ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19-1070

FLYERS RIGHTS EDUCATION FUND, INC, *et. al.,*
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et. al*.,
Respondents.

Petition for Review of Final Agency Action by the United States Department of Transportation

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BRIEF FOR PETITIONERS

Joseph E. Sandler
Sandler Reiff Lamb Rosenstein & Birkenstock P.C.
1090 Vermont Ave N.W. Suite 750
Washington, D.C. 20005
(202) 479-1111
Sandler@sandlerreiff.com
Counsel for Petitioners

June 26, 2019

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties:

Petitioners

The Petitioners in this case are Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org ("FlyersRights"), and Paul Hudson, the President of FlyersRights. FlyersRights is a District of Columbia nonprofit corporation recognized as an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code. FlyersRights educates the public about issues affecting airline passengers, and advocates for the interests of airline passengers. FlyersRights has no parent, subsidiary or affiliate and has never issued shares or debt securities to the public.

Respondents

The Respondents are the United States Department of Transportation ("DOT"), and Elaine L. Chao, United States Secretary of Transportation.

B. Rulings Under Review

The ruling under review is a final order of the DOT, dated February 1, 2019, denying FlyersRights' February 11, 2015 Petition for Rulemaking: Limitation on Change Fees for International Flights, submitted pursuant to § 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e) and 49 C.F.R. § 5.11. Docket No. TRAN-DOT-OST-2015-0031.

C. Related Cases

FlyersRights is not aware of any related cases.

Respectfully submitted,

/s/ Joseph E. Sandler
Joseph E. Sandler

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the undersigned counsel of record for Petitioners certifies that Flyers Rights Education Fund, Inc. is a District of Columbia nonprofit corporation recognized as an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code. FlyersRights has no parent, subsidiary or affiliate and has never issued shares or debt securities to the public.

RECOMMENDATION ON ORAL ARGUMENT

Because of the novelty and public importance of the issues presented, Petitioners believe the Court may benefit from oral argument.

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* Petitioners chiefly rely on these authorities in this brief.

GLOSSARY

APA	Administrative Procedure Act
CFR	Code of Federal Regulations
DOT	United States Department of Transportation
FlyersRights	Flyers Rights Education Fund d/b/a FlyersRights.org
JA	Joint Appendix (Not Deferred)
Rulemaking Petition	Petition for Rulemaking: Limitation of Change Fees for International Flights submitted by FlyersRights (February 11, 2015)
USC	United States Code

STATUTES AND REGULATIONS

Copies of the pertinent statutes and regulations are set forth in the Addendum.

STATEMENT OF JURISDICTION

This Court's jurisdiction rests on 49 U.S.C. § 46110(a), which provides for judicial review in this Court of orders issued by the Secretary of Transportation.

Petitioners Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org and Paul Hudson (jointly referred to as "FlyersRights") petition for review of the United States Department of Transportation ("DOT") February 1, 2019 order (JA 130-46) ("DOT Order") denying FlyersRights' February 11, 2015 Petition for Rulemaking: Limitation on Change Fees for International Flights, submitted pursuant to § 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e) and 49 C.F.R. § 5.11. JA 15-32 (the "Rulemaking Petition"). The agency rulemaking docket was Docket No. TRAN-DOT-OST-2015-0031.

FlyersRights petitioned this Court for review on March 19, 2019. The petition is timely because it was filed within 60 days of the issuance of the final DOT Order denying the rulemaking petition as prescribed by 49 U.S.C. § 46110(a).

STATEMENT OF THE ISSUES

1. Whether DOT's February 1, 2019 Order denying FlyersRights' February 11, 2015 Petition for Rulemaking ("DOT Order") is arbitrary, capricious, or an abuse of discretion within the meaning of the Administrative Procedure Act.

2. Whether the Order is otherwise contrary to law, specifically, the Federal Aviation Act, which requires airlines to establish reasonable prices, rules and practices in foreign air transportation; and authorizes DOT to reject any price or rate for international air transport, filed or unfiled, inconsistent with the statutory requirements; and authorizes DOT to promulgate regulations to carry out those statutory powers.

STATEMENT OF THE CASE

This Petition seeks review of DOT's February 1, 2019 order "(DOT Order", JA 130-46) denying FlyersRights' February 11, 2015 Petition for Rulemaking: Limitation on Change Fees for International Flights, submitted pursuant to § 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e), and 49 C.F.R. § 5.11. Docket No. TRAN-DOT-OST-2015-0031. ("Rulemaking Petition", JA 15-32).

FlyersRights and Paul Hudson petitioned DOT to exercise its statutory authority under 49 U.S.C. §§ 41501 and 41509 to impose regulations limiting unreasonable, unfair, and deceptive change fees in international air transportation. The Rulemaking Petition explained that, while Congress fully deregulated the domestic airline industry through the Airline Deregulation Act of 1978 ("ADA"), the passage of the International Air Transportation Competition Act of 1979 ("IATCA") did not fully deregulate international air travel. Every airline is required to establish and maintain "reasonable prices, classifications, rules and practices

related to foreign air transportation." 49 U.S.C. § 41501. DOT also has clear statutory authority to determine, after a hearing, that any fee for foreign air transportation or any "classification, rule or practice affecting that price, or the value of the transportation provided under that price," is "unreasonable." 49 U.S.C § 41509(a)(1). With or without a hearing, DOT may cancel or reject a tariff of a foreign air carrier if DOT determines that such cancellation or rejection is *"in the public interest." Id*. §41509(a)(2) (emphasis added). *See* Rulemaking Petition, JA 16-17.

The Rulemaking Petition noted that, in the 34 years since passage of the ADA, DOT has not used its authority to cancel or reject any fare charged in international air transportation. *Id*., JA 17 (citation omitted). The Rulemaking Petition pointed out that the average fee to change international flights has increased sharply in the last 15 years, despite no material change in the costs associated with flight changes to justify the increase. JA 24. In 2008, the average fee to change a change international tickets on major U.S. airlines was $150. *Id*. In 2013, the average fee to change international tickets was approximately $300, with some change fees as high as $750. *Id*. From 2007 to 2014, airline revenue from cancellation and change fees increased from $915 million to over $2.9 billion, an increase of more than 225 percent. Rulemaking Petition Ex. 1, JA 31.

The Rulemaking Petition contended that there has been no material increase in costs associated with passenger flight changes that would "justify the astronomical growth of these fees" and that, accordingly as a logical matter they are manifestly unreasonable. JA 24-26. The Petition noted that refundable fares are not a practical option for most consumers given that on average a refundable ticket is 350 percent more expensive than a non-refundable ticket. JA 25.

The Petition argued that DOT's policy of relying solely on competition to protect consumers is "flawed and obsolete" given the increased concentration in the industry, restraint in capacity and growth of airline profitability. JA 26-28. The Petition requested that DOT use its statutory authority to regulate fares and fees in foreign air transportation and suggested that DOT impose a dollar cap that airlines could exceed by showing a "convincing cost justification." JA 29-30.

More than 30 comments were submitted in the rulemaking petition docket. JA 33-91. In those comments, members of the public expressed frustration with expensive and seemingly unavoidable international change fees. The International Air Transport Association and Airlines for America submitted a comment arguing that DOT was not authorized to establish change fees, Open Skies agreements preclude regulation of international fares and fees, and that market forces alone should determine pricing in international air transport. JA 104-120.

In the Order denying the Rulemaking Petition, DOT cited as the principal precedent its denial a 2012 petition for rulemaking triggered by a domestic fare change fee. *Petition for Rulemaking and Third-Party Complaint of Donald L. Pevsner, Esq.*, Docket No. DOT-OST-2012-0109, DOT Order (Nov. 6, 2012) ("Pevsner Order"). DOT Order, JA 139-140. DOT ruled that it is "not required by statute" to regulate international change fees but rather has the "authority to review such prices and rules on a case-by-case basis" and, accordingly, is "free to rely on policy considerations and other statutory obligations." JA 141.

