



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 10th day of September, 2004

Third-Party Enforcement Complaint of

**THE ELECTRONIC PRIVACY
INFORMATION CENTER**

against

NORTHWEST AIRLINES, INC.

Alleging Violation of 49 U.S.C. § 41712

Docket OST-2004-16939-10

Served September 10, 2004

ORDER DISMISSING COMPLAINT

SUMMARY

By this order we dismiss the third-party complaint of the Electronic Privacy Information Center ("EPIC"), joined by the Minnesota Civil Liberties Union ("MnCLU"), against Northwest Airlines, Inc. ("Northwest"), alleging that Northwest violated its own privacy policy, and committed an unfair and deceptive practice in violation of 49 U.S.C. § 41712, when it shared Passenger Name Record ("PNR") data with the Ames Research Center at the National Aeronautics and Space Administration ("NASA") in the months immediately following the terrorist attacks of September 11, 2001, and when its representatives, responding to press reports that JetBlue Airways ("JetBlue") had acknowledged sharing passenger data with a Department of Defense contractor, made public statements in September 2003, that Northwest did not, and would not, share passenger data "in the way that JetBlue Airways has."

Specifically, we find that Northwest's privacy policy did not unambiguously preclude it from sharing data with the federal government; that, even if it did, such a promise would be unenforceable as against public policy, as Northwest is required by law to make such records available to the Department and to other federal agencies "upon demand"; and that, in this case, the record contains no evidence of actual or likely harm to those passengers who provided Northwest with the data that it shared.

BACKGROUND

On the morning of September 11, 2001, four airliners were hijacked in the United States with the purpose of crashing the planes, loaded with passengers and fuel, into sites in New York City and Washington, DC. Three of these hijackings resulted in the complete destruction of the World Trade Center towers in New York, and substantial damage to the Pentagon in Northern Virginia. The resulting loss of nearly 3000 lives was unprecedented, and staggering.¹

Within days of the attack, the Federal Government and many of the carriers operating in the United States became actively involved in efforts to improve security for commercial aviation and to restore public trust in the ability of carriers to deliver passengers safely and reliably to their destinations. One such effort was coordinated between Northwest Airlines and NASA's Ames Research Center.²

I. The EPIC Complaint

The facts central to this case are for the most part undisputed.

Following meetings between NASA officials and representatives of Northwest in mid-December 2001, and in response to both oral and written requests by NASA, Northwest provided to NASA a sample of its PNR data, drawn from a three-month period, for research and development work by NASA. *See* Complaint and Request for Investigation, Injunction, and for Other Relief, Jan. 20, 2004, OST-04-16939-1 ("Compl.") ¶ 23 (data from July, August and September, 2001, provided to NASA on several CD-ROMs); Letter from Mr. Edwards (NASA) to Mr. Dombrowski (Northwest), Dec. 20, 2001, Compl. Ex. B (memorializing and reiterating formal request for data); Email from Ms. Jones (NASA) to Mr. Dombrowski, et al. (Northwest), Dec. 19, 2001, Compl. Ex. D (also requesting CAPPS training manuals and related passenger screening materials). NASA informed Northwest that it was interested in obtaining this data in order to explore whether it could use its existing data analysis expertise to develop better passenger screening and threat assessment tools for use by the airlines and aviation security authorities. *See* Compl. ¶ 21; Letter, Dec. 20, Compl. Ex. B, *supra*; *see also* Presentation: NASA Ames Research Center Northwest Airlines Briefing, December 11-12, 2001, Compl. Ex. C (explaining reason for data solicitation).

¹ Within hours, for the first time in history, the national airspace of the United States was closed to all civilian traffic. This closure lasted four days for commercial flights, and even longer for general aviation, and resulted in immediate financial losses to the airline industry in the billions of dollars. The lingering effects of this closure are still being felt in the industry, and across the economy, compounding the losses occasioned by the terrorist acts themselves.

² Other such efforts have included JetBlue and American Airlines. On September 18, 2003, JetBlue disclosed that in response to a specific request by the Transportation Security Administration (TSA) it had shared customer data with Torch Concepts, a defense contractor, in connection with a Department of Defense based security research initiative. DHS, *Report to the Public on Events Surrounding jetBlue Data Transfer* (Feb. 20, 2004) <http://www.dhs.gov/interweb/assetlibrary/PrivacyOffice_jetBlueFINAL.pdf>. On April 9, 2004, American Airlines disclosed that Airline Automation, its revenue-management technology provider, shared passenger data with the TSA and several TSA contractors, for related research work. AP, *American Released Passenger Data* (Apr. 10, 2004) <<http://www.wired.com/news/print/0,1294,63018,00.html>>.

