BEFORE THE SECRETARY OF TRANSPORTATION
U.S. DEPARTMENT OF TRANSPORTATION

Hon. Anthony Foxx
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Avenue SE Washington, DC 20590-0001

PETITION FOR RULEMAKING: RECIPROCITY RULE

SUBMITTED BY:
FLYERSRIGHTS.ORG
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1. INTRODUCTION

FlyersRights.org is a non-profit organization with over 60,000 airline passenger members who are individually affected by the lack of reciprocity. It 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 2012 inclusion of airline passenger right provisions in the 2012 FAA Modernization and Reform Act. FlyersRights.org advocates for the rights and interests of airline passengers, publishing a weekly newsletter and operates a toll free hotline for passengers at 1-877-FLYERS6.

2. ARGUMENT

The Department of Transportation ("DOT") has the need and authority to reinstate the reciprocity rule. The reciprocity rule, formerly known as Rule 240, was a provision in airlines' contracts of carriage before deregulation. When a flight was cancelled or excessively delayed, the airlines would place passengers on the next available flight, regardless of the airline, for no additional cost.
In light of recent and continuous deluges of airline computer outages that have stranded millions of passengers, and pursuant to § 553(e) of the Administrative Procedure Act\textsuperscript{1} and 49 C.F.R. 5.11, FlyersRights.org petitions the DOT to reinstate the reciprocity rule under the Secretary of Transportation’s right to address and prevent unfair, predatory, and anticompetitive practices\textsuperscript{2}. A corollary of the right to petition under § 553(e) is the right to receive reasons if the petition is denied. The Supreme Court reaffirmed limited judicial review for the denial of a rulemaking petition and for the adequacy of the reasons given.\textsuperscript{3}

To reinstate reciprocity, FRO proposes the following language:

*When cancellations and major delays (of more than two hours) are experienced, the carrier will, at the passenger’s option:*

1. transport the passenger without stop over on its next flight on which space is available in the same class of service as the passenger's original outbound flight at no additional cost to the passenger, or

2. arrange for the transportation on another carrier or combination of carriers, without stopover on its next flight, in the same class of service as the passenger's original outbound flight at no additional cost to the passenger; or

3. if acceptable to the passenger, transport the passenger in a lower class of service, entitling the passenger to a partial refund

A. DOT has the duty to prohibit predatory and anticompetitive practices by the airlines.

It is DOT’s policy under Section 40101, in carrying out its Section 41509 functions, to interpret the public interest to include “placing the maximum reliance on competitive market

\textsuperscript{1} 5 U.S.C. § 553(e)
\textsuperscript{2} 49 U.S.C. § 41712; 49 U.S.C. § 40101(a)(9)
\textsuperscript{3} See Massachusetts v. E.P.A., 549 U.S. 497 (2007)
forces and on actual and potential competition. However, DOT must also consider the prevention of unfair, deceptive, predatory, and anticompetitive practices as consistent with the public interest. Reliance on competitive market forces has not made the frequency of computer outages decrease. After the recent flurry of airline consolidation, there is far less competition in the commercial air transportation market. Each of the four major US airlines has had large scale computer outage in the past year and a half, delaying over a million passengers and cancelling approximately 7880 flights. Not only have recent market forces not reduced computer outages, but market forces in the form of higher load factors, have made the effects much worse for passengers.

When the reciprocity rule was followed before deregulation, load factors were around 50% to 60%. Modern load factors are around 85%. With that load factor, it would take six substitute flights to rebook all the passengers of a cancelled flight. Not only are more substitute flights needed to re-route the modern, fuller flight, but the lack of a reciprocity rule limits the number of available, substitute flights. When airlines currently provide for substitute flights after flight cancellations or delay, they generally limit their alternatives to their own flights. When

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4 49 U.S.C. § 40101(a)(3)
5 49 U.S.C. § 40101(a)(9)
6 Since 2010, Southwest Airlines has acquired AirTran Airways, American Airlines merged with US Airways, United Airlines merged with Continental Airlines, and Delta Airlines completed its merger with Northwest Airlines. From 1987 to the present, the number of major US carriers, according to BTS definitions, decreased from ten to four.
7 Four major airlines have an 85% domestic market share, according to a June 2014 GAO Report. http://www.gao.gov/assets/670/664060.pdf
8 Calculated by multiplying the average of 174 seats on a flight (2015 average) by the number of cancelled flights, using a load factor of 85%.
10 Monthly load factors have ranged from 78.89% to 88.13% since the beginning of 2013, according to BTS
13 See Appendix
their reputation is most at stake during the largest of outages, the airlines have sometimes voluntarily booked their delayed passengers on other airlines. The airlines will use this occasional, voluntary reversion to reciprocity as an argument against the need for regulation. However, this merely incentivizes token adherence to beneficial practices in order to avoid regulation, and maintain unfair and anti-competitive practices that unnecessarily burden the traveling public directly and the entire US economy indirectly.

