

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

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Notice of Proposed Rulemaking)	Docket DOT-OST-2016-0208
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**COMMENTS OF BUSINESS TRAVEL COALITION, CONSUMER ACTION, CONSUMER
FEDERATION OF AMERICA, CONSUMER REPORTS, EDONTRAVEL.COM,
FLYERSRIGHTS.ORG, NATIONAL CONSUMERS LEAGUE, TRAVEL FAIRNESS NOW, AND
U.S. PIRG**

**PROPOSED RULES TO IMPROVE AIRLINE POLICIES ON
REFUNDS OF FEES AND OTHER COMPENSATION FOR BAGGAGE
AND OTHER ANCILLARY SERVICES NOT PROVIDED**

Executive Summary

Consistent with Congressional directives in the 2016 and 2018 Federal Aviation Administration reauthorization statutes, in this *Notice of Proposed Rulemaking* (“NPRM”) the Department of Transportation (“DOT”) proposes a number of rules to ensure that passengers obtain refunds for baggage fees and other ancillary services when air carriers fail to provide the service for which a passenger paid.

The listed consumer and public interest commenters represent the interests of the millions of passengers who fly annually. We are troubled that DOT has in several instances put too high a priority on minimizing air carrier cost or inconvenience even when the result is more cost and inconvenience for passengers. In the following comments, we urge DOT to instead promulgate rules that prioritize the interests of passengers.

Specifically, DOT should adopt a rule requiring air carriers to provide refunds of baggage fees automatically whenever checked baggage fails to arrive at its destination when passengers arrive. Such a rule would be far simpler for passengers to understand, for air carriers to follow, and for DOT to enforce. This would eliminate the potential complexities raised by DOT in connections with the convoluted clock and delivery-method based approach that DOT proposes.

This simpler approach would not, as DOT fears, create significant costs for airlines that could potentially be passed on to consumers. For example, we note that rules requiring automatic refunds of baggage fees whenever a bag is delayed would require air carriers to refund less than 1.2% of the fees they collect for checked baggage. Moreover, the cost to air carriers of compliance would be more than offset by the benefits to consumers of a proactive refund system that prioritizes getting refunds to consumers with a minimum of delay and inconvenience.

Our comments take a similar approach regarding refunds for ancillary services that air carriers fail to provide. Instead of putting the onus on passengers to complain about an air

carrier's failure to provide an ancillary service, it should be incumbent on the air carriers themselves to track when ancillary services are not delivered and to automatically refund passengers.

Introduction

Business Travel Coalition, Consumer Action, the Consumer Federation of America, Consumer Reports, Ed Perkins of EdOnTravel.com, FlyersRights.org, National Consumers League, Travel Fairness Now, and U.S. PIRG (“consumer and public interest commenters” or “we”) hereby submit the following comments in response to the *Notice of Proposed Rulemaking* (“NPRM”) adopted by the Department of Transportation (“DOT” or “Department”) in the above-captioned proceeding.

Business Travel Coalition’s mission is to interpret industry and government policies and practices and provide a platform so that the managed travel community can influence issues of strategic importance to their organizations.

Consumer Action is a nonprofit organization that has championed the rights of underrepresented consumers nationwide since 1971. Throughout its history, the organization has dedicated its resources to promoting financial and consumer literacy and advocating for consumer rights both in the media and before lawmakers to promote economic justice for all. With the resources and infrastructure to reach millions of consumers, Consumer Action is one of the most recognized, effective and trusted consumer organizations in the nation.

The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

Consumer Reports is an expert, independent, nonprofit organization, founded in 1936, that works side by side with consumers for a fair, transparent, truthful, and safe marketplace. It is the world’s largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and

services annually. It has been active for decades on a wide range of policy issues affecting consumers, including in air travel.

A longtime travel expert, Ed Perkins helps consumers get the most from their travel dollar. His feature and Q&A columns give readers up-to-the-minute advice on everything from planning an itinerary for a European rail trip to booking flights, renting cars and buying travel insurance. Perkins also peppers his columns with valuable tips to avoid travel hassles.

FlyersRights.org is the largest nonprofit airline passenger organization with over 50,000 members and supporters nationwide. It publishes an online newsletter, operates a toll-free hotline for airline passengers, and advocates for their rights and interests. FlyersRights.org was founded in 2007 after thousands of passengers, including the founder Kate Hanni, was stranded on the tarmac for over nine hours in Austin, Texas.

Founded in 1899, the National Consumers League (“NCL”) is America’s pioneering consumer and worker advocacy organization. Our non-profit mission is to promote social and economic justice for consumers and workers in the United State and abroad.

Travel Fairness Now is a non-profit organization that advocates for greater competition, transparency and fairness for travelers.

U.S. PIRG is a federation of independent, state-based, citizen-funded Public Interest Research Groups, and is part of The Public Interest Network, which operates and supports organizations committed to a shared vision of a better world and a strategic approach to social change. Since 1970, state PIRGs have delivered results-oriented citizen activism, stood up to powerful special interests, and used the time-tested tools of investigative research, media exposés, grassroots organizing, advocacy and litigation to win real results on issues that matter.