At the time Northwest shared its passenger data with NASA, the carrier's website (located at <<http://www.nwa.com/>>) made a number of representations regarding the handling of information provided by customers using the site. Compl. ¶¶ 11-16; *see also* Northwest Airlines WorldWeb Reservations, CyberSavers, and WorldPerks Award Travel Reservations Privacy Policy (located at <<http://www.nwa.com/legal2.html>>, archival copy dated Aug. 12, 2001) ("Privacy Policy"); Northwest Airlines WorldWeb Reservations, CyberSavers and Award Travel Reservations Usage Agreement and Notices (located at <<http://www.nwa.com/legal4.html>>, archival copy dated Aug. 12, 2001) ("Usage Agreement"). Both the Privacy Policy and the Usage Agreement informed customers who use the website that they "are in complete control of [their] travel planning needs ... [including] the use of information [they] provide to Northwest Airlines," Compl. ¶ 14 (omitting the words "travel planning needs ... [including]"), and proceeded to detail the manner in which Northwest would use the data to work with relevant third parties to "ensure successful fulfillment of [customers'] travel arrangements," *id.*; *see also* Privacy Statement at 3, *supra*; Usage Agreement at 1, *supra*. Moreover, both the Privacy Policy and the Usage Agreement emphasized that Northwest does not "sell individual customer names or other private profile information to third parties," and that it shares customer information "with [Northwest] partners only for specific and pertinent promotional use **but only** if [Northwest] customers have opted to receive such information." Privacy Policy at 2, *supra* (emphasis in original); Usage Agreement at 1, *supra* (emphasis in original); *see* Compl. ¶ 14.

In September 2003, NASA contacted Northwest to arrange for the return of the data. *See* Compl. ¶ 25; Letter from Mr. Schwabacher (NASA) to Mr. Dombrowski (Northwest), September 23, 2003, Compl. Ex. G. According to the letter, NASA management had terminated funding for research involving the Northwest PNR data, and decided "not to continue working with passenger data in order to avoid creating the appearance [of] violating people's privacy." *Id.* The letter also drew Northwest's attention to "the problems JetBlue is now having after providing passenger data for a project similar to [the NASA project]." *Id.*

At the same time NASA was returning the data to Northwest, comments were made to the press by Northwest executives, asserting that Northwest had not and would not engage in information sharing comparable to JetBlue's disclosure of passenger data to a defense contractor. On September 23, 2003, Northwest's Kurt Ebenhoch was quoted by the New York Times as stating that "We do not provide that type of information to anyone." Compl. ¶ 26; *see also* Micheline Maynard, *JetBlue Moves to Repair Its Image After Sharing Files*, New York Times, Sept. 23, 2003, at C4 (prefacing Ebenhoch's words by stating, "Other airlines dismissed the idea that the practice of sharing passenger information with the authorities might be prevalent.") (Compl. Ex. H). The message was reiterated the following day in a story carried by the St. Paul Pioneer Press, which cited comments, made on September 23, 2003, by Northwest CEO Richard Anderson in a meeting of the St. Paul Rotary Club, to the effect that "Northwest Airlines will not share customer information, as JetBlue Airways has." Compl. ¶ 27; *see also* *NWA Chief Says Airline Won't Share Flier Data*, St. Paul Pioneer Press, Sept. 24, 2003, at C2 (Compl. Ex. I).

On January 16, 2004, Northwest issued a statement that, notwithstanding the comments made by several of its executives in September, it had given passenger data to NASA, but that the data had been returned. *See* Compl. ¶ 30; *see also* Sara Kehaulani Goo,

Northwest Gave U.S. Data on Passengers; Airline Had Denied Sharing Information for Security Effort, *The Washington Post*, Jan. 18, 2004, A1 (Compl. Ex. L).

EPIC filed its complaint on January 20, 2004, alleging that by complying with NASA's data request Northwest violated its Usage Agreement and Privacy Policy detailed above, and that its conduct constituted an unfair and deceptive practice that harmed Northwest's customers, in violation of 49 U.S.C. §41712. Compl. ¶¶ 38-41. EPIC relies heavily upon the Federal Trade Commission's interpretation of 15 U.S.C. § 45(a), which we have acknowledged is the mold from which section 41712 was cast. Compl. ¶ 34, *citing* Letter from Mr. Podberesky (U.S. DOT) to Mr. Mogg (Dir. Gen. EC) (July 14, 2000), <<http://www.export.gov/safeharbor/DOTLETTERFINAL.htm>>. EPIC argues that Northwest's failure to abide by its privacy commitment in this case is particularly egregious because the alleged privacy violation was pervasive, affecting the "fundamental privacy rights" of potentially more than 10 million consumers, Compl. ¶ 39, because the "procurement and use of personal information [was] by the government," *id.*, because the data likely included European citizens' personal information, *id.*, and because the data likely included children's personally identifiable information, Compl. ¶¶ 37, 39. According to EPIC, the "likelihood is great" that Northwest's customers were misled by its privacy commitments, that its "material misrepresentations" "may have materially affected" its customers' choice of air carrier service, and that consequently, under FTC precedents, Northwest has engaged in a deceptive practice. Compl. ¶ 40.

