



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

Issued by the Department of Transportation
on the 14th day of December, 2016

Third Party Complaint of

Joel Hayes

v.

American Airlines, Inc.

Docket DOT-OST-2014-0077

Served December 14, 2016

ORDER OF DISMISSAL

On May 19, 2014, Mr. Joel Hayes filed a third-party complaint against American Airlines, Inc. (American). He contends that American improperly withdrew 60,000 miles from his AAdvantage frequent flier account, based on a mistaken belief that he had attempted to make fictitious bookings on American's website (www.aa.com). He states that American falsely accused him of fraud, and that American's accusation was actually the result of the carrier's flawed online reservation system. He alleges that American committed unfair and deceptive practices in violation of 49 U.S.C. § 41712. Pursuant to 14 CFR 302.406(a)(2), we dismiss the complaint for the reasons set forth below.

The Complaint

Mr. Hayes states that in October 2013, he booked a round-trip ticket from Austin, Texas, to London, England, for travel in March 2014. He contends that he requested upgrades using frequent flier miles and cash copayment. He further states that he received an upgrade for the return flight fairly quickly, but the upgrade for the outbound flight was delayed. As his flight date approached, according to Mr. Hayes, he repeatedly used American's website to determine whether business class seats were available for his potential upgrade on the outbound flight. He states that he accessed the business class seatmap for his flight by taking the preliminary steps that would ordinarily be used to book a flight (*i.e.*, entering data through the "find flights" tab), while entering placeholder data for passenger details. He contends that at the time, he believed that this was the only way to access the desired business class seatmap. On the day before his departure, a corporate security officer at American informed him that his AAdvantage account had been penalized by 60,000 miles, and that he would not receive an upgrade. Mr. Hayes

explains that American accused him of placing a series of fictitious bookings on the site in an attempt to block premium seats from being booked by others, in order to obtain an upgrade for himself. He asserts that he only intended to see the available seats, not to make fictitious bookings. He further explains that he never intended to make any bookings at all, because he never pressed the “Hold” button for a reservation, or took any other steps that could be reasonably construed as completing a reservation. He further asserts that American’s online systems are improperly designed to create temporary bookings under circumstances like his, where passengers are simply attempting to see available seats. Finally, he argues that until American actually penalized his account, he was never placed on notice that his activity would be considered a fraudulent attempt to create a booking.

Mr. Hayes alleges that American committed unfair and deceptive practices in violation of 49 U.S.C. § 41712. He states that American’s actions were “unfair” because they were arbitrary and capricious. He recognizes that pursuant to the terms and conditions of the AAdvantage program, American is generally entitled to penalize accounts for fraud; however, he argues that this determination must not be based on flawed website architecture or a mistaken belief about a passenger’s intent. Similarly, he argues that American’s actions were “deceptive” because American never warned him that his actions could be construed as fraudulent. Mr. Hayes asks the Department to investigate the matter, to order American to provide additional training to its corporate security staff, and to impose civil penalties.

Answer of American

American filed its answer on June 17, 2014. American states that Mr. Hayes’ “flurry of activity” as the flight departure date approached “had all the hallmarks of prohibited fraudulent, fictitious and abusive bookings that are expressly prohibited by American.” (Answer at 3.) American notes that in the 96 hours prior to departure, Mr. Hayes created 28 bookings using fictitious names, while omitting his AAdvantage account number. American explains that Mr. Hayes began with the flight search page, then entered his origin, destination, and dates of travel. After selecting the flight that he had previously booked, he created a fictitious “placeholder” name, and entered information regarding the type of booking, date of birth, gender, and a contact telephone number, while avoiding the optional frequent flyer number. American contends that this process created passenger name records which placed 45 upgraded seats out of inventory for a total of over 41 hours in the few days before the flight’s departure. American further asserts that American’s website architecture is not at fault, because it provides two ways for a passenger to easily access a flight’s dynamic seatmap without going through a laborious, and fictitious, booking process. American concludes the complaint should be dismissed because there is no evidence of unfair and deceptive business practices, and because the complaint is essentially a breach-of-contract claim for which Mr. Hayes may seek relief in an appropriate forum.

Relevant Law, Analysis and Decision

Pursuant to the Airline Deregulation Act (the Act),¹ the Department of Transportation has the exclusive jurisdiction to regulate unfair and deceptive practices by airlines, including practices that involve frequent flier programs. 49 U.S.C. § 41713(b)(1); 49 U.S.C. § 41712; *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1422, 1428 (2014).

Generally, a practice is unfair to consumers if it causes or is likely to cause substantial harm, the harm cannot reasonably be avoided, and the harm is not outweighed by any countervailing benefits to consumers or to competition.² Here, the practice in dispute is American's withdrawal of miles from a passenger's frequent flier account because the passenger, on 28 separate occasions over a 96-hour period prior to his scheduled flight, entered information used to make new reservations using fictitious names but did not press the "hold" button to complete these reservations.

We will assume *arguendo* that the practice of withdrawing miles from a passenger's frequent flier account causes or is likely to cause substantial harm. We now turn to the question of whether the harm can be reasonably avoided. As noted above, Mr. Hayes states that he entered fictitious information into the reservations portal in order to view seatmaps; however, American provides consumers with an easily-accessible alternative method for doing so. Specifically, at the time of Mr. Hayes' complaint, American's website contained an easily-found feature where consumers could view seatmaps for flights by accessing the prominent "Plan Travel" link at the top of the www.aa.com home page, then selecting "View Available Seats," then entering the appropriate flight information. Consumers may view the seatmap for any available class of service.³ It is not necessary for consumers to go through the process of entering the passenger information that is used to make a new reservation in order to view the seatmap. As such, we conclude that any harm, including the penalty of lost frequent flyer miles, was reasonably avoidable. The fact that Mr. Hayes may not have been personally aware of that feature of American's website does not render American's practice unfair.

