BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

National Association for Biomedical Research	)	
	)	
v.	)	Docket No. OST-2018-0124
	)	
United Airlines, Inc., British Airways, PLC	)	
China Southern Airlines Co., Ltd.,	)	
and Qatar Airways Company, Q.C.S.C.	)	

ANSWER AND MOTION TO DISMISS OF
UNITED AIRLINES, INC.

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September 26, 2018

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United[1] hereby files this Answer[2] and Motion to Dismiss in response to the formal third-party complaint ("Complaint") submitted to the Department by the National Association for Biomedical Research ("NABR") on August 21, 2018.[3] The Complaint alleges that United and the three other named airlines (together, "Respondents") improperly discriminate against customers who seek to transport animals for the purpose of live animal research undertaken at medical and other research facilities.[4] The Complaint requests that the Department investigate Respondents'

[1] Common names are used for airlines.

[2] United notes that it was never formally served with the complaint as required by 14 CFR 302.404 and is technically not required to provide an Answer. See 14 CFR 302.405 (requiring answers "after the date of the service of the formal complaint"). Nevertheless, and without waiving any objections, United has provided the following Answer pursuant to the Department's email of September 5, 2018, granting Respondents an extension of time and requiring answers by Sept. 26, 2018.

[3] *National Association for Biomedical Research v. United Airlines, Inc., British Airways, PLC, China Southern Airlines, Co., Ltd., and Qatar Airways Company, Q.C.S.C.*, Complaint for Discrimination in Violation of 49 U.S.C § 41310(A); Unlawful Refusal in Violation of 49 U.S.C. § 44902(B); Failure to Establish Reasonable Practices in Violation of 49 U.S.C. § 41501; and Unlawful Refusal to Transport Baggage in Violation of 49 U.S.C. § 4170 (filed August 21, 2018) ("Complaint").

[4] Complaint at 1.

practices and seek remedies, including "cease and desist orders directed to each airline, civil penalties, and other appropriate enforcement remedies, against each Respondent."[5]

United appreciates the opportunity to respond to the issues raised by the Complaint. United prioritizes and devotes significant resources to complying with the Department's anti-discrimination regulations and ensuring that its policies promote and provide fair treatment for all members of the travelling public. However, United is confident that its current policy is reasonable under the circumstances and does not constitute discrimination that violates any applicable statute or regulation.

United respectfully submits that neither a Department investigation nor an enforcement action is warranted in this case because NABR has failed to state any claims upon which relief may be granted. With respect to the enumerated allegations in the Complaint, United lacks sufficient knowledge and information to specifically admit or deny the allegations in paragraphs 1-27 and accordingly denies the allegations. United specifically denies all allegations related to Counts 1 through IV and the requested relief in paragraphs 28 through 43 of the Complaint. To the extent that there is any factual allegation that is not specifically admitted or denied herein, it should be deemed to have been denied.

United's responses to the allegations and defenses are outlined below. United respectfully requests that the Department dismiss the Complaint without further investigation pursuant to 14 CFR 302.406(a)(2) because: (i) federal common law explicitly permits common carriers to refuse to carry particular kinds of cargo; and (ii) the cited regulations do not apply to the conduct at issue.

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[5] *Id.*

I. BACKGROUND

United's policy is to only transport non-human primates to and from zoos and sanctuaries located in the 50 United States and Puerto Rico. Pursuant to this policy, United does not ship non-human primates: (i) to or from international destinations; (ii) as pets;[6] or (iii) to or from medical research facilities. As the Complaint describes in detail, United is far from the only carrier to enact a policy that prohibits the transport of non-human primates used for laboratory research.[7] In fact, most carriers are no longer willing to transport animals used for medical research.[8]

Carriers' refusal to transport animals used in medical research is warranted and reasonable. Such policies may be based on a variety of legitimate operational, safety, and business reasons, including concerns about transferring zoonotic diseases from animals to humans, the high cost of training personnel and acquiring protective equipment for ground handlers, the negative reactions of airline passengers, pressure from animals rights activists, and the unprofitable nature of live-animal transport.[9] United established its current policy in order to support sound and safe operational practices and provide the best experience for its customer passengers by minimizing service disruptions from animal rights groups and activists that targeted United for accepting animals destined for research facilities.