II. The Minnesota Civil Liberties Union Complaint

On January 26, 2004, the Minnesota Civil Liberties Union (MnCLU) joined EPIC's complaint, repeating many of the allegations noted above, but contributing a few new details regarding Northwest's disclosures to NASA. *See* Letter from Mr. Samuelson (MnCLU) to FTC, Jan. 26, 2004, OST-2003-16939-4 ("MnCLU Letter").

MnCLU alleges that the data provided to NASA included "names, addresses, credit card numbers and phone numbers." MnCLU Letter at 1.

MnCLU also points out that, in January 2004, Northwest issued a press release indicating that the previous statements by both Mr. Anderson and Mr. Ebenhoch, noted above, contrasting JetBlue's disclosure of passenger data to a defense contractor with Northwest policy, were made without knowledge of Northwest's work with NASA. MnCLU Letter at 2 ("Mr. Anderson now says that he was not aware of the breach of privacy when he made the public statement."), *quoting* Liz Fedor, *NWA: CEO Unaware Feds Got Data*, *Star Tribune*, (Jan. 19, 2004) <<http://www.startribune.com/stories/535/4326603.html>> (Mr. Ebenhoch stated "'he also has no knowledge of the [Northwest] security department's role in the NASA study.'"); *see also* *Northwest Airlines Statement on Media Reports Regarding NASA Aviation Security Research Study* (Jan. 18, 2004), <<http://www.nwa.com/corpinfo/newsc/2004/pr012120041269.html>>.

MnCLU asserts that Northwest "breached its promise" to protect its customers' personal information, that this breach caused "substantial injury" to its customers, and that the breach "violates the established public policy of the protection of privacy as enunciated by the

Privacy Act of 1974 and numerous Supreme Court precedents declaring the right of privacy a fundamental right.” MnCLU Letter at 2-3. MnCLU also asserts that the “injury cannot be mitigated by any gains in airline security because NASA has abandoned the study.” *Id.* at 3.

III. Northwest’s Answer

For the most part, Northwest does not dispute the purely factual allegations made by EPIC and MnCLU. *See* Answer of Northwest Airlines, Inc., Feb. 27, 2004, OST-04-16939-5 (“Ans.”).³ Rather, focusing on three independent lines of argument, Northwest attacks the legal sufficiency of the allegations made by both EPIC and MnCLU, and disputes their conclusions. First, Northwest claims that its cooperation with NASA was a morally imperative and “appropriate part of [the] broad public response” to the terrorist attacks of September 11, 2001. Ans. at 1-2. Second, Northwest asserts that passengers “have no inherent right or expectation of privacy in the information provided when traveling on commercial airlines,” and the sharing of passenger data with NASA did not violate either the terms or the spirit of Northwest’s stated privacy policy. Ans. at 2. Third, Northwest states that EPIC and MnCLU lack standing to request that the Department initiate formal proceedings against Northwest in this context, as “only persons alleging actual, concrete injury should be permitted to file formal complaints and compel a docketed proceeding.” Ans. at 2-3.

A. A Moral Imperative to Share Data

By way of a background preliminary statement, Northwest draws our attention to statements by the then Administrator of the Federal Aviation Administration, Jane Garvey, that “‘assumptions underlying aviation security [were] fundamentally changed’” by the events of September 11, 2001. Ans. at 3, *quoting* Jane Garvey (FAA Admin.), Statement before the Subcommittee on Aviation, Committee on Transportation and Infrastructure, Sept. 21, 2001. It is noted that, in the months immediately following September 11, the FAA urged government, industry and the public, to work together “‘to create a seamless web of security.’” Ans. at 5, *quoting* Jane Garvey, “The New World of Aviation,” National Press Club, Washington, DC, Oct. 17, 2001. Thus, according to Northwest, it was morally imperative that it work with NASA, and do all within its power to aid in the development of better integrated and more effective security protocols. Moreover, Northwest continues, the public could not fail to be aware of these trends, and accordingly expect increased vigilance by the airlines and by the government in identifying and responding to potential threats. Thus, Northwest asserts, passengers could expect that more invasive identification

