Second day of May, 2012

**Atlantic Southeast Airlines, Inc.
Compliance with 49 U.S.C. §§ 40127(a), 41702,
41310, and 41712**

**Docket OST-2012-0002
Served: May 2, 2012**

CONSENT ORDER

This order concerns violations by Atlantic Southeast Airlines, Inc. ("Atlantic Southeast" or the "Carrier"),¹ of the Federal statutes prohibiting U.S. and foreign air carriers from subjecting any air traveler to discrimination on the basis of race, color, national origin, religion, sex or ancestry. The order directs Atlantic Southeast to cease and desist from future violations and assesses the carrier \$25,000 in civil penalties.

Federal law is clear that an airline cannot refuse passage to or otherwise discriminate against an individual because of that person's race, color, national origin, religion, sex, or ancestry. Specifically, 49 U.S.C. § 40127 provides that an "air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry." 49 U.S.C. § 41310 prohibits air carriers and foreign air carriers from unreasonably discriminating against any person in foreign air transportation, and 49 U.S.C. § 41702 requires that U.S. carriers provide safe and adequate transportation. Finally, 49 U.S.C. § 41712 prohibits unfair and deceptive practices by air carriers. Each of these provisions has been interpreted to prohibit air carriers from discriminating on the basis of race, color, national origin, religion, sex, or ancestry. See American Airlines Inc., OST-2003-15046-18 (Aug. 21, 2003) and United Air Lines, Inc., Order 2011-11-2 (Nov. 1, 2011).

The Office of Aviation Enforcement and Proceedings ("Enforcement Office") investigated Atlantic Southeast Airline's compliance with the above-cited statutory prohibitions following allegations that two religious leaders (Imams) were removed and denied re-boarding on flight 5452, operated as a Delta Connection flight by Atlantic Southeast, at the

¹ Effective January 1, 2012, Atlantic Southeast Airlines, Inc. acquired and merged with ExpressJet Airlines, Inc. The combined company also changed its name to "ExpressJet Airlines, Inc." as of that date.

Memphis International Airport on May 6, 2011, because their previous removal from the aircraft by Delta security officials and the search of the passengers' seating areas by law enforcement officials resulted in passenger concern and unrest. While the Enforcement Office finds that the initial decision to remove the Imams from Atlantic Southeast flight 5452 to conduct secondary screening was not discriminatory, the evidence in the Enforcement Office's view disclosed that Atlantic Southeast violated the law when it failed to re-board the passengers on flight 5452 after law enforcement officials and its mainline carrier partner's security officials determined that they were not a security threat and cleared them for travel. Once an individual who has been removed from an aircraft because of security concerns has been found to not be a security threat, the carrier must allow that individual to re-board the same aircraft and take his/her flight so long as the aircraft has not yet departed unless a valid safety or security concern exists. The Enforcement Office believes that the removed individuals should have been re-boarded in this case.

In mitigation, the Carrier maintains that no Atlantic Southeast employee made any decision or took any action with regard to any Atlantic Southeast passenger based on that passenger's race, color, national origin, religion, sex, or ancestry. In that regard, the Carrier notes that Federal law also provides air carriers the authority and responsibility to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety" (49 U.S.C. § 44902(b)) and establishes that "[t]he pilot in command of an aircraft is directly responsible for, and is the final authority as to the operation of the aircraft." 14 CFR § 91.3(a). The Carrier further states that even though it continues to strenuously deny that any violation of Federal law occurred, it has elected to settle this matter with the Enforcement Office rather than to engage in costly and protracted litigation.

The Carrier maintains that there is no Federal law, regulation, or guidance that speaks directly to the unique circumstances with which the Atlantic Southeast employees were faced. It further asserts the following to demonstrate that no discrimination occurred: (1) Atlantic Southeast had initially boarded and was already in the process of transporting all passengers on flight 5452 when its mainline carrier partner's gate staff boarded the aircraft and requested identification for the Imams, which was collected by the flight attendant and returned several minutes later; (2) Atlantic Southeast then began transporting all passengers boarded on flight 5452, which left the gate without incident, and did not discriminate against any of them based on any protected classification; (3) Atlantic Southeast's mainline carrier partner's gate staff recalled the flight due to "security concerns" and the captain was directed to return the aircraft to the gate without further information; (4) following removal of the two passengers and their bags from the aircraft by the mainline carrier's personnel, two uniformed TSA officials boarded the aircraft, put on gloves and conducted an on-board search in the areas where the two passengers were removed – in full view of a plane full of passengers; (5) upon repeated requests for more information on the nature of the security issue, the captain was told only that one of the passengers was on the "No Fly" list; (6) during and after the TSA search, passengers became visibly upset, with at least one passenger crying audibly and asking to get off the aircraft because she thought something was wrong; (7) shortly thereafter and now delayed over one hour, flight 5452 departed the gate without the removed passengers on board but was then called back due to "security" reasons for the second time; (8) the mainline carrier partner's personnel advised the captain that TSA had cleared the two removed passengers and requested that they be re-boarded on flight 5452; (9) in light of the foregoing circumstances and the events witnessed by the