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[6] United will accept non-human primates as service animals provided they meet all applicable acceptance criteria and satisfy United's service-animal policy.

[7] *See* Complaint at 8-11.

[8] Given that the Complaint claims that a total of 27 airlines have policies that discriminate against customers seeking to have animals transported for the purpose of medical research, *see* Complaint at 8-11, there is no clear explanation for why NABR singled out four airlines against which to bring its complaint. Indeed, the ubiquity of carrier policies disallowing the transport of animals destined for medical research makes a Formal Complaint against four providers an improper vehicle for the Department to address NABR's arguments. Any resulting Department action must be industry-wide and apply to all carriers.

[9] Alice Ra'anan and Bill Yates, "Addressing the Crisis in Transporting Research Animals," Speaking of Research (Jan. 14, 2014), https://speakingofresearch.com/2014/01/14/addressing-the-crisis-in-transporting-research-animals/.

NABR previously filed an informal complaint against United alleging that its policy banning the transport of non-human primates to and from medical research facilities is discriminatory in 2017. United submitted its response to NABR's informal complaint to the Department on March 17, 2017, and has not received any follow up communications from the Department regarding the informal complaint since. The Department's silence on this issue indicates to United that the Department does not consider its policy unduly discriminatory when compared to the policies of other air carriers.

II. FEDERAL COMMON LAW PERMITS COMMON CARRIERS TO REFUSE TO CARRY PARTICULAR KINDS OF CARGO

Airlines that provide a service to the public and transport all those who present themselves and comply with the rules and requirements applicable to the air transportation under the contract of carriage are considered "common carriers." While airlines as common carriers have a duty to serve the public, provide transportation to everyone, and provide safe carriage, this duty comes with limitations. One such limitation courts have consistently found is that common carriers may refuse to carry particular kinds of cargo.[10] Notably, in a recent case concerning similar facts as those presented here, the Fifth Circuit affirmed a federal district court's holding that Delta Air Lines' decision to stop transporting trophies of lions, leopards, elephants, rhinoceroses, and buffalo that were legally hunted did not violate its federal common law duty of equal treatment.[11] Consistent with other courts, the basis of this holding was that "a common carrier may discriminate

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[10] *See York Co. v. Cent. R.R.,* 70 U.S. 107, 112 (1865) ("[H]e may limit his services to the carriage of particular kinds of goods…"); *B.J. Alan Co. v. I.C.C.*, 897 F.2d 561, 563 (D.C. Cir. 1990) ("a common carrier is free to carve out as large or as small a niche as it feels appropriate.") (citations omitted); *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 345 (D.C. Cir. 2013) ("at common law[,] carriers could pick and choose the goods which they would transport in common carriage…" (quoting *Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F.2d 1162, 1166 (6th Cir. 1979)).

[11] *Conservation Force et al. v. Delta Airlines, Inc.*, 190 F. Supp.3d 606 (N.D. Tex. 2016) (*Conservation Force*), *aff'd* 682 F. App'x 310 (5th Cir. 2017).

in what it chooses to carry, but it may not discriminate as to the persons for whom it carries."[12] In reaching its decision, the court confirmed that Delta's policy was adequate even given that its justification was the avoidance of adverse publicity.[13]

The federal common-law principle affirmed by the Fifth Circuit in the *Conservation Force* case applies directly to United's policy concerning animals destined for medical research facilities. United is a common carrier and is thus prohibited from discriminating against passengers; nevertheless, United is permitted to refuse to carry specific types of cargo. Although United's policy bans the shipment of animals used in medical research, it does not discriminate against medical researchers themselves by, for example, enacting a policy that prohibits medical researchers from shipping any cargo with United. Under United's policy, medical researchers are free to ship allowed cargo, including other types of medical research supplies, just as any other class of passengers is permitted to ship any cargo subject to United's specific policies. Although United's policy may negatively affect medical researchers, that impact does not mean that United's decision is unlawfully discriminatory.[14]

III. THE CITED REGULATIONS ARE INAPPLICABLE TO THE CONDUCT AT ISSUE IN THE COMPLAINT

The Complaint articulates four different legal bases for its claim, including: discrimination in violation of 49 U.S.C. § 41310(a); refusal to transport in violation of 49 U.S.C. § 44902(b); failure to establish reasonable practices in violation of 49 U.S.C. § 41501; and refusal to transport baggage in violation of 49 U.S.C. § 41704. As discussed in detail below, the statutes the Complaint cites do not address the conduct at issue in it. Accordingly, the Complaint fails to state an actionable claim against United and should be dismissed.