³ In a few notable instances, Northwest does assert that the factual representations made by EPIC are incomplete and misleading. *See, e.g.*, Ans. at 9-10 (contrasting an extract drawn by EPIC from Northwest’s on-line privacy policy, which EPIC represents as assuring passengers that they will be “‘in complete control of ... the use of information [they] provide to Northwest Airlines,’” with the text obscured by the ellipsis, which provides that users of Northwest’s online reservations system are “‘in complete control of [their] travel planning needs. This includes controlling the use of information [they] provide to Northwest Airlines and its affiliates.’”).

requirements and searches would become a prerequisite to flying commercially in the United States and abroad.⁴

In this context, Northwest also elaborates on its “historic” and long-standing relationship with the Ames Research Center, as well as the history of the Center itself. Ans. at 6-8. NASA, it seems, was motivated by “the best of intentions” when it requested passenger data from Northwest, as its researchers wished to determine whether “‘computer techniques developed by NASA to detect anomalies in large volumes of scientific and engineering data could be used to assist in threat detection.’” Ans. at 7, quoting Letter from D. Lee Forsgren, NASA Assistant Administrator for Legislative Affairs, to Senator Gordon Smith, Jan. 27, 2004, Ans. Exh. 2 (NASA Letter). Northwest states that while the data was in the possession of NASA, the information was maintained on CD-ROMs in a “secured lab with limited access,” and when not in use “in a locked file cabinet in a locked office,” and that when the research project at NASA was terminated in late 2002, the data were returned to Northwest. Ans. at 8, quoting the NASA Letter.

B. No Privacy Rights Were Violated

Northwest attacks the substantive allegations of privacy violations along three fronts. First, Northwest argues that the abstract form of the “right of privacy” asserted by EPIC and MnCLU is not supported by any statute, regulation or precedent, but on the contrary, in some instances the data allegedly protected are subject to mandatory disclosure to the Bureau of Customs and Border Protection by regulation. Ans. at 10-11. Second, by sharing passenger data with NASA, Northwest asserts that it did not engage in an “unfair” practice within the definitions provided by either the Federal Trade Commission or this Department, in relevant part because reasonable expectations of privacy associated with air travel have been eroded to a point where no discernable injury could have been occasioned by Northwest’s conduct. Ans. at 12-15. Third, Northwest argues that its online privacy policy, which remains the only viable basis for asserting a right of privacy on behalf of Northwest passengers, was not violated by the sharing of data with NASA, because such disclosure was not directly proscribed by the terms of the policy, which simply states, in relevant part, that Northwest “‘do[es] not *sell* individual customer names or other private profile information to third parties,’ (emphasis in original),” and separately provides that the policy “‘is subject to existing laws and legal process, and nothing contained in this Agreement is in derogation of

⁴ In a footnote, Northwest takes EPIC to task for its assertion that public opinion polls reflect a broad consensus that passenger privacy should trump additional security precautions. Ans. at 6 n. 8. Specifically, EPIC asserts in its Complaint that “[p]ublic opinion surveys consistently show that many Americans are ‘concerned’ or ‘very concerned’ about the loss of privacy,” and that “[g]overnment use of airline passenger information is a particularly important issue.” Compl. ¶¶ 7-8. Northwest cites a Los Angeles Times poll that concluded that “[n]inety-percent of those asked said they favor new security measures at the nation’s airports,” and that more than 60% said that “‘erosion of some civil liberties’” to fight terrorism “‘was a necessary sacrifice.’” Ans. at 6 n. 8, quoting Mark Z. Barabak, *U.S. Keen to Avenge Attacks; Americans Say Way of Life Has Changed Forever*, L.A. Times at A1 (Sept. 16, 2001). Still, the exercise of our enforcement discretion does not rely upon the shifting sands of public perception. It is likely that, as we have moved away from the immediate aftermath of September 11, the weight of public perception has only become more ambiguous, though it remains probable that travelers expect that they will be subject to more invasive security screening than prior to September 11.

Northwest Airlines' right to comply with law enforcement requests or requirements.' ” Ans. at 16-18.

C. EPIC and MnCLU Lack Standing

Finally, Northwest asserts that neither EPIC nor MnCLU has standing to “invoke the formal complaint procedures under the Department’s regulations.” Ans. at 19-20. In particular, Northwest asserts that neither EPIC nor MnCLU has alleged “any concrete or particularized injury by a member of either organization,” and both entities are “clearly waging a public policy battle by way of the complaint process.” *Id.* Under such circumstances, Northwest contends that the formal complaint process has been perverted, and we should exercise our discretion to insist upon a more stringent standard in allowing matters to be docketed as formal versus informal complaints.