DOT cited two reasons for denying the Rulemaking Petition. First, DOT held that "regulation of change fees would be inconsistent with the obligations of the United States under its international Open Skies agreements." JA 142. Second, DOT concluded that international change fees "may be based on reasonable factors beyond the direct costs," and could reflect the "cost of lost opportunities" to sell the original ticket while it was held by passenger. DOT assumed that this lost "opportunity cost" translated into "lost revenue" for which the airline would have to compensate by raising base fares if there were any regulation of change fees. JA 145-146. Citing the Pevsner Order, DOT posited that "the lower price for nonrefundable tickets is trade-off for passengers agreeing to a restriction that allows a carrier to manage its inventory and cash flow." JA 145.

SUMMARY OF THE ARGUMENT

DOT has ample authority to regulate international change fees. DOT itself has taken the position it has statutory authority to take action against both filed and unfiled international passenger fares and rules. And it has authority to promulgate regulations to guide such action.

DOT's refusal to exercise that authority was not based on factual assumptions that have any basis in the record and was not based on reasoned decision making. First, regulation of international change fees would not, in many significant cases, be inconsistent with U.S. obligations under "Open Skies agreements," which are bilateral air service agreements generally affording passenger carriers of both the U.S. and the other country broad freedom to determine routes, capacity and pricing for flights between the two countries. DOT has already regulated cancellation-related fees including those charged for international flights and evidently does not regard its regulation as being inconsistent with the Open Skies agreements. Further, approximately 30 percent of international departures from the U.S. are to countries not even party to any Open Skies agreement, including China, Russian and the Dominican Republic among others.

A number of significant Open Skies agreements—including those with Canada and Japan—allow the U.S. to regulate pricing that is "unreasonably high" due to abuse of market dominance. DOT could certainly find that change fees are

unreasonably high because of a dominant position given the decline of competition in the industry. And the U.S. Department of State Model Open Skies Agreement appears to allow for regulation of international change fees.

Second, DOT's economic reasoning does not withstand scrutiny. DOT posited that high change fees are reasonable because they disincentivize passengers from making changes, thereby saving the airlines money and leading to lower fares for passengers "willing to commit to their itinerary." DOT's assumption of lost revenue resulting from the "lost opportunity" to sell the original ticket while the passenger was holding it has no factual support whatsoever in the record and is not logical. DOT failed to consider the unreasonably high cost of refundable tickets and offered no evidence whatsoever that there is any relationship between change fees and any "lost opportunity" or other cost. A Senate staff report concluded the contrary—finding that the existence of such a relationship is belied by the airlines' practice of charging the same change fee regardless of how long in advance of the flight the passenger changes his or her flight.

DOT did not employ reasoned decision making in rejecting the Rulemaking Petition and there is no basis in the record for the factual assumptions upon which it relied. For these reasons, the Rulemaking Petition should be granted.

STATEMENT OF STANDING

Petitioners FlyersRights and Paul Hudson, its President, are adversely affected and substantially aggrieved by the DOT's order and have the necessary standing to challenge the DOT order. As an organization advocating for and representing the interests of airline passengers, FlyersRights and Paul Hudson petitioned the DOT on February 11, 2015 to issue regulations imposing reasonable limits on the amount of change fees that carriers can charge in foreign air transportation. On February 1, 2019, DOT issued a final order denying the petition.

As the petitioners for a rulemaking, Petitioners are adversely affected and substantially aggrieved by DOT's denial. To establish standing, a party must show that it has suffered an injury-in-fact, *i.e.*, a concrete, and particularized, actual or imminent invasion of a legally protected interest; that the injury is fairly traceable to the challenged action of the defendant; and that a favorable decision will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

FlyersRights is a non-profit organization that works to advocate for the interests of airline passengers. FlyersRights has standing as an organization because its member, Petitioner Paul Hudson, has standing to sue in his own right, the interests at stake are germane to FlyersRights' purpose, and Petitioners submitted the

Rulemaking Petition to the DOT requesting the regulation of change fees in foreign air transportation.

Here, Mr. Hudson, a member and President of FlyersRights, has a substantial interest and has suffered an injury sufficient to demonstrate standing. *See* Declaration of Paul Hudson ("Hudson Decl."), Standing Evidentiary Addendum Ex. 1. Mr. Hudson frequently flies on commercial airlines, and averages six international flights per year. (Hudson Decl. ¶ 8). Mr. Hudson has previously inquired regarding the fee to change his international flights, but neither the website nor airline representatives could tell him the exact cost of the fee; knowing that change fees can be expensive, he has never changed an international flight, which has resulted in wasted time and money. *Id*. ¶ 9. He has been inhibited from changing flights in circumstances in which such a change would save substantial time that he could have devoted to his work for the organization. *Id*. ¶¶ 9-10. Mr. Hudson believes that without regulation, airlines will continue to impose unreasonable change fees on international flights, which may impede his ability to do his job. *Id*. ¶¶ 10-11.

Other members of FlyersRights have been forced to pay exorbitant and unreasonable change fees in foreign commercial air travel. On March 25, 2015, FlyersRights member Arthur Anderson submitted a comment on Rulemaking Petition to DOT stating that on a recent international flight he and his wife were

forced to pay a change fee of $300 each, $600 total, for a $400 flight. Declaration of Arthur Anderson ("Anderson Decl."), Standing Evidentiary Addendum Ex. 2; JA 88. Expensive and unavoidable change fees make Mr. Anderson hesitant to fly on commercial airlines for international flights. Anderson Decl. ¶ 6. Mr. Anderson believes that without regulation, airlines will continue to impose unreasonable change fees on international flights. Anderson Decl. ¶ 7.

For these reasons, FlyersRights and Mr. Hudson submitted the Rulemaking Petition to the DOT to regulate change fees in international air travel. Mr. Hudson's injuries, and those of FlyersRights' members, including Mr. Anderson, are caused by DOT's failure to require airlines to establish reasonable change fees for foreign air transportation. The requested relief would redress Mr. Hudson's injury and those of FlyersRights members by requiring DOT to institute a rulemaking to establish such requirements.

Because Mr. Hudson, a member of FlyersRights, has standing to bring this action in his own right, and the interests at stake are germane to FlyersRights' purpose, Petitioners have standing to bring this action.

In addition, these same interests show that Petitioners have prudential standing. See 49 U.S.C § 46110(a) (a "person disclosing a substantial interest in an order issued by the . . . Secretary of Transportation . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the

District of Columbia Circuit . . ."); *Safe Extensions, Inc. v. Federal Aviation Administration*, 509 F.3d 593, 600 (D.C. Cir. 2007) (49 U.S.C. § 46110(a) establishes standard for prudential standing).

ARGUMENT

I. DOT HAS AUTHORITY TO ISSUE REGULATIONS CAPPING CHANGE FEES IN FOREIGN AIR TRANSPORTATION

The Federal Aviation Act of 1958, P.L. No. 85-726, authorized the Civil Aeronautics Board to regulate international airline rates, and required all airlines to file tariffs setting out their fares and rates, 49 U.S.C. §41504; and empowered the CAB (now the DOT) to hold hearings to determine the reasonableness of any price or related charge in the tariff. *Id*. §41509(a).

In 1978, Congress enacted the Airline Deregulation Act of 1978, P.L. No. 95-504, which entirely deregulated pricing of domestic air travel. DOT then eliminated the requirement that airlines file tariffs for domestic travel. *Tariffs for Post-1982 Domestic Travel*, 47 Fed. Reg., 1489201 (April 7, 1982). Then in 1979, Congress enacted the International Air Transportation Competition Act of 1979, P.L. 96-192, which kept in place DOT's authority to regulate international airline rates, but authorized DOT to exempt a class of airlines from the tariff filing requirements if DOT finds such exemption to be in the public interest. Thus, "[i]n the international airline market, … Congress stopped short

of full deregulation." *Wortman v. All Nippon Airways*, 854 F.3d 606, 613 (9th Cir. 2017).