This petition for rulemaking does not seek to replace the market approach of the Airline Deregulation Act. Instead, this petition seeks to address the system wide disruption that clearly harms the public interest with unnecessary delays and expenses. A reciprocity rule will allow air transportation to operate more efficiently by matching unused seats on other airlines to delayed passengers. Airline load factors can increase and passengers would reach their destinations sooner. Without a reciprocity rule, airlines that seek to do right by passengers who are stranded will also be at a competitive disadvantage to airlines that place the full burden and expense on the passengers. Accordingly, FlyersRights.org petitions DOT to exercise its statutory authority under §40101 to regulate unfair, predatory, and anticompetitive practices.

B. The recent flurry of computer outages necessitates a reciprocity rule

Computer outages have greatly increased over the last five years. In particular, since July 2015, Delta, American, United, and Southwest Airlines have all suffered at least one significant computer outage. The typical computer outage cancels or delays hundreds if not thousands of flights. Without the reciprocity rule, passengers are stranded until the computer issues are fixed and enough open seats are available. With the reciprocity rule, the unaffected airlines could fly these passengers and minimize passenger delay and empty seats.

C. Without the reciprocity rule, airlines are engaging in predatory and anticompetitive practices.

Current practices are both predatory and anticompetitive. In 1987, there were ten major airlines, according to BTS. With only four major airlines today, consumers have fewer options for air travel. At the city-pair level, a more accurate representation of airline concentration,
consumers have even fewer choices. Consumers are at the mercy of the airlines. Airlines can cancel and delay flights without repercussion, even when the cause of the cancellation or delay is within their control as it is for computer outages and technical malfunctions. As a result, they are not incentivized to engage in reciprocity in order to match unfilled seats on other airlines with their own delayed passengers, and they are not incentivized to update their computer systems.

Part of this opposition to reciprocity is that airlines do not want to benefit their competitors. When the reciprocity rule was in effect, the delayed airline would pay the walk up price on a competitor’s airline, which is typically much higher than the normal fare. One would think this would incentivize an airline to be more reliable than other airlines so that they receive more walkup fares than they would have to purchase. However, without the reciprocity rule, if the four major airlines all suffer from computer outages, the incentive to compete on reliability shrinks, and passengers suffer from decreased reliability and a smaller menu of flights.

This would be as if you had paid a babysitter to watch your kids while you go out to a baseball game, but at the last minute you get an email notification that the babysitter has cancelled, sorry! She offers you either a full refund of her $20 per hour salary that you pre-paid or to watch your kids much later that night or maybe the next morning. It is nice to be refunded for a service that a provider has repudiated, but now you cannot go to the baseball game and use those $50 tickets. You need a babysitter soon, and the price of a babysitter is much higher on short notice.

The babysitter could call one of the other seven babysitters in the area. While they may charge a higher “walkup rate”, a rate that you cannot afford to pay (that’s why you scheduled this babysitter two months in advance), the babysitter does enough business with you that she could cover the difference. Instead of matching you with another babysitter who otherwise is not making any money so that you can enjoy the plans you made months in advance, she apologizes and merely refunds the money you paid. She doesn’t want to give the other babysitters a premium, even though if they all agreed to this reciprocity rule, she would receive the premiums some of the time. In fact, if she works to become the most reliable of the babysitters, she could earn the most and net a profit. The babysitters who are most careless with their schedules would suffer a loss, but the system as a whole, babysitters and parents, benefit. While the babysitters
come out even by paying and being paid the higher walkup rates, the customers come out ahead, relative to have no babysitter at all.

This analogy applies to the airlines. Airlines currently engage in reciprocity when they choose. Ticket agents have the ability to purchase tickets from other airlines. The costs of implementing this system permanently are far outweighed by the benefits of airline passengers reaching their destinations as soon as possible, in order to fully enjoy their vacation time, hotel reservations, cruise tickets, etc.

Airline deregulation was intended to improve air transportation efficiency by relying on market forces and airline competition instead of government regulation. However, with airline consolidation and much less competition, DOT needs to exercise its regulatory power in the public interest to restore efficient air transportation in the public interest and protect the flying public from the airlines’ greed and refusal to serve the passenger’s interests.

D. DOT is authorized to issue an Emergency Rulemaking

Emergency Rulemaking under the Administrative Procedure Act allows agencies to finalize rules without prior publication of the proposed rule in the Federal Register. Emergency rulemaking is permitted when the agency has “good cause” to find that the standard rulemaking procedure would be “impracticable, unnecessary, or contrary to the public interest.” This is normally found when there are threats to public safety, technical amendments, and where Congress has afforded the agency no discretion.”

FlyersRights.org proposes the reinstatement of the reciprocity rule, formerly known as Rule 240. Accordingly, the standard lengthy rulemaking procedure lasting several years would be contrary to the public interest when considering the flurry of computer outages and flight cancellations and the airlines’ inadequate responses. With outages happening more frequently, another computer outage around the holiday season would be devastating to the airline industry, passengers, the travel industry, and the general public.