IV. EPIC’s Reply

On March 9, 2004, EPIC filed a reply to Northwest’s answer.⁵ EPIC devotes the greater part of its reply to a restatement of the complaint, a refinement of its argument that the Department ought to be guided by the FTC’s reading of Section 5 of the Federal Trade Commission Act, and a reiteration that Northwest’s conduct violated the standards set forth by the FTC. *See* Reply of the Electronic Privacy Information Center, Mar. 9, 2004, OST-04-16939-6 (“Reply”). In sharpening its attack, EPIC states that it “has not alleged that [Northwest’s] disclosure violated any law intended solely to protect airline passenger privacy ... [but instead] contends that [Northwest’s] disclosure of millions of passenger records to NASA without the knowledge or consent of those individuals affected violated the airline’s publicly posted privacy policy, which constitutes an unfair and deceptive practice under 49 U.S.C. § 41712.” Reply at 6-7, citing *In re GeoCities*, FTC No. C-3850 (1999), *In the Matter of Eli Lilly*, FTC No. 012-3214 (2002) and *In the Matter of Microsoft Corp.*, FTC No. 012-3240 (2002), decisions of the FTC that, according to EPIC, “protect consumers from businesses that freely disclose all manner of consumer information because they arbitrarily decide what the public does and does not expect in terms of privacy.”

EPIC asserts that Northwest’s representations to its customers, by the privacy policy and elsewhere, “affirmatively misrepresented to consumers how their personal information will and will not be disclosed.” Reply at 4. In addition, EPIC asserts that it was Northwest, not NASA, that proposed the data transfer, *see* Reply at 4 (quoting Hearing on Administrations Space Initiative before the Senate Commerce Comm. on Science and Transportation, 108th Cong., Jan. 28, 2004), and the data were ultimately transferred “in the absence of a warrant, court order, or any legal process that would make clear the basis for the disclosure, the purpose of the collection, or the limitations on subsequent use,” *id.* Finally, EPIC asserts that the data shared with NASA “went far beyond the categories of information

⁵ EPIC filed a request for leave to submit a reply, to which Northwest consented. *See* Request of the Electronic Privacy Information Center for Leave to File a Reply, Mar. 9, 2004, OST-04-16939-6. As a matter of course, we grant EPIC’s request and accept the Reply for filing.

that airlines are required to provide” on a routine basis to regulatory agencies, such as the Bureau of Customs and Border Protection. Reply at 5, citing 19 CFR §122.49a(a)-(c).⁶

Finally, EPIC argues that regardless of whether Northwest’s privacy policy explicitly barred the sharing of passenger data with NASA, it engaged in a deceptive practice by failing to affirmatively disclose that it would share passenger information with NASA, and after it shared the data, by continuing to represent to its customers that no such data sharing did or would occur. Reply at 9-10. Once again, EPIC notes that Northwest representatives, including Northwest CEO Richard Anderson, made public statements in September 2003, that they “do not” and “will not” engage in the type of data sharing JetBlue had engaged in. Reply at 10, quoting press reports at Compl. Ex. H and Compl. Ex. I. EPIC asserts that Northwest cannot make a viable distinction based on the type of disclosure involved, where the partner is a governmental rather than a commercial entity, as such a distinction “is of little or no concern to the traveling public.” Reply at 10 (citing nothing, however, in support of its estimation as to what is a “concern to the traveling public”).⁷

V. Northwest’s Supplemental Response

Shortly after receiving the EPIC Reply, the Enforcement Office asked Northwest to provide further comment on the statements made by Mr. Anderson and Mr. Ebenhoch, that contrasted Northwest policy to that of JetBlue and, according to EPIC, thus gave the public the impression that Northwest did not, does not, and would not share passenger data with the government. On April 5, 2004, Northwest filed its Supplemental Response. See Supplemental Response of Northwest Airlines, Inc., April 5, 2004, OST-04-16939-9 (“Supp.”).

Northwest responded to this allegation in two parts. First, Northwest faults EPIC for failing to identify consumer injury proximately traceable to the statements of its executives, even if those statements were misleading or false with respect to the airline’s past conduct. Supp. at 2-3. In particular, Northwest contends that no consumers affected by the data disclosure, whose travel plans with Northwest were made, altered or executed in 2001, could have relied upon statements made by Northwest representatives in September 2003. *Id.* Turning prospectively, Northwest asserts that the statements are fully consistent with the carrier’s existing and anticipated policies, and that they thus accurately reflect the current treatment of passenger data for all passengers who might rely upon the representations. *Id.*

⁶ Although EPIC also asserts that Northwest “fails to address the third factor contributing to a finding of unfairness, which is whether the practice is unethical and unscrupulous,” Reply at 7, this seems patently incorrect. As noted above, Northwest concentrates a full third of its answer to an argument that cooperation with NASA in the immediate aftermath of September 11 was morally imperative.