passengers and crew, the captain exercised what he believed was his discretion as pilot-in-command to not re-board the removed passengers due to safety concerns; and (10) the two removed passengers were transported to their destination on another Atlantic Southeast flight later that day without incident.

The Carrier believes that these circumstances supported the captain's judgment that it was unreasonable to re-board the two removed passengers based on legitimate safety concerns. It further argues that but for the captain's inability to obtain information and the two intervening acts of the removal of the passengers and the search of the aircraft, in neither of which Atlantic Southeast played any role, Atlantic Southeast would have transported the Imams on flight 5452 without incident – as it had already attempted to do. Rather, the Carrier maintains that the captain's decision was an appropriate exercise of discretion based on the intervening acts of its mainline carrier partner's personnel and the TSA that created legitimate safety concerns, and was not based on any protected classification. According to the Carrier, there was a valid safety and/or security concern present and this scenario does not fit the generic circumstance described by the Enforcement Office where an individual was simply not permitted to re-board the same aircraft that had not yet departed. Atlantic Southeast's aircraft had departed and was called back to the gate – not once but twice, which only served to increase the distress of passengers and en route safety concerns. Finally, Atlantic Southeast disagrees that the failure to re-board the Imams on the original flight warrants a determination of discrimination where no such intent was present and its contract of carriage necessarily permits such operational flexibility.

The Enforcement Office has carefully considered all the information provided by Atlantic Southeast, but continues to believe that enforcement action is warranted. To avoid litigation, the Enforcement Office and Atlantic Southeast have reached a settlement of this matter. Without admitting any violations of the law occurred, Atlantic Southeast consents to the issuance of an order to cease and desist from future violations of 49 U.S.C. §§ 40127, 41310, 41702, and 41712 and to the assessment of a civil penalty of \$25,000. The Enforcement Office believes that this settlement is appropriate and serves the public interest and creates an incentive for all carriers to comply fully with the civil rights laws enforced by the Department of Transportation.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Atlantic Southeast Airlines, Inc., engaged in discriminatory conduct in violation of 49 U.S.C. §§ 40127, 41310, 41702, and 41712 when it denied boarding on Atlantic Southeast flight 5452 to two Imams, as discussed above;
3. We order Atlantic Southeast Airlines, Inc., and all other entities owned and controlled by it, and their successors and assigns, to cease and desist from future violations of 49 U.S.C. §§ 40127, 41310, 41702, and 41712;

4. We assess Atlantic Southeast Airlines, Inc., a civil penalty of \$25,000, which shall be due and payable within 30 days from the date of issuance of this order. Failure to pay the penalty as ordered shall subject Atlantic Southeast Airlines, Inc., to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and to possible additional enforcement action for failure to comply with this order;
5. We order Atlantic Southeast Airlines, Inc., to provide civil rights training to the flight and cabin crewmembers of the flight described above. That training must cover the incident covered in this order and make clear that in the absence of a valid safety or security concern, passenger or crew unrest is not an acceptable basis to deny boarding. Upon completion of that training, but no later than 14 months after the service date of the order, Atlantic Southeast Airlines, Inc., shall submit a sworn statement from an appropriate company official certifying that the flight and cabin crewmembers have received the civil rights training required under this order;
6. Any failure of Atlantic Southeast Airlines, Inc., to conduct the training or document it adequately to the Enforcement Office in accordance with ordering paragraph 5 shall constitute a continuing violation of this consent order and subject Atlantic Southeast Airlines, Inc., to enforcement action; and
7. Payment of the penalty shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the instructions contained in the Attachment to this order. Failure to pay the compromise penalty assessment as ordered will subject Atlantic Southeast Airlines, Inc., to an assessment of interest, penalty, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with this order.

This order will become a final order of the Department 10 days after its service unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

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DEPUTY GENERAL COUNSEL

(SEAL)

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