In 1999, DOT adopted a rule creating three categories of countries. 14 C.F.R. § 293.10. Carriers flying between Category A countries and the U.S. need not file tariffs. Carriers flying between Category B countries and the U.S. file tariffs only for standard one-way economy fares. *Id.* Carriers flying between Category C and the U.S. must continue to file tariffs for all their fares. *Id.* In determining the category to which a country is assigned, DOT is to take into account, among things, the existence of an aviation agreement between that country and the U.S., providing for "double disapproval" of filed rates, *Id*. § 293.10(a)(2)(i), meaning that both the U.S. and foreign government must disagree in order to disapprove a filed rate. *See* DOT Order, JA 138.

Regardless of whether an international fare or charge is filed in a tariff, under the law every domestic and foreign air carrier is required to "establish, comply, and enforce-… reasonable prices, classifications, rules and practices related to foreign air transportation; …." 49 U.S.C. §41501(1). With respect to filed tariffs, DOT has clear statutory authority to determine, after a hearing, that any "price for foreign air transportation" or any "classification, rule or practice affecting that price, or the value of the transportation provided under that price," is "unreasonable." 49 U.S.C § 41509(a)(1). With or without a

hearing, DOT may cancel or reject a tariff of a foreign air carrier if DOT determines that such cancellation or rejection is "in the public interest." *Id*. § 41509(a)(2).

As to unfiled rates and charges for international air transport, DOT itself has taken the position that "the Department has always had the statutory authority to take action directly against unfiled passenger fares and rules under a variety of circumstances. And… the Department will reserve the option… of revoking the exemption, and thus of reinstating the tariff-filing obligation with regard to a particular carrier or carriers, or for specific markets, where consistent with the public interest." U.S. Dept. of Transportation, *Notice of Proposed Rulemaking, Exemption from Passenger Tariff-Filing Requirements in Certain Instances*, 62 Fed. Reg. 10758-01, 10763 (March 10, 1997).

Completing the statutory scheme, DOT has general statutory authority to take action that it "considers necessary to carry out this part, including… prescribing regulations, standards and procedures." 49 U.S.C. §41501. The "part" referred to is Part A of Title 49, Subtitle VII, which includes the international pricing provisions of Chapter 415. Thus, DOT has (i) statutory authority to issue regulations governing exercise of (ii) its statutory authority to take action against both filed and unfiled tariffs for international air transport, in order to (iii) enforce the statutory mandate that *all* air carriers "establish, comply,

and enforce-… reasonable prices, classifications, rules and practices related to foreign air transportation; …" 49 U.S.C. § 41501(1).

To be sure, as it contends, DOT is "not *required* by statute to issue regulations setting a cap on change fees in foreign air transportation." (DOT Order, JA 14) (emphasis added). But DOT has *full authority* to issue such a regulation. The issue is whether there was a permissible basis for its failure to do so, in response to the Rulemaking Petition filed by Flyers Rights.

II. STANDARD OF REVIEW OF DOT'S REFUSAL TO INITIATE RULEMAKING

Under Section 706(2)(A) of the Administrative Procedure Act (the "APA"), this Court reviews the DOT's Order to determine if it was "arbitrary, capricious, an abuse of discretion of otherwise not in accordance with law." *Safe Extensions, Inc. v. F.A.A.*, 509 F.3d 593, 604 (D.C. Cir. 2007) (quoting 5 U.S.C. §706(2)(A)). This Court has exclusive jurisdiction, under the Federal Aviation Act, to "affirm, amend, modify or set aside any part of the order and may order" DOT "to conduct further proceedings." 49 U.S.C. § 46110(d).

Refusals to promulgate rules are "susceptible to judicial review, though such review is extremely limited and highly deferential." *Massachusetts v. E.P.A.*, 549 U.S. 497, 527-28 (2007) (citing *National Customs Brokers & Forwarders Assn. of America, Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

"Where . . . 'the proposed rule pertains to a matter of policy within the agency's expertise and discretion, the scope of review should "perforce be a narrow one, limited to ensuring that the [agency] has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.'" *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (internal citations omitted). "Our review turns, more specifically, on whether the agency 'adequately explained the facts and policy concerns it relied on and [whether] . . . those facts have some basis in the record.'" *Flyers Rights Education Fund, Inc. v. Federal Aviation Administration*, 864 F.23d 738, 743 (D.C. Cir. 2017) (quoting *WildEarth Guardians v. EPA,* 751 F.3d 649. 653 (D.C. Cir. 2014) (alterations in original). "In other words, [the Court] look[s] to see whether the agency employed reasoned decision making in rejecting the petition." *Defenders of Wildlife,* 532 F.3d at 919.

In this case, DOT claimed that, in rejecting the Rulemaking Petition, DOT was "free to rely on policy considerations and other statutory obligations." DOT Order, JA 141. DOT actually relied on (i) the supposed inconsistency of any regulation of international change fees with Open Skies agreements between the U.S. and various foreign nations; and (ii) the economic justification offered by the

airline industry for imposing change fees. DOT Order at 13-16, JA 142-146. As to both factors, its reliance was misplaced.

III. REGULATION OF INTERNATIONAL CHANGE FEES WOULD NOT BE INCONSISTENT WITH U.S. OBLIGATIONS UNDER OPEN SKIES AGREEMENTS

In its Order denying the Rulemaking Petition, DOT stated that "[m]ost importantly, regulation of changes fee would be inconsistent with the obligations of the United States under its international Open Skies agreements." DOT Order, JA 142. That is simply not the case.

The U.S. Government has concluded more than 120 "Open Skies" agreements with other nations. *See* U.S. Department of State, *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation* (July 25, 2017), https://www.state.gov/open-skies-partnerships-expanding-the-benefits-of-freer-commercial-aviation/ ("State Dept. Open Skies Fact Sheet"). These agreements "are bilateral air service agreements the U.S. Government negotiates with other countries to provide rights for airlines to offer international passenger and cargo services." *Id*. "These agreements give passenger and freight carriers licensed by, or with principal places of business in, a party broad freedom to determine routes, capacity and pricing for flights involving the two countries on the basis of commercial considerations and with limited regulation." *U.S. Open Skies Agreements Number More than One Hundred*," 105 Am. J. Int'l L. 586 (2011).

DOT notes that the factors it is to consider in exercising its authority over foreign air transportation rates include "'placing maximum reliance on competitive market forces and on actual and potential competition, . . . '" DOT Order, JA 139 (quoting 49 U.S.C. § 40101(a)(6)). And DOT notes, correctly, that it is required to "'act consistently with obligations of the United States under an international agreement' when carrying out responsibilities to regulate foreign air transportation." *Id*. (quoting 49 U.S.C. § 40105(b)(1)(A)).

DOT contends that "[u]nilateral regulation of change fees would substantially interfere with our obligations under Open Skies agreements, and violate that statutory mandate." DOT Order, JA 143. In fact, DOT regulation of international change fees would not "substantially interfere" with U.S. obligations under Open Skies agreements. Those agreements leave significant room for DOT to exercise of its statutory authority to issue regulations governing exercise of its power to take action against both filed and unfiled rates and charges for international air transport, in order to enforce the fundamental statutory requirement mandate that *all* air carriers "establish, comply, and enforce-… reasonable prices, classifications, rules and practices related to foreign air transportation; …." 49 U.S.C. § 41501(1).

A. DOT Has Already Regulated Cancellation-Related Fees Charged By All Airlines Including Those Covered by Open Skies Agreements

First, it appears that DOT itself does not regard Open Skies agreements as an impediment to its ability to regulate refunds in international air transport. A regulation applicable to *all* domestic and international airlines requires the airlines to allow "reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure." 14 C.F.R. § 259.5 (b)(4).