⁷ At best, EPIC makes the suggestion that customers might have chosen to fly on other airlines had they known that Northwest would share passenger data with “the government,” and that the “intense media interest” in the data disclosures by both JetBlue and Northwest “show that the public clearly is interested in how passenger information is handled and who has access to it.” Reply at 10-11. Senator Gordon Smith is credited with stating that he and Senator Ron Wyden had been “inundated by concerned [citizens] who’ve wondered whether their privacy has been violated.” *Id.* (citation omitted). While this would suggest that some types of data sharing (such as sale of the data, or the unsecured sharing of data with a commercial partner) likely would have upset Northwest customers, and perhaps any data sharing would arouse the angry suspicion of some customers, it does not demonstrate that such reactions are reasonable or informed.

Second, Northwest argues that the statements themselves did not represent an affirmative “public relations strategy to mislead the public,” but were instead the isolated statements of two employees made in answer to questions posed by the press. Supp. at 3-4. A press release issued by Northwest on January 18, 2004, acknowledged that, at the time they spoke with the press, both Mr. Anderson and “a Northwest spokesperson” (presumably Mr. Ebenhoch) were unaware that Northwest had provided data to NASA. *Id.* at 4, citing Northwest Airlines News Release, “Northwest Airlines Statement on Media Reports Regarding NASA Aviation Security Research Study,” Jan. 18, 2004, Supp. at Tab 1 (“NWA Press Release”). The press release concludes by stating that, regardless of Northwest’s past practices, Northwest’s “current policy” precludes the sharing of passenger data with government agencies or contractors in the absence of a “data protection protocol.” NWA Press Release.

Thus, according to Northwest, when made, the statements by both Mr. Anderson and Mr. Ebenhoch accurately reflected Northwest company policy, and could not therefore represent a deceptive practice. To the extent these statements mischaracterized Northwest’s past conduct, such a mischaracterization was unintentional and, in any case, harmless, as no customer whose data was shared with NASA could have based his or her decision to fly with Northwest on any resulting misapprehension.

DECISION

This case presents a matter of first impression for the Department, requiring that we address whether a “privacy policy” published on an airline’s website interferes with the carrier’s ability to share information with the government, and if so, the extent to which such interference is permissible or constitutes an unfair or deceptive practice, either in its observance or its breach, under 49 U.S.C. § 41712. Naturally, the answers to these questions will depend heavily upon the actual terms of the policy, and any public representations made by the carrier regarding its own understanding of their import. Consequently, while a few general propositions may be gleaned from the discussion that follows, the conclusions we reach in this case are predominantly a function of the privacy policy announced by Northwest, related public statements made by Northwest officials (orally and in writing), the data that were shared, the terms under which they were shared, and with whom they were shared.

Nevertheless, at the outset, several general principles will guide our analysis.⁸ First, a carrier is bound by the representations it makes to its customers, not only by the law of contract and tort, enforced by the courts, but also by the law of unfair and deceptive practices, regulated under 49 U.S.C. § 41712. *Compare American Airlines, Inc. v. Wolens*, 513 U.S.

⁸ Although not “guiding” our discussion, one additional principle should be noted. Namely, both EPIC and MnCLU have standing to formally petition the Department to initiate enforcement proceedings in this case. We are authorized to investigate questions of unfair methods of competition on our own initiative. 49 U.S.C. § 40101. Consistent with this broad authority, our procedural regulations expressly contemplate the filing of formal complaints by “any person.” 14 C.F.R. § 302.404. As we have emphasized in the past, we believe that we serve the public interest most effectively by entertaining *all* complaints that raise timely and germane issues, without regard to the complainant. *See* Order 2000-10-8, Docket OST 99-6691, Oct. 11, 2000 (rejecting argument raised by Continental, and others, that the Association of Retail Travel Agents lacked standing). Accordingly, we reject Northwest’s invitation to dismiss the complaint for lack of standing.

219 (1995) (matters of private contract reserved to State law) *with Morales v. TWA*, 504 U.S. 374 (1992) (public assurances and statements subject to regulation by the Department).

Second, as we have repeatedly made clear, conduct may constitute an unfair practice under § 41712 “if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits.” *American Society of Travel Agents, Inc. v. Delta Airlines, Inc.*, Order 2002-9-2 (Sept. 4, 2002) (allegations of injury “too speculative” to support enforcement action), citing *Association of Discount Travel Brokers v. Continental/Eastern Tariff*, Order 92-5-60 (May 29, 1992) (“In administering section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the model for section 411[, (re-codified as § 41712)], the FTC has stated that a firm’s conduct may be an unfair practice if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits.”); *see also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5 (1972). While the events of September 11, 2001, may have a bearing on the public policy or moral ramifications of Northwest’s conduct, they did not suspend the rule of law, and would not excuse this or any carrier’s failure to comport with the requirements of § 41712 where “specific and substantial injury” has been done to the public. *Cf. REA Express, Inc. v. C.A.B.*, 507 F.2d 42 (2^d Cir. 1974).