We now turn to the question of whether American engaged in a deceptive practice. Here, Mr. Hayes does not allege that American's website contained affirmative misleading statements. Rather, he asserts that American omitted material information by failing to warn him that his

¹ The Act prohibits states from enacting or enforcing a law related to the price, route, or service of an air carrier. 49 U.S.C. § 41713(b)(1).

² The statute providing the Department authority to regulate unfair and deceptive practices, 49 U.S.C. § 41712, is modeled after Section 5 of the FTC Act, 15 U.S.C. § 45. In analyzing whether a practice of a carrier or ticket agent action is unfair, we use a standard similar to the Federal Trade Commission's standard for unfairness. See <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

³ At present, this feature is found under the "Plan Travel" tab, at the "flight schedules and notifications" link. A passenger may also access seat maps by using the "find flights" tab on the home page, without going so far down the booking path as to enter passenger details or a frequent flyer number. Specifically, after the passenger selects a departure airport, arrival airport, and date of departure, and presses the "search" button, a list of available flights will appear. Each available flight has a "seats" link, leading to that flight's seatmap.

actions would be construed as an attempt to create fraudulent bookings, particularly because he took no steps to finalize a booking.

A practice is deceptive if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (*i.e.*, one that is likely to affect the consumer's decision with regard to a product or service).⁴ We do not find American's omissions or practices in this instance were deceptive.

American does not dispute that during the "flurry of activity" in question, Mr. Hayes did not take the steps necessary to complete a booking as it is commonly understood. American also does not dispute that it did not warn him that his actions took seats temporarily out of inventory, or that his acts could be seen as fraudulent. Finally, American does not dispute that it took adverse action against Mr. Hayes without prior warning.

However, under the unusual circumstances presented here, failing to provide such a warning is not deceptive. First, and most importantly, Mr. Hayes was not acting as a reasonable consumer generally acts. In our view, a reasonable consumer who had already booked a flight and who wanted to view available seatmaps would have made an effort to find a way to view those seatmaps online without inputting "placeholder" information into the booking path. As noted above, American already provided the means to do so. Another reasonable alternative would have been to call American's service desk to determine whether any upgrades were available, or to ask American how to access the seatmaps properly online. A reasonable consumer, who had already booked a flight on American's website, would not repeatedly access the same booking path and input fictitious "placeholder" names 28 times over 96 hours to view seatmaps. Further, a reasonable consumer would likely recognize that a carrier would view this activity as improper, even in the absence of an explicit warning.

In our view, it was not a deceptive practice for American to determine that these actions had "all the hallmarks" of a fraudulent attempt to obtain an upgrade and to take adverse action without warning him. Even if American was mistaken about Mr. Hayes' true motives, this fact standing alone would not rise to the level of a deceptive practice.

We see no basis for questioning the methods by which American's corporate security department determined that Mr. Hayes' practice of repeatedly accessing the website's reservations features so close to the date of departure was designed to hold or block seats. In so concluding, we pass no judgment on whether we believe that Mr. Hayes was in fact intending to misuse the system. Because we have found no evidence of unfair or deceptive practices with respect to American's fraud-detection methods, we dismiss that element of the complaint.⁵

⁴ The Federal Trade Commission's standard for deception is instructive. See <http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁵ We disagree with American's assertion that Mr. Hayes made "fictitious bookings" and "fictitious reservations." See Complaint, Attachment 2 (email dated March 20, 2014). As noted above, Mr. Hayes' actions did not create "bookings" or "reservations" as an ordinary consumer would understand those words.

Mr. Hayes also suggests that American committed unfair and deceptive practices by failing to enforce its contractual rights in good faith. Specifically, while he recognizes that American may penalize passengers for fraudulent bookings, he asserts that American's assessment of fraud must be based on an accurate and good-faith assessment that the passenger intended to abuse the program. *See* Complaint at ¶ 26.⁶ American counters that this is effectively a breach of contract claim.

To the extent that Mr. Hayes is re-asserting his claims for unfair and deceptive practices in the guise of a breach of contract claim, we find that American has not acted in an unfair or deceptive manner in enforcing its contract of carriage and deny the claim for the reasons set forth above.

We note, however, that a passenger might in certain circumstances have a cause of action against an airline in a court of competent jurisdiction for breach of contract, including breach of a frequent-flyer agreement. *Ginsberg*, 134 S.Ct. at 1428 (citing *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995)). In *Ginsberg*, the United States Supreme Court held that a passenger may assert a state law claim for breach of the implied covenant of good faith and fair dealing if the applicable state law governing implied covenants seeks to protect the reasonable expectations of the parties, rather than impose the good-faith standards of society on the contract, and the frequent-flyer agreement does not prohibit such claims. *Id.* at 1431-1433. We express no opinion regarding whether Mr. Hayes has a cause of action under any state law.

ACCORDINGLY, pursuant to the authority delegated under 49 CFR Part 1, we dismiss the complaint of Joel Hayes against American Airlines, Inc., in Docket OST-2014-0077. 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 Mr. Hayes states: "American's AAdvantage terms purport to let American forfeit all of a member's award tickets, cancel a member's account, and eject a member from future participation in AAdvantage for any reason or no reason. In general I do not dispute that it is American's right to take such acts if it so chooses. But I question whether American is permitted to take such acts for an improper reason, or, as here, a mistaken reason."