DOT evidently does not regard such a regulation as being inconsistent with U.S. obligations under the Open Skies agreements, since it applies to all airlines, including airlines operating under such agreements. It makes no sense that, under the Open Skies agreements, DOT would somehow be free to require airlines to provide refunds in full in certain circumstances, but unable to regulate the amount of a partial refund—the change fee—under any circumstances.

B. A Substantial Portion of International Air Transportation Is Not Covered by Open Skies Agreements

As DOT acknowledges in its Order, "certain important international markets are not currently covered by Open Skies agreements." DOT Order, JA 143. In fact, approximately 30 percent of international departures from the United States are made to countries that are *no*t covered by Open Skies agreements. *See* U.S.

Department of State, *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation* (July 25, 2017), https://www.state.gov/open-skies-partnerships-expanding-the-benefits-of-freer-commercial-aviation/. China, the country with the sixth most commercial flyer traffic into the United States, is not under an Open Skies agreement. *See* U.S. Department of Transportation, *U.S. International Air Passenger and Freight Statistics* (June 2019), https://cms.dot.gov/sites/dot.gov/files/docs/mission/office-policy/aviation-policy/340936/us-international-air-passenger-and-freight-statistics-december-2018.pdf ("International Passenger Statistics"). Neither is the Dominican Republic, the country with the eighth most commercial flight traffic into the United States. *Id.*

Other very significant foreign markets to which no Open Skies agreement currently applies include Hong Kong, Argentina, Russia, and the Bahamas. See U.S. Department of State, Open Skies Agreements Currently Being Applied (last updated March 19, 2019), https://www.transportation.gov/policy/aviation-policy/open-skies-agreements-being-applied. Thus Open Skies agreements would not preclude any form of regulation by DOT of international change fees in a very significant segment of the market for international air transport.

DOT suggests that FlyersRights' proposed rule is "not limited to change fees that are imposed outside of an Open Skies regime." DOT Order, JA 143. But DOT's determination that it could not grant the Rulemaking Petition in full is not in itself a

basis for rejecting the Rulemaking Petition in its entirety and refusing to engage in *any* regulation of international change fees.

C. Open Skies Agreements Covering Significant Markets Allow DOT to Regulate International Change Fees

Even where air transport between the U.S. and another country is covered by an Open Skies agreement, the agreement may specifically allow for regulation by the U.S. Government, through the DOT, of change fees. For example, certain Open Skies agreements contain a provision that would expressly allow the DOT to regulate pricing for the "protection of consumers from prices that are unreasonably high or restrictive because of the abuse of a dominant position." This Court found that identical language –"prices that are unduly high or restrictive because of the abuse of a dominant position"—found in air service treaties predating the Open Skies agreements, was "express language subjecting them [foreign airlines] to the jurisdiction of the United States over predatory pricing and abuse of monopoly power." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 932 (D.C. Cir. 1984).

Such language is found, for example, in the Open Skies agreement with Canada. Air Transport Agreement Between the Government of the United States of America and the Government of Canada, Article 6, section 1(b) (2007). https://2009-2017.state.gov/e/eb/rls/othr/ata/c/ca/114781.htm. Canada is the country with the most air traffic destined to the U.S. of any country in the world,

with 31,273,468 passengers in 2018. International Passenger Statistics at 20. The Open Skies Agreement between the U.S. and Japan contains an identical provision. Memorandum of Understanding Between United States and Japan, Article X, section 1(b) (2009) https://2009-2017.state.gov/documents/organization/133720.pdf. Japan is the foreign gateway with the fourth most commercial flyer traffic into the U.S. with 10,482,064 passengers departing Japan for the U.S in 2018. International Passenger Statistics at 20.

DOT could certainly find that change fees in many cases are "unreasonably high because of . . . abuse of a dominant position." As FlyersRights pointed out in its Rulemaking Petition, consolidation of airlines has caused the U.S. airline industry to become extremely concentrated, with four airlines controlling 87 percent of domestic flights. *See* Rulemaking Petition at 12, JA 26 (citing P. LeBeau, *New American Airlines Means "Big 4" Control US Skies*, CNBC (Feb. 14, 2013), http://cnbc.com/id/100461115#). With respect to number of total passengers carried in both domestic and international flights in 2017, 65 percent of that total was carried by only four airlines: Southwest, Delta, American and United. *See* Aeroweb, *Top US Airlines in 2017*, http://ww.fi-aeroweb.com/Top-100-US-Airlines.html (last accessed June 22, 2019). And many airlines worldwide have joined one of three "alliances" that have been granted antitrust immunity by DOT under 49 U.S.C. §§

41308, 41309. General Accounting Office, *Airline Competition*, GAO Report 14-515 at 48-49 n. 83.

Thus, DOT could avail itself of the consumer protection language in these Open Skies agreements to impose reasonable regulation of international change fees.

D. The Model Open Skies Agreement Allows for Regulation of International Change Fees

The Model Open Skies Agreement ("Model Agreement") developed and promoted by the US. Department of State (JA 1-14) includes a provision stating that:

> If a Party applies different rules, regulations, terms, conditions or limitations to one or more of its airlines, or to airlines of different countries, each airline of the other Party shall be subject to the least restrictive of such criteria. Nothing in this paragraph shall limit the rights of a party to require airlines of both Parties to adhere to requirements relating to the protection of passenger funds and passenger cancellation and refund rights.

Model Air Transport Agreement, Article 2, section 5, JA 4. As noted above, a change fee effectively operates as a condition to the right to a refund of the price of the original ticket—that is, the passenger may obtain a refund that can be applied to the price of a new ticket but only after deducting the change fee. Accordingly, it appears that under the language of Model Agreement, DOT may regulate international change fees even for transport to and from countries with Open Skies agreements with the U.S., to the extent those agreements are based on the Model Agreement.

And many of the Open Skies agreements are in fact based on the Model Open Skies Agreement developed by the State Department. For example, the Open Skies agreement between the U.S. and Ukraine is an example of an active Open Skies agreement that contains the consumer protection clause set out in the Model Agreement. *See* Air Transport Agreement Between the Government of the United States and the Government of Ukraine, JA 95. Similarly, the Open Skies agreement between the U.S. and the United Kingdom is based on the Model Agreement. U.S.-U.K Air Transport Agreement of Nov. 28, 2018, https://www.state.gov/u-s-uk-air-transport-agreement-of-november-28-2018/.

For these reasons, to the extent DOT's decision to refrain from rulemaking was based on its determination that such rulemaking "would be inconsistent with the obligations of the United States under its international Open Skies agreements," (DOT Order at 13, JA 142), that decision is arbitrary and capricious because it is not reasoned and is not supported by the record.

IV. DOT DID NOT EMPLOY REASONED DECISIONMAKING IN UNCRITICALLY ACCEPTING THE AIRLINE INDUSTRY'S RATIONALE FOR INTERNATONAL CHANGE FEES

As another factor in its decision not to engage in the requested rulemaking, DOT accepted wholesale, uncritically, the contention of the airline industry that "higher change fees disincentivize passengers from making changes to their itineraries, thus increasing efficiency and load predictability, and ultimately leading

to lower base fares for passengers who are willing to commit to their itinerary." DOT Order, JA 144 (citing Motion for Leave to File of the International Air Transportation Association and Airlines for America and Joint Comments Opposing Petition for Rulemaking at 10-12 (July 15, 2015) (JA 104-120)). DOT cites no economic studies or analyses to support this proposition. And DOT's reasoning in accepting this proposition simply does not withstand scrutiny.

