

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.**

Air Canada

Violations of 14 CFR Part 259 and 49 U.S.C. § 41712

Enforcement Proceeding

DOT-OST-2021-0073

ENFORCEMENT COMPLAINT

Introduction and Nature of the Case

The U.S. Department of Transportation (Department or DOT) has the authority to prohibit unfair or deceptive practices by airlines and ticket agents in air transportation or the sale of air transportation under 49 U.S.C. § 41712. As a carrier that operates flights to and from the United States, Air Canada is engaged in air transportation for purposes of section 41712. For well over 20 years, the Department has informed airlines operating flights to and from the United States that a refusal to refund passengers when an airline cancels or significantly changes a flight would be an unfair business practice in violation of section 41712, whether or not the passenger has purchased a non-refundable ticket. The Department reminded airlines of this obligation multiple times in 2020. Nevertheless, from March 2020 to April 2021, Air Canada adopted a policy that it would not offer refunds to passengers for flights that Air Canada cancels or significantly changes. This unlawful no-refund policy imposed significant harm to consumers and benefited Air Canada at the expense of other airlines that did comply with U.S. law.

In addition to the general prohibition on unfair practices, a DOT regulation requires airlines to adhere to their Customer Service Plan regarding prompt ticket refunds; specifically, airlines are required to provide refunds within 7 days for purchases made by credit card and 20 days for cash and check purchases. In an enforcement notice dated May 12, 2020, given the significant volume of refund requests resulting from the COVID-19 pandemic, the Department's Office of Aviation Consumer Protection (OACP) announced its intention to use its enforcement discretion and not take action against airlines for not processing refunds within the required timeframes if, under the totality of the circumstances, they are making good faith efforts to provide refunds in a timely manner. Air Canada did not make such good faith efforts. Instead, for almost one year after the announcement of the May 2020 enforcement notice, Air Canada continued its no-refund policy in violation of U.S. law. For the length of time that Air Canada failed to offer prompt

refunds for flights that it had canceled or significantly changed, Air Canada continuously violated this regulation.

Air Canada has informed the Department that it has received over 15,000 refund complaints or comments, and 5,110 refund requests, involving flights to or from the U.S. that were cancelled by Air Canada due to the COVID-19 pandemic between March 13 and November 13, 2020. In addition, to date, OACP has received almost 90 formal complaints and over 6,000 informal complaints regarding Air Canada's no-refund policy. The Department has not been able to resolve this matter with Air Canada through an agreed consent order assessing a civil penalty. Accordingly, pursuant to the Department's Rules of Practice in Proceedings, OACP hereby brings this Enforcement Complaint against Air Canada.

Jurisdiction and Applicable Law

1. Air Canada is a foreign air carrier with its principal office at 7373 Blvd. Cote-Vertu Ouest, Saint-Laurent, Quebec H4S 1Z3, Canada.
2. Air Canada holds a foreign air carrier permit to operate flights to and from the United States pursuant to 49 U.S.C. 41301. Air Canada is engaged in foreign air transportation within the meaning of 49 U.S.C. 40102.
3. As a foreign air carrier, Air Canada is subject to the Department's adjudicatory authority pursuant to 49 U.S.C. 40101 et seq. and 14 CFR Part 302. One condition of Air Canada's foreign air carrier permit is that Air Canada "comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States." (DOT Order 2008-9-23, September 18, 2008).
4. As a foreign air carrier, Air Canada is subject to the requirements of 49 U.S.C. 41712(a) (Section 41712), which prohibits unfair and deceptive practices in air transportation or the sale of air transportation. Section 41712 authorizes the Department to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation.
5. Air Canada is a "covered carrier" within the meaning of 14 CFR Part 259 (Enhanced Protections for Airline Passengers). Among other things, section 259.5(a) requires "covered carriers," such as Air Canada, to adopt a Customer Service Plan and to adhere to the Plan's terms.
6. The Customer Service Plan must include certain commitments relating to the payment of refunds to passengers when required by section 41712. Section 259.5(a)(5) states: "Where ticket refunds are due, providing prompt refunds, as required by 14 CFR § 374.3 and [Regulation Z, 12 CFR Part 1026] 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.” Regulation Z, at 12 CFR 1026.11(a)(2), states that for credit card purchases, refunds must be provided within seven days of receipt of a written request from the consumer. Pursuant to 14 CFR 374.3(b), violations of Regulation Z constitute violations of 49 U.S.C. Subtitle VII.