Finally, when a carrier makes an express commitment to its customers as a class, we will construe the meaning of such a commitment, where possible, so as to avoid unlawful or unenforceable promises. In other words, ambiguity, where it exists, will be resolved in favor of a reading that allows the carrier to keep its promises with customers while also abiding by existing legal obligations. This is consistent with the rules of construction applied to statutory, regulatory and contract interpretation, and there is no reason not to apply the same standards here.⁹

I. NORTHWEST DID NOT VIOLATE THE EXPRESS TERMS OF ITS POLICY

Our analysis thus begins with a strict reading of the policy itself, spread across two documents located on the Northwest website during the relevant period. The first was entitled “Northwest Airlines WorldWeb Reservations, CyberSavers, and WorldPerks Award Travel Reservations Privacy Policy” (“Privacy Policy”), at <<http://www.nwa.com/legal2.html>>. The second was entitled “Northwest Airlines WorldWeb Reservations, CyberSavers and Award

⁹ “[I]n the interpretation of a promise or agreement[,] ... an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect[.]” Restatement 2d Contracts § 203(a). *See also, e.g., Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) (“[T]o construe statutes so as to avoid results glaringly absurd[] has long been a judicial function.”); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (“[A]mbiguity should be resolved in favor of a legal construction of the parties’ agreement”); *Sporting Club Acquisitions, Ltd. v. Federal Deposit Ins. Corp.*, No. 94-1567, 1995 WL 694128, at *3 (10th Cir. Nov. 24, 1995) (unpublished) (“[U]nder a long-standing principle of construction, FDIC’s interpretation of the contract, [if] ... unlawful, should be rejected in favor of the legal alternative proposed by SCA.” (citing Colorado case law)); *United States v. Fidelity & Deposit Co.*, 10 F.3d 1150, 1154 (5th Cir. 1994) (“Any other construction [of the bond] would be nonsensical under federal law, as such constructions would require us either to rewrite the bond or to make the bond conflict with federal law.”); *id.* at 1154 n. 14 (citing cases for the proposition that “contractual language is interpreted whenever possible to uphold the validity of the contract,” and “that reasonable doubt about the construction of a contract should be resolved in favor of legality”).

Travel Reservations Usage Agreement and Notices” (“Usage Agreement”), at <<http://www.nwa.com/legal4.html>>. Each of these documents directs the reader’s attention to the other, and together both form an integrated whole.

By its terms, the policy applied only to data provided by Northwest customers who used the Northwest reservations website.

To *these* customers, Northwest states, in introductory fashion, that “you are in complete control of your travel planning needs. This includes controlling the use of information you provide to Northwest Airlines, its airline affiliates and WorldPerks partners.” Privacy Policy at 1; Usage Agreement at 1.¹⁰ As the word “complete” does not appear in the second of these sentences, but does appear in the first (where it applies rather axiomatically to the customer’s “travel planning needs”), we are inclined to view the omission as intentional and significant. We decline EPIC’s invitation to rewrite the statement on this point, as it would render the policy internally inconsistent and potentially unenforceable,¹¹ as shown below. *See* Part II, *infra*.

The second passage emphasized by both EPIC and Northwest, again found in both documents, provides that “[Northwest] do[es] not *sell* individual customer names or other private profile information to third parties and ha[s] no intention of doing so in the future. [Northwest] do[es] share User names and email addresses with our WorldPerks partners only for specific and pertinent promotional use *but only* if our customers have opted to receive” such information. Privacy Policy at 2; Usage Agreement at 1. Again, we are inclined to view Northwest’s emphasis of the word “sell” as intentional and significant, both for what it encompasses and for what it does not. Notwithstanding EPIC’s suggestions to the contrary, nothing in this statement suggests that Northwest will not share data with third parties if such a transfer is not made for value.¹² The quoted language leaves open the possibility that Northwest will share customer data with unnamed third parties for purposes of research and development,¹³ and that it may share customer data with the government. Northwest is not

¹⁰ Because we decide that Northwest has not violated its privacy policy, and that if it did, such a violation does not warrant the initiation of enforcement proceedings, we will not dwell on the degree to which EPIC and MnCLU have overstated the class of persons potentially affected by Northwest’s conduct, nor require that Northwest provide a more detailed accounting of the number of passengers affected. By any measure, the policy at issue in this case covered only a subset of the “potentially more than 10 million” customers whose records were transferred to NASA, Compl. ¶ 39, as not every customer uses Northwest’s website, and not all information contained in each customer’s PNR was gathered in the course of their use of the website.