First, DOT asserts that "[w]hen a consumer purchases a seat on a specific flight, the airline is prevented from selling the seat to another purchaser." DOT Order at 15, JA 144. That would certainly come as a surprise to the many passengers whose seats are oversold—literally, sold to another purchaser. According to DOT's own statistics, in the first quarter of 2019 alone, 128,683 passengers experienced denied boarding because the flight was oversold. DOT, Office of Aviation Enforcement & Proceedings, *Air Travel Consumer Report* at 41 (June 2019), https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/341291/june-2019-atcr.pdf (last accessed June 26, 2019).

Second, DOT asserts that each airline sets its change fee by "evaluating the cost of lost opportunities to sell that seat during the time period it was removed from inventory by the traveler who had purchased it." DOT Order at 15, JA 144. The assumption that the airline has lost the opportunity to sell the ticket to another passenger while the passenger who originally purchased it is holding it. But if the

original flight is not sold out, no such opportunity has been lost. If the flight was sold out, or nearly so, the airline can resell the passenger's ticket (for the originally booked flight) at a higher price. And that the passenger is able to obtain a ticket for the new flight indicates that there is relatively low demand for those tickets—implying a likelihood that the ticket being forfeited is actually able to fetch a higher price than the new one being purchased.

Third, for these same reasons, the assumption that airlines always lose revenue from passengers changing flights is illogical. And therefore, so is DOT's suggestion that if the agency were in any way to limit or restrict the amount of change fees, "the airline would have to compensate for that lost revenue by raising fares for all its consumers." DOT Order at 16, JA 145.

Finally, DOT suggests that passengers have the option to pay more for refundable tickets and that "'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.'" DOT Order at 16, JA 145 (quoting Pevsner Order). In relying on its 2012 decision in the Pevsner matter, DOT took no account whatsoever of the fact that circumstances have changed greatly—specifically, that from 2007 to 2014, airline revenue from cancellation and change fees increased from $915 million to over $2.9 billion, an increase of more than 225 percent. Rulemaking Petition Ex. 1, JA 031. This alone is a "fundamental change in the factual premises previously

considered by the agency," *WildEarth Guardians*, 751 F.3d 653, which DOT did not even acknowledge let alone consider.

Moreover, there is no evidence cited by DOT that there is any relationship whatsoever between the premium for refundable tickets, or the amount of change fees, on the one hand, and any "lost opportunity" or other cost to airlines of "managing their inventory," on the other. To the contrary, a report prepared by the minority staff of the U.S. Senate Committee on Commerce, Science and Transportation found that "the change/cancellation fees charged by most airlines bear little to no relation to the actual cost incurred by the airline when a ticket is changed or cancelled." U.S. Senate Committee on Commerce Science and Transportation, Office of Oversight and Investigations, Minority Staff, *The Unfriendly Skies: Consumer Confusion Over Airline Fees* at 9 (Aug. 6, 2015) available at https://www.commerce.senate.gov/public/_cache/files/79d9b832-3d92-48a4-af4f-9a4cce28f5ae/8CB39475B79345233CAE7F94EB0129E1.8-6-15-final-airline-report.pdf (last accessed June 26, 2019) ("Senate Staff Report"). The Senate Staff Report explained that:

> Airlines justify their change/cancellation fees by claiming the fees are necessary to cover the opportunity cost of an airline not being able to rebook a seat. This rationale however, fails to account for why many airlines charge the same penalty fees regardless of the lead time a passenger provides for an airline to resell the ticket.

Id. at 13. The Senate Staff Report notes five of seven surveyed airlines that charge change cancellation fees charge consumers a flat fee for a change/cancellation that does not vary based on how long the change is made in advance of the scheduled flight. *Id*. And as FlyersRights noted in the Rulemaking Petition, in April 2013, United, American, Delta and US Airways all raised their domestic changes fees to exactly $200 within two weeks of each other. (Rulemaking Petition at 14, JA 28 (citing Associated Press, *Airline Mergers Have Already Increased Fares*, CBS (Aug. 14, 2013), http:dfw/cbslocal.com/2013/08/14/airline-mergers-have-already-increased-fares/). That is hardly indicative of "each airline …us[ing] its best judgment in evaluating the cost of lost opportunities" to sell the original ticket, cited by DOT as the key justification for change fees. DOT Order at 15, JA 144.

The Senate Staff Report goes on to explain that:

> Further, if the rationale for change/cancellation fees is to deter consumers from purchasing airfare before their travel plans are finalized, airlines should strive to provide consumers with clear notice of the potential for substantial penalties should they wish to change their plans. However, committee minority staff review of the website of the seven major airlines that charge change/cancellation fees shows that consumers do not generally receive prominent disclosures regarding these fees when procuring airfares.

Senate Staff Report at 13-14. Indeed, the lack of transparency of change fees and other ancillary fees was noted in GAO's Report, GAO, *Airline Competition*, Rept. No. GAO-14-515 at 46-47 (2014) (cited in DOT Order at 5 n. 5, JA 134).

Thus, the economic rationale cited by for its refusal to regulate DOT—that any regulation of change fees would raise costs for airlines and fares for consumers—is not supported by any facts in the record or otherwise, and is not well-reasoned.

CONCLUSION

DOT's decision not to engage in rulemaking was based on erroneous assertions about the Open Skies agreements and its economic rationale was based factual assumptions not in the record and was not well-reasoned. For these reasons, as set forth above, the Petition for Review should be granted and the DOT's decision not to institute a rulemaking should be reversed and remanded with instructions to institute rulemaking.

Respectfully Submitted,

/s/ Joseph E. Sandler

Joseph E. Sandler
Sandler Reiff Lamb Rosenstein & Birkenstock
1090 Vermont Ave N.W. Suite 750
Washington, D.C. 20005
(202) 479-1111
Sandler@sandlerreiff.com
Counsel for Petitioners

Dated: June 26, 2019

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that the foregoing brief complies with the length limitation of Fed. R. App. P. 32(a)(7)(A) because the principal brief contains 28 pages.

/s/ Joseph E. Sandler
Joseph E. Sandler
Counsel for Petitioners

Dated: June 26, 2019

CERTIFICATE OF SERVICE

I, Joseph E. Sandler, hereby certify that on this 26th day of June 2019, I electronically filed the foregoing document and attached addendums with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in this case who are registered CM/ECF users will be served by the CM/ECF system:

Thais-Lyn Trayer, Esq.
Abby Wright, Esq.
U.S. Department of Justice
950 Pennsylvania Ave N.W.
Washington, D.C. 20530
Tel. (202) 514-3159
Thais-Lyn-Trayer@usdoj.gov
Abby.Wright@usdoj.gov

Attorneys for Respondents

/s/ Joseph E. Sandler
Joseph E. Sandler

Counsel for Petitioners

Dated: June 26, 2019

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19-1070

FLYERS RIGHTS EDUCATION FUND, INC, *et. al.,*
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et. al*.,
Respondents.

Petition for Review of Final Agency Action by the United States Department of Transportation

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STATUTORY AND REGULATORY ADDENDUM

Joseph E. Sandler
Sandler Reiff Lamb Rosenstein & Birkenstock P.C.
1090 Vermont Ave N.W. Suite 750
Washington, D.C. 20005
(202) 479-1111
Sandler@sandlerreiff.com
Counsel for Petitioners

June 26, 2019

STATUTORY AND REGULATORY ADDENDUM

STATUTES

REGULATIONS

STATUTES

5 U.S.C. § 553
§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--
(1) a military or foreign affairs function of the United States; or
(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--
(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--
(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.
(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706
§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. § 41501
§ 141501. Establishing reasonable prices, classifications, rules, practices, and divisions of joint prices for foreign air transportation

Every air carrier and foreign air carrier shall establish, comply with, and enforce--
(1) reasonable prices, classifications, rules, and practices related to foreign air transportation; and

(2) for joint prices established for foreign air transportation, reasonable divisions of those prices among the participating air carriers or foreign air carriers without unreasonably discriminating against any of those carriers.