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12 *Conservation Force*, 190 F. Supp.3d at 610.
13 *Id*. at 611.
14 *Id*. at 610-11.

a. Discrimination in Violation of 49 U.S.C. § 41310(a)

United's policy is not discriminatory. Section 41310(a) provides that "[a]n air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination."[15] Language nearly identical to that of the current section 41310(a) was contained in section 404(b) of the Federal Aviation Act prior to the 1993 recodification of the federal aviation statutes.[16] Section 404(b), and thus its successor section 41310(a), was designed to ensure that rates and services for passenger and cargo traffic are *offered on an equal basis* to all who seek to use the air carriers.[17] Indeed, a primary purpose of the Civil Aeronautics Act was to assure uniformity of rates and services to all persons using the facilities of air carriers.[18]

The history of the statute makes clear that section 41310(a) is meant to protect specific groups within the travelling public from being offered different rates and services related to passenger and cargo traffic.[19] Section 41310(a) is not meant to prohibit air carriers from creating policies that apply to *all* groups within the travelling public, even if those policies may have a disparate impact on certain groups. If a policy results in a disparate treatment of a specific group, a court may look at whether there are any transportation related factors to justify the disparate treatment.[20]

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[15] 49 U.S.C. § 41310(a).

[16] *See Atalia Violation of 49 U.S.C. S 41310*, Consent Order, 1998 WL 865086, at *1.

[17] *Transcon. Bus Sys., Inc. v. C. A. B.*, 383 F.2d 466, 475 (5th Cir. 1967) (*Trans. Bus Sys.*).

[18] *Lichten v. E. Airlines*, 189 F.2d 939, 941 (2d Cir. 1951).

[19] Accordingly, this language has, in general, been invoked mainly in connection with rate and fare issues and racially discriminatory practices affecting foreign air transportation. *See Advanced Micro Devices v. CAB*, 742 F.2d 1520 (D.C. Cir. 1984); *Pacific Common Fares Investigation*, 96 CAB 160 (1982); *Hawaii Common Fares Investigation*, 96 CAB 33 (1982); *American's Cargo Space Allocation*, 89 CAB 690 (1981); *South African Airways, Houston Service Exemption*, 98 CAB 471 (1982).

[20] *Trans. Bus Sys.*, 383 F.2d at 490-91.

Under the terms of the statute, United's policy is not discriminatory on its face because United offers rates and services to all groups within the travelling public on an equal basis. Indeed, no person, whether a laboratory or zoo employee, may ship non-human primates to or from medical research facilities using United's services. United's policy does result in a disparate impact on a specific group of members of the travelling public who frequently seek to ship animals to or from medical research facilities, but this impact is not discriminatory as a matter of law. United is permitted to justify its policy by demonstrating that transportation-related factors justify the disparate treatment, and has done so by documenting the severe disruptions to its transportation services that were caused by protestors when it previously permitted the shipment of animals to and from medical research facilities. Thus, United has met its burden and the policy is not discriminatory under the terms of section 41310(a).

In addition, NABR's reference to a DOT letter related to a Kuwait Airways complaint is misguided and inapplicable to this case.[21] That case involved a discrimination complaint based on citizenship – not the type of discrimination at issue here.

b. Refusal to Transport in Violation of 49 U.S.C. § 44902(b)

Section 44902 authorizes an air carrier to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety."[22] Contrary to NABR's characterization of the statute, the statute not only permits an air carrier to refuse to transport property under "specific, limited circumstances,"[23] but instead permits an air carrier to refuse to transport property that it

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[21] Letter from Blane A. Workie, Assistant General Counsel for Aviation Enforcement Proceedings, DOT (Sep. 30, 2015).
[22] 49 U.S.C. § 44902(b).
[23] Complaint at 15.

