



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

Issued by the Department of Transportation
on the 16th day of May, 2019

Third Party Complaint of

Food Allergy Research and Education, Inc.

v.

American Airlines, Inc.

Docket DOT-OST-2017-0026

Served May 16, 2019

Third Party Complaint of

Alicia White

v.

American Airlines, Inc.

Docket DOT-OST-2017-0204

Served May 16, 2019

ORDER OF DISMISSAL

On February 15, 2017, Food Allergy Research and Education, Inc., (FARE) filed a third-party complaint against American Airlines, Inc. (American). FARE contends that American violates the Air Carrier Access Act (ACAA), 49 U.S.C. § 41705, and its implementing regulations by refusing to allow passengers with food allergies to preboard in order to wipe down seating areas. On December 17, 2017, Alicia White filed a formal complaint raising the same issue. We have consolidated these complaints for disposition pursuant to 14 CFR 302.404(d). Pursuant to 14 CFR 302.406(a)(2), we dismiss the complaints for the reasons set forth below.

FARE Complaint

FARE is a nonprofit organization based in McLean, Virginia, that advocates for individuals with food allergies.¹ FARE contends that individuals with food allergies are individuals with

¹ See www.foodallergy.org.

disabilities, because food allergies substantially impair major life activities such as breathing and eating.

FARE states that individuals with severe allergies can experience an allergic reaction not only by ingesting food, but also through skin contact. FARE notes that preboarding would allow individuals with allergies and their families to wipe down seating areas, tray tables, armrests, and seat covers to prevent skin contact with allergens. FARE contends that this process of wiping down surfaces can only take place safely and effectively through preboarding, and “cannot be effectively accomplished during general boarding.” Complaint at ¶ 12. FARE contends that preboarding to wipe down surfaces not only reduces the risk of contact with allergens, but also significantly alleviates anxiety, particularly in children with severe allergies.

Next, FARE contends that American has an explicit and publicly-stated policy prohibiting passengers from preboarding to wipe down surfaces.² FARE alleges that this policy not only discriminates against passengers with allergies, but is also misleading because it implies that passengers have no federally-protected right to preboard on the basis of allergy. Complaint at ¶ 16. Specifically, FARE cites 14 CFR 382.93, which provides that carriers must “offer preboarding to passengers with a disability who self-identify at the gate as needing additional time or assistance to board, stow accessibility equipment, or be seated.” FARE concludes that American’s policy violates the ACAA and section 382.93.³

White Complaint

On December 17, 2017, Alicia White (who is represented by FARE’s counsel) filed a separate complaint against American. She states that she purchased three tickets on American for her family to travel to Disney World. She further states that her son has a life-threatening allergy to peanuts. According to Ms. White, after purchasing the tickets, she called American and asked for preboarding to wipe down seat surfaces, but American told them that the airline’s policy was to not allow preboarding for this purpose. She states that American did not offer a refund, but instead offered vouchers, which the family cannot use unless the airline also offers preboarding. Ms. White raised the same legal arguments with respect to preboarding that were set forth in FARE’s complaint.

Answers of American

American filed its response to the FARE complaint on January 19, 2017. American contended that certain passengers with allergies may not qualify as passengers with disabilities, because

² See <https://www.aa.com/i18n/travel-info/experience/dining/special-meals-and-nut-allergies.jsp>. As we explain further below, American’s website only discusses preboarding to wipe down surfaces for peanut and tree nut allergies. American’s web site is silent with respect to preboarding for other types of food allergies. In its answer to the complaint, however, American clarifies that it does not allow preboarding for passengers with any food allergies.

³ In a related claim, FARE contends that American may not charge a fee to allow passengers with allergies to preboard in order to wipe down surfaces, because this type of preboarding is required by law. See 14 CFR 382.31(a)(generally, carriers may not impose a charge to provide a service that is required to be provided under Part 382).

certain allergies may not be so severe as to substantially impair a major life activity. American further contended that not all passengers with food allergies may be sensitive to skin contact.