49 U.S.C. § 41509

§ 41509. Authority of the Secretary of Transportation to suspend, cancel, and reject tariffs for foreign air transportation

(a) Cancellation and rejection.--(1) On the initiative of the Secretary of Transportation or on a complaint filed with the Secretary, the Secretary may conduct a hearing to decide whether a price for foreign air transportation contained in an existing or newly filed tariff of an air carrier or foreign air carrier, a classification, rule, or practice affecting that price, or the value of the transportation provided under that price, is lawful. The Secretary may begin the hearing at once and without an answer or another formal pleading by the air carrier or foreign air carrier, but only after reasonable notice. If, after the hearing, the Secretary decides that the price, classification, rule, or practice is or will be unreasonable or unreasonably discriminatory, the Secretary may cancel or reject the tariff and prevent the use of the price, classification, rule, or practice.
(2) With or without a hearing, the Secretary may cancel or reject an existing or newly filed tariff of a foreign air carrier and prevent the use of a price, classification, rule, or practice when the Secretary decides that the cancellation or rejection is in the public interest.
(3) In deciding whether to cancel or reject a tariff of an air carrier or foreign air carrier under this subsection, the Secretary shall consider--
(A) the effect of the price on the movement of traffic;
(B) the need in the public interest of adequate and efficient transportation by air carriers and foreign air carriers at the lowest cost consistent with providing the transportation;
(C) the standards prescribed under law related to the character and quality of transportation to be provided by air carriers and foreign air carriers;
(D) the inherent advantages of transportation by aircraft;
(E) the need of the air carrier and foreign air carrier for revenue sufficient to enable the air carrier and foreign air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier and foreign air carrier transportation;
(F) whether the price will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation;

(G) reasonably estimated or foreseeable future costs and revenues for the air carrier or foreign air carrier for a reasonably limited future period during which the price would be in effect; and
(H) other factors.
(b) Suspension.--(1)(A) Pending a decision under subsection (a)(1) of this section, the Secretary may suspend a tariff and the use of a price contained in the tariff or a classification, rule, or practice affecting that price.
(B) The Secretary may suspend a tariff of a foreign air carrier and the use of a price, classification, rule, or practice when the suspension is in the public interest.
(2) A suspension becomes effective when the Secretary files with the tariff and delivers to the air carrier or foreign air carrier affected by the suspension a written statement of the reasons for the suspension. To suspend a tariff, reasonable notice of the suspension must be given to the affected carrier.
(3) The suspension of a newly filed tariff may be for periods totaling not more than 365 days after the date the tariff otherwise would go into effect. The suspension of an existing tariff may be for periods totaling not more than 365 days after the effective date of the suspension. The Secretary may rescind at any time the suspension of a newly filed tariff and allow the price, classification, rule, or practice to go into effect.
(c) Effective tariffs and prices when tariff is suspended, canceled, or rejected.--(1) If a tariff is suspended pending the outcome of a proceeding under subsection (a) of this section and the Secretary does not take final action in the proceeding during the suspension period, the tariff goes into effect at the end of that period subject to cancellation when the proceeding is concluded.
(2)(A) During the period of suspension, or after the cancellation or rejection, of a newly filed tariff (including a tariff that has gone into effect provisionally), the affected air carrier or foreign air carrier shall maintain in effect and use--
(i) the corresponding seasonal prices, or the classifications, rules, and practices affecting those prices or the value of transportation provided under those prices, that were in effect for the carrier immediately before the new tariff was filed; or
(ii) another price provided for under an applicable intergovernmental agreement or understanding.
(B) If the suspended, canceled, or rejected tariff is the first tariff of the carrier for the covered transportation, the carrier, for the purpose of operations during the period of suspension or pending effectiveness of a new tariff, may file another tariff containing a price or another classification, rule, or practice affecting the price, or the value of the transportation provided under the price, that is in effect (and not subject to a suspension order) for any air carrier providing the same transportation.

(3) If an existing tariff is suspended or canceled, the affected air carrier or foreign air carrier, for the purpose of operations during the period of suspension or pending effectiveness of a new tariff, may file another tariff containing a price or another classification, rule, or practice affecting the price, or the value of the transportation provided under the price, that is in effect (and not subject to a suspension order) for any air carrier providing the same transportation.

(d) Response to refusal of foreign country to allow air carrier to charge a price.--When the Secretary finds that the government or an aeronautical authority of a foreign country has refused to allow an air carrier to charge a price contained in a tariff filed and published under section 41504 of this title for foreign air transportation to the foreign country--

(1) the Secretary, without a hearing--

(A) may suspend any existing tariff of a foreign air carrier providing transportation between the United States and the foreign country for periods totaling not more than 365 days after the date of the suspension; and

(B) may order the foreign air carrier to charge, during the suspension periods, prices that are the same as those contained in a tariff (designated by the Secretary) of an air carrier filed and published under section 41504 of this title for foreign air transportation to the foreign country; and

(2) a foreign air carrier may continue to provide foreign air transportation to the foreign country only if the government or aeronautical authority of the foreign country allows an air carrier to start or continue foreign air transportation to the foreign country at the prices designated by the Secretary.

(e) Standard foreign fare level.--(1)(A) In this subsection, "standard foreign fare level" means--

(i) for a class of fares existing on October 1, 1979, the fare between 2 places (as adjusted under subparagraph (B) of this paragraph) filed for and allowed by the Civil Aeronautics Board to go into effect after September 30, 1979, and before August 13, 1980 (with seasonal fares adjusted by the percentage difference that prevailed between seasons in 1978), or the fare established under section 1002(j)(8) of the Federal Aviation Act of 1958 (Public Law 85-726, 72 Stat. 731), as added by section 24(a) of the International Air Transportation Competition Act of 1979 (Public Law 96-192, 94 Stat. 46); or

(ii) for a class of fares established after October 1, 1979, the fare between 2 places in effect on the effective date of the establishment of the new class.

(B) At least once every 60 days for fuel costs, and at least once every 180 days for other costs, the Secretary shall adjust the standard foreign fare level for the particular foreign air transportation to which the standard foreign fare level applies by increasing or decreasing that level by the percentage change from the last previous period in the actual operating cost for each available seat-mile. In

adjusting a standard foreign fare level, the Secretary may not make an adjustment to costs actually incurred. In establishing a standard foreign fare level and making adjustments in the level under this paragraph, the Secretary may use all relevant or appropriate information reasonably available to the Secretary.
(2) The Secretary may not decide that a proposed fare for foreign air transportation is unreasonable on the basis that the fare is too low or too high if the proposed fare is neither more than 5 percent higher nor 50 percent lower than the standard foreign fare level for the same or essentially similar class of transportation. The Secretary by regulation may increase the 50 percent specified in this paragraph.
(3) Paragraph (2) of this subsection does not apply to a proposed fare that is not more than--
(A) 5 percent higher than the standard foreign fare level when the Secretary decides that the proposed fare may be unreasonably discriminatory or that suspension of the fare is in the public interest because of an unreasonable regulatory action by the government of a foreign country that is related to a fare proposal of an air carrier; or
(B) 50 percent lower than the standard foreign fare level when the Secretary decides that the proposed fare may be predatory or discriminatory or that suspension of the fare is required because of an unreasonable regulatory action by the government of a foreign country that is related to a fare proposal of an air carrier.
(f) Submission of orders to President.--The Secretary shall submit to the President an order made under this section suspending, canceling, or rejecting a price for foreign air transportation, and an order rescinding the effectiveness of such an order, before publishing the order. Not later than 10 days after its submission, the President may disapprove the order on finding disapproval is necessary for United States foreign policy or national defense reasons.
(g) Compliance as condition of certificate or permit.--This section and compliance with an order of the Secretary under this section are conditions to any certificate or permit held by an air carrier or foreign air carrier. An air carrier or foreign air carrier may provide foreign air transportation only as long as the carrier maintains prices for that transportation that comply with this section and orders of the Secretary under this section.