I. DOT Should Require That Baggage Fees Be Refunded Automatically When Air Carriers Fail to Deliver Checked Baggage Upon Arrival.

The eleven largest U.S. air carriers collected \$5.8 billion in baggage fees in 2019¹ with passengers typically paying \$30-65 for the first checked bag (with the notable exception of Southwest Airlines, which does not charge a fee for the first or second checked bag).² When a passenger pays to check baggage, her expectation is that the air carrier will deliver the baggage at her destination airport upon arrival. When an air carrier fails to do so, whether due to circumstances within the air carrier's control or not, it has not provided the service for which the passenger paid. Whether the failure to deliver a checked bag to the passenger when the passenger arrives is due to circumstances within the air carrier's control or not is immaterial. When a checked bag fails to arrive on time, passengers are likely to be significantly inconvenienced by that failure and may subsequently need to incur additional costs to, for example, purchase clothing that was packed in a checked bag,

The Department states that the purpose of this NPRM is to promulgate statutorily-required rules that "ensure that travelers are treated fairly when requesting refunds for ancillary service fees."³ Specifically regarding baggage fees, we urge the Department to initiate a rulemaking to require airlines to automatically refund consumers' baggage fees when a passenger's checked baggage fail to arrive with the passenger at the destination airport upon arrival.

Once a consumer checks a bag, she has no control over whether the bag arrives at the destination airport. As such, there is no way for the consumer to reasonably avoid the inconvenience and expense caused by an air carrier's failure to deliver the checked bag. An

¹ Bureau of Transportation Statistics, Schedule P-1.2. Online: <https://www.bts.gov/bts/bts/baggage-fees-airline-2019>

² TripAdvisor.com. "Airline Baggage Fees." [Accessed September 15, 2021] Online: <https://www.tripadvisor.com/AirlineFees>

³ Refunding Fees for Delayed Checked Bags and Ancillary Services That Are Not Provided (hereafter "NPRM"), 86 Fed. Reg. 38,421 (July 21, 2021). Online: <https://www.transportation.gov/sites/dot.gov/files/2021-07/Refunding%20Fees%20NPRM.pdf>

air carrier's failure to refund the baggage fee at this point should therefore be considered an unfair or deceptive practice by the Department. The solution to this problem is simple: The Department should require that baggage fees be automatically refunded when the service purchased – delivery of a checked bag when the passenger arrives – is not provided. Such a rule would be far simpler for passengers to understand, for air carriers to follow, and for the Department to enforce than the convoluted clock and location-based system proposed in this NPRM.

An automatic refund requirement would not be unduly burdensome for air carriers. The Department estimates that at least 2.3 million checked bags were delayed in 2019 on domestic flights.⁴ Conservatively assuming an average checked bag fee of \$30, a requirement that air carriers refund checked baggage fees would be expected to return \$69 million in refunds to consumers annually, or less than 1.2% of total checked baggage fees collected each year by the major U.S. air carriers.

Such a mandate would be stronger than the minimum Congress strictly required in the Federal Aviation Administration Reauthorization Act of 2016. It would nonetheless be within the Department's authority under its general § 41712 authority to regulate unfair and deceptive practices in air transportation or the sale of air travel. It would also conform with 49 U.S.C. 41704, note, as that statute only requires the Department to promulgate rules requiring refunds when bags arrive "not later than" 12 hours after the arrival of a domestic flight or 15 hours after the arrival of an international flight. An automatic refund requirement such as the one we recommend would therefore satisfy the requirements of 49 U.S.C. 41704, note.

To maximize the ability of air carriers to reunite delayed bags with passengers as quickly as possible, the Department should also initiate a rulemaking requiring air carriers to maintain interline agreements for the purpose of delivering delayed baggage to passengers as promptly as possible. Such a requirement would help address the concern the

⁴ *NPRM*. 38,422.

Department raises in the NPRM regarding the inability of air carriers to deliver delayed baggage when an air carrier only operates one flight per day to a particular destination.

II. At A Minimum, DOT Baggage Fee Refund Rules Should Adopt the Minimum Times Specified in 49 U.S.C. 41704, Note; But DOT Can and Should Go Further.

In this NPRM, the Department proposes rules that would mandate that baggage fees be refunded only when a bag is delayed more than 12 hours for a domestic flight or 25 hours for an international flight. The Department argues that adopting a more lenient standard for international flights than the statute directs is necessary because absent such flexibility, carriers “may have less incentive to deliver delayed bags as soon as possible.”⁵

DOT should to discard such a convoluted, counterintuitive rationale for allowing air carriers to avoid responsibility for refunding checked baggage fees. When air carriers fail to deliver baggage in a timely manner, they are already subject to as much as \$3,800 in liability for domestic flights and approximately \$1,780 for international flights under DOT and international regulations.⁶ Given such liability, the prospect of also needing to refund \$30-65 checked bag fees is unlikely to create significant additional incentive to expedite delivery of delayed baggage.