American admitted that it does not permit passengers with food allergies to preboard in order to wipe down seats, tray tables, and other surfaces. American contended that the ACAA and Part 382 do not require carriers to allow preboarding for this purpose. More specifically, American contended that this type of preboarding is not “on the list of enumerated reasons when pre-boarding may be required” under section 382.93. Answer at ¶ 31. American denied a violation of the ACAA or Part 382.

American filed its answer to the White complaint on February 2, 2018. American reasserted the legal arguments from its answer in the FARE matter, and added that any rule requiring American to allow preboarding would run afoul of a provision of a statute prohibiting the Department from requiring airlines to establish peanut-free buffer zones.⁴

Additional Filings

On November 17, 2017, FARE filed a letter to the docket describing the experiences of approximately 30 individuals who had been adversely affected by American’s preboarding policy.

On November 6, 2018, American filed a notice in both dockets indicating that effective December 12, 2018, it will revise its policies and procedures to allow passengers with peanut and tree nut allergies to preboard in order to wipe down seating areas. American did not concede a violation of Part 382. American indicated that its change in policy would better accommodate passengers with food allergies.

Decision

Section 382.93 states that carriers “must offer preboarding to passengers with a disability who self-identify at the gate as needing additional time or assistance to board, stow accessibility equipment, or be seated.” Passengers with severe nut allergies are passengers with disabilities for purposes of Part 382.⁵

When a passenger with a severe allergy asks for preboarding to wipe down seating surfaces, he or she is requesting additional time “to be seated,” because from the passenger’s perspective, the seating area cannot be safely accessed until it is wiped down. Accordingly, we have reason to believe that when an airline fails to allow passengers with severe nut allergies to preboard to wipe

⁴ Department of Transportation and Related Agencies Appropriations Act of 2000, Pub. L. 106-69, section 346 (“Section 346”).

⁵ In the preamble to Part 382, we indicated that an allergy may or may not rise to the level of a disability, depending on severity. Part 382 Preamble, 73 FR 27459, 27660 (“remember that not all allergies rise to the level of a disability. The fact that someone may have a stuffy nose or sneeze when exposed to dog or cat dander does not necessarily mean that the individual has a disability.”) In contrast, an allergy that “produces shock or respiratory distress that could require emergency or significant medical treatment” would rise to the level of a disability. *Id.*

down seating surfaces, it violates section 382.93.⁶ However, in light of American's decision to revise its preboarding policy, we have determined as an exercise of enforcement discretion that no further action is necessary at this time.

ACCORDINGLY, pursuant to the authority delegated under 49 CFR Part 1, we dismiss the complaint of FARE against American Airlines, Inc., in Docket OST-2017-0026 and the complaint of Alicia White in Docket OST-2017-0204. Pursuant to 14 CFR 302.406(b), this order shall become effective as a final order of the Department thirty days after service of this order.

By:

BLANE A. WORKIE
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An electronic version of this document is available at www.regulations.gov.

⁶ We do not believe that Section 346 has precluded such a determination. Section 346 states:

Hereafter, none of the funds made available under this Act or any other Act, may be used to implement, carry out, or enforce any regulation issued under section 41705 of title 49, United States Code, including any regulation contained in part 382 of title 14, Code of Federal Regulations, or any other provision of law (including any Act of Congress, regulation, or Executive order or any official guidance or correspondence thereto), that requires or encourages an air carrier (as that term is defined in section 40102 of title 49, United States Code) to, on intrastate or interstate air transportation (as those terms are defined in section 40102 of title 49, United States Code)--

- (1) provide a peanut-free buffer zone or any other related peanut-restricted area; or
- (2) restrict the distribution of peanuts,

until 90 days after submission to the Congress and the Secretary of a peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft.

This order does not direct American to provide a peanut-restricted area or to restrict the distribution of peanuts. Rather, it recognizes that passengers with severe allergies to various types of nuts may need additional time to ensure that their own seating area is free from allergens.