7. Under 49 U.S.C. § 46101(a)(4), the Department may issue an order compelling compliance with the provisions of Part A, Subtitle VII of Title 49 U.S.C., including 49 U.S.C. § 41712. The Department may also issue an order compelling compliance with the requirements prescribed under that Part, including 14 CFR Part 259.
8. Section 41712 provides that if the Department, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice.
9. Under 49 U.S.C. § 46301 and 14 CFR Part 383, for violations taking place between July 31, 2019, and January 1, 2021, the Department may assess civil penalties of up to \$34,174 for each violation of 49 U.S.C. § 41712 or a regulation prescribed, or order issued under, 49 U.S.C. § 41712. The civil penalty applicable to violations occurring from January 11, 2021 to May 2, 2021 is \$34,777; and the civil penalty for violations from May 3, 2021 to the present is \$35,188. Revisions to Civil Penalty Amounts, 84 Fed. Reg. 37059 (July 31, 2019); 86 Fed. Reg. 1745 (January 11, 2021) and 86 Fed. Reg. 23241 (May 3, 2021). Under 49 U.S.C. § 46301(a)(2), a separate violation occurs for each day that the violations at issue continued.

Background and Enforcement History

10. As noted above, Section 41712 authorizes the Department to determine if a foreign air carrier is engaged in an unfair or deceptive practice.
11. Section 41712 does not specifically define the words “unfair” or “deceptive.”
12. The Department final rule titled “Defining Unfair and Deceptive Practices” was published in the Federal Register on December 7, 2020. The final rule codifies OACP’s existing definitions of the statutory terms “unfair” and “deceptive” for purposes of section 41712. 14 CFR 399.79(b); 85 Fed. Reg. 78707, 78710 (December 7, 2020).
13. In the final rule on Defining Unfair and Deceptive Practices, the Department stated that OACP has historically considered an airline’s practice to be “unfair” to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. This definition is now codified in 14 CFR 399.79(b)(1), which became effective on January 6, 2021. 85 Fed. Reg. 78707, 78717 (December 7, 2020).
14. OACP has long taken the view that a carrier’s refusal to provide requested refunds to passengers in circumstances where the carrier has cancelled the flight for whatever reason

or has made a significant schedule change or other materially adverse change in the quality of the flight service to be provided to the passenger is an unfair business practice in violation of section 41712, whether or not the passenger purchased a non-refundable ticket. In a rulemaking notice published in 2011, the Department stated:

We reject some carriers' and carrier associations' assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (e.g., greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel. Since at least the time of an Industry Letter of July 15, 1996 (see <http://airconsumer.dot.gov/rules/guidance>), the Department's Aviation Enforcement Office¹ has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.

76 FR 23110, 23129 (Apr. 11, 2011); *see also id.* (the Office "continue[s] to believe that there are circumstances in which passengers would be due a refund, including a refund of non-refundable tickets and optional fees associated with those tickets, due to a significant flight delay").

15. More recently, OACP provided two notices reminding airlines that these longstanding principles apply even in light of the COVID-19 pandemic. *See* "Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" (May 12, 2020) ("May 12, 2020 Enforcement Notice"), available at https://www.transportation.gov/airconsumer/FAQ_refunds_may_12_2020; "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the Covid-19 Public Health Emergency on Air Travel" (April 3, 2020) ("April 3, 2020 Enforcement Notice"), available at https://www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020.
16. In a letter to Air Canada dated July 24, 2020, OACP explained its position that Air Canada's practice of not offering a refund to a ticketed passenger when the carrier cancels or significantly changes the passenger's flight is an unfair practice, using the definition set forth above.
17. OACP explained that it views Air Canada's practice as causing substantial harm to consumers. Specifically, OACP stated that consumers were harmed when they paid money to Air Canada for a service that Air Canada did not provide and noted that Air

¹ The Office of Aviation Consumer Protection was formerly known as the Office of Aviation Enforcement and Proceedings, sometimes shortened to the Aviation Enforcement Office.