49 U.S.C. § 41504
§ 41504. Tariffs for foreign air transportation

(a) Filing and contents.--In the way prescribed by regulation by the Secretary of Transportation, every air carrier and foreign air carrier shall file with the Secretary, publish, and keep open to public inspection, tariffs showing the prices for the

foreign air transportation provided between places served by the carrier and provided between places served by the carrier and places served by another air carrier or foreign air carrier with which through service and joint prices have been established. A tariff--

(1) shall contain--

(A) to the extent the Secretary requires by regulation, a description of the classifications, rules, and practices related to the foreign air transportation;

(B) a statement of the prices in money of the United States; and

(C) other information the Secretary requires by regulation; and

(2) may contain--

(A) a statement of the prices in money that is not money of the United States; and

(B) information that is required under the laws of a foreign country in or to which the air carrier or foreign air carrier is authorized to operate.

(b) Changes.--(1) Except as provided in paragraph (2) of this subsection, an air carrier or foreign air carrier may change a price or a classification, rule, or practice affecting that price or the value of the transportation provided under that price, specified in a tariff of the carrier for foreign air transportation only after 30 days after the carrier has filed, published, and posted notice of the proposed change in the same way as required for a tariff under subsection (a) of this section. However, the Secretary may prescribe an alternative notice requirement, of at least 25 days, to allow an air carrier or foreign air carrier to match a proposed change in a passenger fare or a charge of another air carrier or foreign air carrier. A notice under this paragraph must state plainly the change proposed and when the change will take effect.

(2) If the effect of a proposed change would be to begin a passenger fare that is outside of, or not covered by, the range of passenger fares specified under section 41509(e)(2) and (3) of this title, the proposed change may be put into effect only on the expiration of 60 days after the notice is filed under regulations prescribed by the Secretary.

(c) Rejection of changes.--The Secretary may reject a tariff or tariff change that is not consistent with this section and regulations prescribed by the Secretary. A tariff or change that is rejected is void.

49 U.S.C. § 46110
§ 46110. Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of

Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate. The Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security

Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.
(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

49 U.S.C. § 41308
§ 41308. Exemption from the antitrust laws

(a) Definition.--In this section, "antitrust laws" has the same meaning given that term in the first section of the Clayton Act (15 U.S.C. 12).
(b) Exemption authorized.--When the Secretary of Transportation decides it is required by the public interest, the Secretary, as part of an order under section 41309 or 42111 of this title, may exempt a person affected by the order from the antitrust laws to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order.
(c) Exemption required.--In an order under section 41309 of this title approving an agreement, request, modification, or cancellation, the Secretary, on the basis of the findings required under section 41309(b)(1), shall exempt a person affected by the order from the antitrust laws to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order.

49 U.S.C. § 41309
§ 41309. Cooperative agreements and requests

(a) Filing.--An air carrier or foreign air carrier may file with the Secretary of Transportation a true copy of or, if oral, a true and complete memorandum of, an agreement (except an agreement related to interstate air transportation), or a request for authority to discuss cooperative arrangements (except arrangements related to interstate air transportation), and any modification or cancellation of an agreement, between the air carrier or foreign air carrier and another air carrier, a foreign carrier, or another carrier.
(b) Approval.--The Secretary of Transportation shall approve an agreement, request, modification, or cancellation referred to in subsection (a) of this section when the Secretary finds it is not adverse to the public interest and is not in violation of this part. However, the Secretary shall disapprove--

(1) or, after periodic review, end approval of, an agreement, request, modification, or cancellation, that substantially reduces or eliminates competition unless the Secretary finds that--
(A) the agreement, request, modification, or cancellation is necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations); and
(B) the transportation need cannot be met or those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive; or
(2) an agreement that--
(A) is between an air carrier not directly operating aircraft in foreign air transportation and a carrier subject to subtitle IV of this title; and
(B) governs the compensation the carrier may receive for the transportation.
(c) Notice and opportunity to respond or for hearing.--(1) When an agreement, request, modification, or cancellation is filed, the Secretary of Transportation shall give the Attorney General and the Secretary of State written notice of, and an opportunity to submit written comments about, the filing. On the initiative of the Secretary of Transportation or on request of the Attorney General or Secretary of State, the Secretary of Transportation may conduct a hearing to decide whether an agreement, request, modification, or cancellation is consistent with this part whether or not it was approved previously.
(2) In a proceeding before the Secretary of Transportation applying standards under subsection (b)(1) of this section, a party opposing an agreement, request, modification, or cancellation has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available. The party defending the agreement, request, modification, or cancellation has the burden of proving the transportation need or public benefits.
(3) The Secretary of Transportation shall include the findings required by subsection (b)(1) of this section in an order of the Secretary approving or disapproving an agreement, request, modification, or cancellation.

REGULATIONS

49 C.F.R. § 5.11
§ 5.11 Filing of petitions.

(a) Any person may petition the Secretary to issue, amend, or repeal a rule, or for a permanent or temporary exemption from any rule.
(b) Each petition filed under this section must:
(1) Be submitted in duplicate to the Docket Clerk, Office of the General Counsel, Department of Transportation, Washington, DC 20590;

(2) Set forth the text or substance of the rule or amendment proposed, or of the rule from which the exemption is sought, or specify the rule that the petitioner seeks to have repealed, as the case may be;
(3) Explain the interest of the petitioner in the action requested including, in the case of a petition for an exemption, the nature and extent of the relief sought and a description of the persons to be covered by the exemption;
(4) Contain any information and arguments available to the petitioner to support the action sought; and
(5) In the case of a petition for exemption, unless good cause is shown in that petition, be submitted at least 60 days before the proposed effective date of the exemption.

14 C.F.R. § 259.5
§ 259.5 Customer Service Plan.

(a) Adoption of Plan. Each covered carrier shall adopt a Customer Service Plan applicable to its scheduled flights and shall adhere to the plan's terms.

(b) Contents of Plan. Each Customer Service Plan shall address the following subjects and comply with the minimum standards set forth:

(1) Disclosing on the carrier's website, at the ticket counter, or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation, that the lowest fare offered by the carrier may be available elsewhere if that is the case;

(2) Notifying consumers of known delays, cancellations, and diversions as required by 14 CFR 259.8 of this chapter;

(3) Delivering baggage on time, including making every reasonable effort to return mishandled baggage within twenty-four hours, compensating passengers for reasonable expenses that result due to delay in delivery, as required by 14 CFR part 254 for domestic flights and as required by applicable international agreements for international flights, and reimbursing passengers for any fee charged to transport a bag if that bag is lost;

(4) Allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure;

(5) Where ticket refunds are due, providing prompt refunds, as required by 14 CFR 374.3 and 12 CFR part 226 for credit card purchases, and within 20 days after

receiving a complete refund request for cash and check purchases, including refunding fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation;

(6) Properly accommodating passengers with disabilities, as required by part 382 of this chapter, and other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays;

(7) Meeting customers' essential needs during lengthy tarmac delays as required by § 259.4 of this chapter and as provided for in each covered carrier's contingency plan;

(8) Handling “bumped” passengers with fairness and consistency in the case of oversales as required by part 250 of this chapter and as described in each carrier's policies and procedures for determining boarding priority;

(9) Disclosing cancellation policies, frequent flyer rules, aircraft seating configuration, and lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff;

(10) Notifying consumers in a timely manner of changes in their travel itineraries;

(11) Ensuring responsiveness to consumer problems as required by § 259.7 of this chapter; and

(12) Identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.

(c) Self-auditing of plan and retention of records. Each carrier that is required to adopt a Customer Service Plan shall audit its own adherence to its plan annually. Carriers shall make the results of their audits available for the Department's review upon request for two years following the date any audit is completed.