The lack of a reciprocity rule gives airlines a disincentive to maintain an efficient air transportation system by dumping the costs and inconvenience on the public with no penalty. A reciprocity rule would encourage lower cancellation and delay rates by rewarding the airlines who have the fewest flight delays and cancellations. A market solution will not work if all
Airlines have frequent computer outages and if only passengers are harmed. After consolidation, consumers have few choices in air travel, so the damaging reputation effects of unreliability are lessened. However, if airlines were to benefit or be harmed by their reliability in the walkup fare market, airlines will compete to increase reliability, increasing the efficiency of the air transportation market.

Jean Medina, spokeswoman for Airlines for America, recently argued that a mandatory reciprocity rule, by virtue of being a regulation, would be a disincentive for the airlines to improve and compete on the quality of the services the airlines offer. Certainly Medina does not believe that the free market is a natural state, without any regulation, and that any regulation will harm competition. Regulations, by definition, impose burdens on a company, but when applied to all create a level playing field necessary for fair competition. Here, regulation is designed to arrive at a better outcome by correcting inefficiencies in markets by properly aligning incentives, and providing a level playing field for fair competition. Without such reasonable regulation, anticompetitive and predatory practices are nearly certain to prevail.

Airlines clearly benefit from reasonable regulation. Safety and security were never deregulated and safety and security have clearly improved. Airlines for America and some radical libertarians might argue that safety regulation is not necessary because airlines could have competed on safety and passengers would have chosen the safest airlines. However, the DOT, the US Congress, and the International Civil Aviation Organization (ICAO) representing all nations with airlines have determined otherwise, finding that safety and security regulation is essential.

Some airlines may argue they will be harmed by the more expensive walkup rate. However, only the least reliable airlines will be losing money on the reciprocity rule. For each airline that has to pay the walkup rate, another airline is earning that revenue. Airlines as a whole will come out even, passengers will come out ahead (relative to being delayed even longer), and the rule will spur competition among airlines to provide the most reliable service and make the most from the reciprocity rule.

16 http://www.huffingtonpost.com/entry/ls-it-time-for-airlines-to-revive-rule-240_us_57c2f318e4b0b01630df923b?section=us_travel
To allow the current double standard to persist whereby an airline can cancel or delay a flight, for reasons within its control, with the passenger not getting any compensation or accommodation is clearly unfair. If a passenger needs to cancel or change flights, they must pay a high fee.

3. CONCLUSION

For the reasons stated herein, the Department of Transportation should adopt an emergency regulation, guidance, or act to reinstate the reciprocity rule so as to correct the system wide inefficiency caused by airline consolidation and the resulting lack of competition.

Respectfully submitted by:

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Appendix A

Southwest Airlines Contract of Carriage

4c(4). “Delays or Involuntary Cancellations. If a Passenger’s scheduled transportation is cancelled, terminated, or delayed before the Passenger has reached his final destination as a result of a flight cancellation, Carrier-caused missed connection, flight delay, or omission of a scheduled stop, Carrier will either transport the Passenger at no additional charge on another of Carrier’s flights, refund the fare for the unused transportation, or provide a credit for such amount toward the purchase of future travel.”

United Airlines Contract of Carriage

Rule 240(D): “In the event of flight cancellation, diversion, delays of greater than 90 minutes, or delays that Delta Domestic General Rules Tariff Page 41 of 51 will cause a passenger to miss connections, Delta will (at passenger’s request) cancel the remaining ticket and refund the unused portion of the ticket and unused ancillary fees in the original form of payment in accordance with Rule 260 of these conditions of carriage. If the passenger does not request a refund and cancellation of the ticket, Delta will transport the passenger to the destination on Delta’s next flight on which seats are available in the class of service originally purchased. At Delta’s sole discretion and if acceptable to the passenger, Delta may arrange for the passenger to travel on another carrier or via ground transportation. If acceptable to the passenger, Delta will provide transportation in a lower class of service, in which case the passenger may be entitled to a partial refund. If space on the next available flight is available only in a higher class of service than purchased, Delta will transport the passenger on the flight, although Delta reserves the right to upgrade other passengers on the flight according to its upgrade priority policy to make space in the class of service originally purchased.”

American Airlines Contract of Carriage

Delays, cancellations and diversions: “When cancellations and major delays are experienced, you will be rerouted on our next flight with available seats. If the delay or cancellation was caused by events within our control and we do not get you to your final destination on the expected arrival day, we will provide reasonable overnight accommodations, subject to availability.

In extreme circumstances, it is possible that a flight will cancel while on the ground in the city to which it was diverted. When this happens you will be rerouted on the next American flight with available seats, or in some circumstances on another airline or some other alternative means of transportation. If we are unable to reroute you, reasonable overnight accommodations will be provided by American, subject to availability.”

United Airlines Contract of Carriage

Rule 24(E)(2): “When a Passenger’s ticket is affected because of Irregular Operations caused by UA, UA will take the following measures:
i. Transport the Passenger on its own flights, subject to availability, to the Destination, next Stopover point, or transfer point shown on its portion of the Ticket, without Stopover in the same class of service, at no additional cost to the Passenger; or

ii. At its sole discretion, UA may arrange for the passenger to travel on another carrier. United may also, at its sole discretion, and if acceptable to the passenger, arrange for the passenger to travel via ground transportation.”