decides *may be* harmful to safety.[24] The statute is violated when the reasons for refusal are "arbitrary and capricious."[25]

United's policy at issue here is based on reasonable grounds and therefore cannot, as a matter of law, violate the statute. As described above, United established its policy refusing to transport non-human primates to and from medical testing facilities after it became the target of protests and campaigns of various animal rights groups. Based on these events, it was United's judgment that the protests were harmful to the normal and safe operation of its services. This judgment included the calculation that a protest could become violent and be harmful to the safety of its airline passengers. Thus, United's refusal to transport non-human primates to medical research facilities was explicitly based on its judgment that such transport might be inimical to safety. Accordingly, the basis for United's policy falls within the permissible standards of the statute and is not arbitrary and capricious because it is based in reasoned decision making.

Moreover, even if United's policy were arbitrary and capricious, the cited statute does not apply in this context. Courts have found that Section 44902 authorizes only ad hoc refusals to carry certain items, and does not cover blanket boycotts of certain types of cargo.[26] Here, United's refusal to carry animals to and from medical research facilities is not on an ad hoc basis, but is instead the subject of a well-considered, blanket policy. Thus, the Complaint fails to state an actionable claim under Section 44902.

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[24] 49 U.S.C. § 44902(b).

[25] *See, e.g.*, *Al-Watan v. Am. Airlines, Inc.*, 658 F. Supp. 2d 816, 824 (E.D. Mich. 2009); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).

[26] *Delta Air Lines, Inc. v. C. A. B.*, 543 F.2d 247 (D.C. Cir. 1976) (referring to the former codification at 49 App. U.S.C.A. § 1511(a)) (citing *Air* Line *Pilots Ass'n, Intern. v. C. A. B.*, 516 F.2d 1269 (2d Cir. 1975)).

c. Failure to Establish Reasonable Practices in Violation of 49 U.S.C. § 41501

Section 41501 provides that every air carrier and foreign air carrier shall establish, comply with, and enforce reasonable prices, classifications, rules, and practices related to foreign air transportation.[27] This statute gives the Department authority to approve or disapprove international airline rates in service to its responsibility for preventing "unfair, deceptive, predatory, or anticompetitive practices in air transportation."[28] It has been used squarely in the airline rates context by the Department and courts alike, and is inapplicable here. The NABR's use of this statute here is meritless.

Nevertheless, contrary to the Complaint's claims, and as described above, United's policy that prohibits the transport of non-human primates to medical research facilities is reasonable in light of the protests and resultant disruption in operations it faced in 2013. Thus, the Complaint fails to establish a claim under Section 41501.

d. Refusal to Transport Baggage in Violation of 49 U.S.C. § 41704

Section 41704 provides that an air carrier shall transport as baggage the property of a passenger traveling in air transportation that may not be carried in an aircraft cabin because of a law or regulation of the United States.[29] NABR's claims that this section requires United to accept and carry non-human primates and other animals as baggage, despite United's well-reasoned policy refusing to carry these animals when they are being transported to and from medical research facilities, is based on an overly broad, unreasonable reading of the statute. This reading is unjustified by the statutory language and applying it would lead to unwanted public policy outcomes.

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[27] 49 U.S.C. § 41501.
[28] *See e.g., Wortman v. All Nippon Airways*, 854 F.3d 606, 613 (9th Cir. 2017).
[29] 49 U.S.C. § 41704.

First, NABR's interpretation of the statute would allow passengers to preempt carriers' specific policies regarding cargo transport so long as the passenger can claim that the property is baggage. This reading would ultimately create an end-run around any rules that a carrier adopts regarding cargo transport. Second, Section 41704 has not previously been applied in a way that would require an air carrier to accept as baggage any and all property that may not be carried in an aircraft cabin. Taken to its logical conclusion, NABR's reading of the statute would also require that carriers transport as baggage all property that may not be carried in an aircraft cabin regardless of safety concerns, including explosive devices. This cannot be the intended outcome of Section 41704, and the Department should thus not accept NABR's interpretation.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Complaint is without merit and should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this date served the foregoing document on the following persons in accordance with the Department's Rules of Practice:

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