14 C.F.R. § 293.10
§ 293.10 Exemption.

(a) Air carriers and foreign air carriers are exempted from the duty to file passenger tariffs with the Department of Transportation, as required by 49 U.S.C. 41504 and 14 CFR part 221, as follows:

(1) The Assistant Secretary for Aviation and International Affairs will, by notice, issue and periodically update a list establishing the following categories of markets:

(i) In Category A markets, carriers are exempted from the duty to file all passenger tariffs unless they are nationals of countries listed in Category C, or are subject to the provisions of paragraph (c) of this section.

(ii) In Category B markets, carriers are exempted from the duty to file all passenger tariffs except those setting forth one-way economy-class fares and governing provisions thereto, unless they are nationals of countries listed in Category C, or are subject to the provisions of paragraph (c) of this section.

(iii) In Category C markets, carriers shall continue to file all passenger tariffs, except as provided in § 293.10(b);

(2) The Assistant Secretary will list country-pair markets falling in Categories A and C, taking into consideration the factors in paragraphs (a)(2)(i) through (iv) of this section. All country-pair markets not listed in Categories A or C shall be considered to be in Category B and need not be specifically listed.

(i) Whether the U.S. has an aviation agreement in force with that country providing double-disapproval treatment of prices filed by the carriers of the Parties;

(ii) Whether the country's Government has disapproved or deterred U.S. carrier price leadership or matching tariff filings in any market;

(iii) Whether the country's Government has placed significant restrictions on carrier entry or capacity in any market; and

(iv) Whether the country's government is honoring the provisions of the bilateral aviation agreement and there are no significant bilateral problems.

(b) By notice of the Assistant Secretary, new country-pair markets will be listed in the appropriate category, and existing country-pair markets may be transferred between categories.

(c) Notwithstanding a determination that a country is in Category A or B, if the Assistant Secretary finds that effective price leadership opportunities for U.S. carriers are not available between that country and any third country, carriers that are nationals of such country may be required to file tariffs, as provided under part

221 or as otherwise directed in the notice, for some or all of their services between the U.S. and third countries.

(d) Air carriers and foreign air carriers are exempted from the duty to file governing rules tariffs containing general conditions of carriage with the Department of Transportation, as required by 49 U.S.C. 41504 and 14 CFR part 221. A description of the general conditions of carriage will be included in the Assistant Secretary's initial notice.

(e) Notwithstanding paragraph (d) of this section, air carriers and foreign air carriers shall file and maintain a tariff with the Department to the extent required by 14 CFR 203.4 and other implementing regulations.

(f) Authority for determining what rules are covered by paragraph (d) of this section and for determining the filing format for the tariffs required by paragraph (e) of this section is delegated to the Director of the Office of International Aviation.

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19-1070

FLYERS RIGHTS EDUCATION FUND, INC, *et. al.,*
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et. al*.,
Respondents.

Petition for Review of Final Agency Action by the United States Department of Transportation

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STANDING EVIDENTIARY ADDENDUM

Joseph E. Sandler
Sandler Reiff Lamb Rosenstein & Birkenstock P.C.
1090 Vermont Ave N.W. Suite 750
Washington, D.C. 20005
(202) 479-1111
Sandler@sandlerreiff.com
Counsel for Petitioners

June 26, 2019

STANDING EVIDENTIARY ADDENDUM

EXHIBIT 1

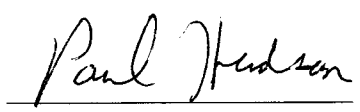
Declaration of Paul Hudson

I, Paul Hudson, declare:

1. I am the President and a member of Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org ("FlyersRights"). I have been President of FlyersRights since 2013.
2. FlyersRights is the largest nonprofit airline passenger organization with over 50,000 members and supporters nationwide.
3. FlyersRights was founded by Kate Hanni in 2007 after she, along with thousands of others were stranded on the tarmac for over 9 hours.
4. FlyersRights was the principal advocate of the 2009 Three Hour Rule ending tarmac confinements, for truth in scheduling regulations by the Department of Transportation, and for the inclusion of several airline passenger rights provisions in the 2012, 2016 and 2018 FAA Reauthorization Acts.
5. FlyersRights operates a toll-free hotline for airline passengers and advocates for their rights and interests.
6. On February 11, 2015 FlyersRights and I submitted a Petition for Rulemaking to the United States Department of Transportation ("DOT") to place limitations on change fees for international flights. On February 1, 2019, the DOT denied the Petition.
7. I have been an advocate for air safety and security for over 25 years. My advocacy began after my 16 year-old daughter was killed on Pan Am 103.

8. I frequently fly on commercial airlines, and average six international flights per year.
9. While flying internationally in the past I have sometimes wanted to change my flight, but when I inquired neither the website nor airline representatives could tell me the exact cost of the change fee. Because I know that change fees can be expensive, I have never changed my international flights, which has caused me inconvenience in travel plans and wasted time and money.
10. Unclear and unavoidable change fees make me hesitant to fly on commercial airlines for international flights, however, my job requires that I still do so.
11. Without regulation, I believe the airlines will continue to impose unreasonable change fees on international flights.
12. For the reasons explained above, FlyersRights members, including myself, are harmed from unreasonable international change fees and the DOT's denial of the Petition for Rule Making to place limitations on change fees for international flights.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on June 22, 2019 in Crofton, Maryland.



Paul Hudson

STANDING EVIDENTIARY ADDENDUM

EXHIBIT 2

Declaration of Arthur Anderson

I, Arthur Eric Anderson, declare:

1. I am a member/supporter of Flyers Rights Education Fund, Inc., d/b/a FlyersRights.org ("FlyersRights").
2. FlyersRights is the largest nonprofit airline passenger organization with thousands of members and supporters nationwide.
3. On February 11, 2015 FlyersRights submitted a Petition for Rulemaking to the United States Department of Transportation ("DOT") to place limitations on change fees for international flights. On February 1, 2019, the DOT denied the Petition.
4. On March 25, 2015, I submitted a comment on the Petition for Rulemaking to the DOT to place limitations on change fees for international flights because I have been forced to pay unreasonably expensive change fees for international flights. A true copy of said comment is affixed hereto as Exhibit A.
5. I hereby confirm the truth and accuracy of my March 2015 comment.
6. Expensive and unavoidable change fees make me hesitant to fly on commercial airlines for international flights.
7. Without regulation, I believe the airlines will continue to impose unreasonable change fees on international flights.
8. For the reasons explained above, FlyersRights members, including myself, are harmed from unreasonable international change fees and the DOT's denial of the

Petition for Rule Making to place a limitation on change fees for international flights.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on June 23, 2019 in Seattle, WA

Arthur Eric Anderson

regulations.gov
Your Voice in Federal Decision-Making

Exhibit A

Arthur Anderson (Correspondence)

This Other document was issued by the **Department of Transportation** (DOT)

For related information, **Open Docket Folder**

Comment Period Closed

ID: DOT-OST-2015-0031-0031

Content

I recently flew from Chile Punta Arenas to Santiago using LAN and connecting in Santiago with United Airlines to Houston. I wanted to book a later flight from 6:30 am to 3 pm because my lay over in Santiago was 12 hours. (United had check in of baggage only 3 hours before the flight so the option of lugging my baggage around the airport for 9 hours was daunting.) The change fee was $300 per person for a ~$400 flight. There were plenty of seats on the later flight the LAN folks said. United change my return flights and will not compensate me for flight time changes. I had purchased an economy plus ticket so I did not develop a deep venous thrombosis. These fees were an additional $800 travel expense for my wife and I.

Document Information

Date Posted:
Mar 25, 2015

Show More Details

Submitter Information

Submitter Name:
Arthur Anderson

City:
Seattle

Country:
United States

State or Province:
WA

ZIP/Postal Code:
98116

Comments

0
Comments Received*

Docket Information

This document is contained in
DOT-OST-2015-0031