Canada's average each-way fare between the U.S. and Canada in 2019 was \$295.24. *See Sabre Global Demand Data.*

18. OACP also made clear to Air Canada that OACP views the harm as not being reasonably avoidable by consumers. OACP is of the view that reasonable consumers understand that “refundable” tickets are valuable because they ensure a refund if the *passenger* cancels the flight. In the letter to Air Canada, OACP stated that a consumer acting reasonably would not believe that he or she must pay more to purchase a refundable ticket in order to be able to recoup the ticket price when the *airline* fails to provide the service paid for through no action or fault of the consumer.
19. OACP expounded to Air Canada that the harm to consumers is not outweighed by countervailing benefits to consumers or to competition. OACP explained its view that consumers gain no countervailing benefit from Air Canada's practice. Likewise, OACP stated that Air Canada's practice does not convey competitive benefits in the marketplace given that other carriers provide refunds when they cancel a flight or make a significant schedule change. OACP noted that Air Canada's practice appears to benefit only Air Canada at the expense of other carriers.
20. OACP also informed Air Canada that it considered the carrier to be in violation of its Customer Service Plan commitments, as set forth in 14 CFR 259.5, by failing to provide refunds when due in a timely manner.

Facts Giving Rise to This Action

21. Before March 19, 2020, Air Canada's practice was to offer refunds to consumers for non-refundable flights that the carrier canceled; however, for flights that it canceled on or after March 19, 2020, the carrier imposed a policy of not offering refunds (except to passengers who specifically purchased “refundable” tickets). *See, e.g., Answer of Air Canada, DOT-OST-2020-0230, at 10.*
22. From March 1, 2020, to the present, OACP received over 6,000 informal complaints that Air Canada has failed to provide refunds, on request, for flights that Air Canada canceled or significantly changed; those complaints were provided to Air Canada.
23. From March 1, 2020, to the present, 89 consumers have filed formal complaints on the Department's docket at www.regulations.gov alleging that Air Canada has failed to offer prompt refunds, on request, for flights that Air Canada canceled or significantly delayed. OACP has determined that 85 of these formal complaints are facially meritorious.²

² Identifying information about those formal complaints is provided in the service list to the Notice of Enforcement Proceedings. For reference, we have set forth below the complainants' last names and the last three digits of the complainants' docket numbers (with the root of the docket number being DOT-OST-2020-0XXX):

Cervinka, 055; Cronsberry, 056; Brayall, 059; Soos-Nagy, 061; Cooke, 062; Horovitz, 063; Jacobsmeyer, 067; Plumridge-Malito, 069; Kwok, 070; Miller, 071; Woo, 073; Stricker, 074; Chen, 077; Fejes, 078; Leung, 079; Morar, 080; Bastian, 081; Jones, 082; Reyes, 083; Stirling, 085; Patten, 087; Nan, 088; Arentsen, 091; Wang, 092;