As we have previously noted, the simplest way to satisfy the requirements of 49 U.S.C. 41704, note would be for DOT to mandate refunds of checked baggage fees whenever a bag fails to arrive when the passenger arrives at her destination. At a minimum, for purposes of mandating baggage fee refunds, the Department’s rules should strictly adhere to 49 U.S.C. 41704, note’s minimum standard of 12-hours for domestic flights and 15-hours for international flights. This will make it more likely that passengers will receive

⁵ NPRM. 38,423.

⁶ U.S. Department of Transportation. “Lost, Delayed, or Damaged Baggage.” (May 27, 2021) Online: <https://www.transportation.gov/lost-delayed-or-damaged-baggage>

compensation when air carriers fail to provide the checked baggage service passengers purchase.

III. The Baggage Fee Refund “Clock” Should Stop When Bags Are Reunited with The Passenger, Not Before.

The Department seeks comment on when, for purposes for providing a refund of checked bag fees, the “clock” for delivery of delayed baggage should stop before the delivery has actually occurred. The Department proposes that the “clock” would stop when, at the air carrier’s discretion, one of the three following scenarios occurs:

- 1) when the bag is transported to a location agreed to by the passenger and the carrier, regardless of whether the passenger is present to take possession of the bag;
- 2) when the bag has arrived at the destination airport, is available for pickup, and the carrier has provided notice to the passenger of the location and availability of the bag for pick-up; or
- 3) if the carrier offers delivery service and the passenger accepts such service, when the bag has arrived at the destination airport, and the carrier has provided notice to the passenger that the bag has arrived and will be delivered to the passenger.

Were DOT to adopt this proposed three-option system, air carriers would have strong incentives to adopt whichever option is most likely to relieve them of responsibility for refunding a baggage fee. Of the three options, option #2 is the one most likely to result in the fewest baggage fee refunds and thus be the system that airlines are mostly likely to adopt. Contrary to the Department’s goal of creating incentives for airlines to deliver delayed baggage to passengers in an efficient manner, the proposed system would create incentives for air carriers to do no more than the minimum necessary to avoid having to refund baggage fees.

At a minimum, the Department should adopt rules that stop the “clock” only when a passenger is reunited with their checked baggage, or when it has arrived at the location designated by the

passenger.⁷ Setting the “clock” this way will create significant consumer benefit by decreasing the inconvenience that passengers experience when checked baggage fails to arrive at an airport when they do. We would reiterate, however, that the “clock” should be used only for the purpose of determining whether an additional payment to the passenger is warranted, and how much. The baggage fee should be refunded whenever a bag does not arrive at the destination airport at the same time as the passenger.

IV. Refunds for Ancillary Fees Paid for Services That Are Not Delivered Should Be Paid Proactively by Air Carriers.

In addition to fulfilling Congressional directives from the FAA Reauthorization Act of 2016 related to baggage fee refunds for delayed bags, this NPRM also proposes rules to fulfill Congress’s directive in the FAA Reauthorization Act of 2018 that air carriers provide refunds for ancillary service fees when the ancillary services are not delivered by an air carrier.⁸ In fulfilling Congress’s directive, the Department should require air carriers to automatically provide refunds for ancillary services not provided, without the need for consumers to complain.

Similar to our statements regarding refunds of baggage fees, the onus for making a passenger whole when an air carrier fails to provide a service the passenger paid for should be entirely on the air carrier, not the passenger. We are concerned that any regulation requiring passengers to seek out refunds will result in fewer refunds being issued than consumers are entitled to receive. Air carriers should not be allowed to pocket a windfall when, for example, a passenger fails to complain about broken in-flight Wi-Fi she paid for. Instead, air carriers should be required to proactively track when ancillary services paid for by passengers are not provided, and to issue refunds automatically. Such a

⁷ This is what Consumer Reports, f/k/a Consumers Union, recommended in its comments to DOT’s 2016 ANPRM. <https://advocacy.consumerreports.org/wp-content/uploads/2016/12/DOT-BagFeeRefunds-CU-comments-11-30-16-FINAL.pdf>.

⁸ NPRM. 38,429.

mandate would not only fulfill the requirements of 49 U.S.C. 42301, note prec., it would also create incentives for air carriers to actually provide the services they advertise.

We further urge the Department to adopt rules requiring air carriers to regularly report to DOT the number of instances in which baggage fees or ancillary fees are refunded to passengers and the total amount of such refunds. Doing so will provide passengers with valuable information to help them decide which air carriers are likely to provide checked baggage service and other ancillary services as advertised.

Conclusion

DOT should not consider it a primary goal to promulgate refund rules that make compliance as easy as possible for air carriers. Instead, the Department should seek refund rules that ensure passengers are made whole and minimize passenger inconvenience when air carriers fail to provide services for which a passenger paid a fee. Doing so will create proper incentives for air carriers to invest responsibly in systems and processes that result in fewer refunds being necessary in the first place.

Communications with respect to this document may be addressed to:

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