24. In November 2020, in order to assess the extent of the number of violations at issue up to that point, OACP asked Air Canada for the number of refund requests that the carrier has received between March and November 2020 for flights to and from the United States that Air Canada has canceled or significantly changed. Air Canada informed the Department that it received approximately 5,110 refund requests involving flights to or from the U.S. that were cancelled by Air Canada due to the COVID-19 pandemic in the period March 13 to November 13, 2020. Air Canada also informed the Department that, in the period March 13 to November 13, 2020, it received approximately 15,428 comments or complaints about refunds involving flights to or from the U.S.
25. Air Canada modified its no-refund policy on or about April 13, 2021.
26. For purposes of this Complaint, and in order to provide adequate notice of its exposure to potential civil penalties at this early stage, OACP conservatively estimates that Air Canada has committed a minimum of 5,110 violations of section 41712. These passengers waited anywhere from 5 months to 13 months to receive refunds.
27. Because 49 U.S.C. 46301 and 14 CFR Part 383 authorize a maximum civil penalty of \$34,184 for each failure to provide a refund in violation of section 41712 between July 31, 2019, and January 1, 2021, OACP estimates Air Canada's *potential* exposure to civil penalties is at least \$174,680,240 without taking into account that each day is a continuing violation. (5,110 x \$34,184 = \$174,680,240).
28. OACP seeks a civil penalty amount that considers consumer harm, the scale of the violations, Air Canada's knowledge and intent, and deterrent effect. In recognition of all of the circumstances, OACP views an appropriate civil penalty for each failure to provide a prompt refund in violation of 49 U.S.C. 41712 and 14 CFR 259.5, to be \$5,000 per violation, which OACP views as high enough to have a deterrent effect. Using this formula, OACP is seeking a civil penalty of \$25,550,000 (based on \$5,000 times 5,110 violations).

Claim for Relief

29. By failing to provide requested refunds to consumers in a timely manner for flights that Air Canada has canceled or significantly changed, Air Canada has committed at least 5,110 violations of 49 U.S.C. 41712 and 14 CFR 259.5.

Lee, 094; Carpenter, 095; Jeffries, 096; Mojo, 097; Wingert, 100; Yeung, 108; Kyle, 111; Horan, 114; Longo, 121; Blazenko, 125; Westphal, 126; Cottrill, 131; Colobong, 132; Chan, 133; Ritchie, 138; Lindsay, 139; Clemens, 143; Osburne, 145; Sheehan, 146; Nickle, 150; Castellani, 151; MacDonald, 154; Blankenship, 155; Mann, 157; Westman, 161; Schaefer, 162; Duffy, 163; Bowe, 166; Kinzie, 170; Neal, 171; Gernazian, 172; Ruskey, 173; Stickelbrucks, 174; Jones, 175; Mellor, 181; Tompkins, 186; Creswell, 187; Dutari, 188; Fells, 190; Gerber, 192; Hauley, 194; Szeremeta, 198; Kalichman, 199; Anderson, 205; Rogers, 208; Dale, 209; Cossette, 210; Hatch, 219; Dockendorff, 221; Knoble, 223; Hetrick, 227; Higdon, 230; McQuillan, 235; Hushagen, 241; Mulchandani, 244; Murphy, 249; Zaiceva, 257; Tatum, 263; see also Gasper, 2021-010; Vanderberg, 2021-011; and Sherman, 2021-030.

Prayer for Relief

WHEREFORE, the Office of Aviation Consumer Protection requests the U.S. Department of Transportation to:

- A. Find that Air Canada, by failing to provide timely refunds on request to passengers for flights to or from the U.S. that were canceled or significantly changed by Air Canada, engaged in an unfair practice in violation of 49 U.S.C. 41712(a);
- B. Find that, by failing to provide prompt refunds on request to passengers for flights to or from the U.S. that were canceled or significantly changed by Air Canada, Air Canada committed violations of its Customer Service Plan in violation of 14 CFR 259.5 and 49 U.S.C. 41712(a);
- C. Assess civil penalties against Air Canada in the amount of \$5,000 for each failure to provide refunds in violation of Section 41712 described in paragraphs A and B above, and for each additional similar violation revealed in the course of this investigation pursuant to 49 U.S.C. § 46301;
- D. Assess total civil penalties against Air Canada in an amount of \$25,550,000;
- E. Order Air Canada to cease and desist from future similar violations of 49 U.S.C. § 41712 and 14 CFR Part 259 by engaging in the conduct described in paragraphs A and B; and
- F. Grant such other relief as may be appropriate.

Respectfully submitted,

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