¹¹ By using the term “enforceable,” we do not mean to imply that the policy is in any sense contractual. Indeed, as noted above, our jurisdiction does not extend to resolving private contractual matters. *See Wolens, supra*. Moreover, although we take no position on the matter, we note that the U.S. District Court for the District of Minnesota specifically concluded that Northwest’s privacy policy did not constitute a contract with its customers. *See In re Northwest Airlines Privacy Litigation*, No. 04-126 (D.Minn. June 6, 2004), Slip Op. at 11.

¹² This is not to say that customer data are utterly unprotected so long as an “exchange for value” is absent. We express no view on the extent to which a carrier can run afoul of a privacy policy containing equivalent terminology if it shares customer data with other private or commercial entities without charge.

¹³ Indeed, the Privacy Policy expressly provides that “information about [customer] visits” may be used “so [Northwest] can continue to work to enhance your time spent with [the airline] online.” Privacy Policy at 1-2. Although Northwest has not argued the point, at the very least it seems plausible that efforts to “enhance” online services may require that Northwest grant controlled access to third party independent contractors. While we

accused of conduct expressly forewarned by this passage. There is no allegation that Northwest has sold its customer data, or that it has shared such data with its affiliates in a manner inconsistent with customer knowledge or authority.

Finally, as Northwest aptly points out, the Usage Agreement further provides that “Northwest Airlines’ performance of this Agreement is subject to existing laws and legal process, and nothing contained in this Agreement is in derogation of Northwest Airlines’ right to comply with law enforcement requests or requirements relating to the User’s use of this Web site or information provided to or gathered by Northwest Airlines with respect to such use.” Usage Agreement at 6. While it is true, as EPIC has pointed out, Reply at 5, that the second portion of this statement is not fully applicable in this case, because Northwest’s decision to share data with NASA was not made “to comply with law enforcement requests,” the proper focus of our attention is on the first portion of the statement. Performance under the Usage Agreement is “subject to existing laws.” Although too much could be made of this clause, it has the virtue of reminding the customer that whatever assurances are made elsewhere, Northwest will continue to share data with the government in those instances where statute, regulation or court order compel it to do so. *See* Ans. at 16 & 18.

II. PUBLIC POLICY SUPPORTS A READING OF NORTHWEST’S PRIVACY POLICY THAT WOULD PERMIT THE SHARING THAT DID OCCUR

EPIC and MnCLU urge us to construe Northwest’s privacy policy as precluding the sharing of customer data with any third-party not specifically identified as a potential recipient. They propose that Northwest’s failure to expressly inform customers that passenger data might be shared with NASA was tantamount to an affirmative representation that it would not be shared with NASA. *See, e.g.*, Reply at 9. Indeed, EPIC and MnCLU go further. They assert that Northwest represented to its customers that no one other than Northwest’s WorldPerks partners, or in the extreme case, “law enforcement,” would ever be given access to passenger data, *see, e.g., id.*, and that a broad public policy that favors the protection of “privacy” should resolve any textual ambiguities in favor of such a reading. We do not believe that the privacy policy can be construed in such a manner, or that public policy requires it.

First, in order to construe Northwest’s written policy as a broad proscription on data sharing, subject only to a short list of narrow enumerated exceptions, we would have to assume that the policy means something other than what it says. While we must read a carrier’s representations to the public as a whole, and doing so in some instances may reveal that consumers have been or are likely to be affected in ways we could not anticipate when looking solely at isolated phrases or statements, we will only use the “whole” to supplant the plain meaning of the text if the text itself permits such a reading, such as where the text is ambiguous, self-contradictory, or manifestly inconsistent with other statements made by the carrier. That is, we will hold a carrier accountable for messages not expressly contained in their statements (written or otherwise) if their statements, taken as a whole, open the door to

take no position on whether such sharing by Northwest would ever constitute an unfair or deceptive practice, this clause certainly demonstrates that the policy does not consistently close the door on third party disclosures.

ambiguity. In this case, we do not believe that the documents constituting Northwest's privacy policy are in the least bit ambiguous.¹⁴

Second, even if we concluded that the message was ambiguous, self-contradictory or inconsistent with other statements by Northwest, we would still not resolve this ambiguity in favor of the meaning suggested by EPIC and MnCLU. To do so would mean that Northwest had adopted an unlawful position, i.e., a position that contradicts its regulatory obligations. In this regard, Northwest does not separately identify this Department as one of the entities with which it may, from time to time, share customer data. Nevertheless, Northwest is not only permitted by current regulations to share such data with the Department, it is required to do so. *See* 49 U.S.C. § 41708 (Department may require filing of reports by carriers); 49 U.S.C. § 41709 (Department "shall prescribe" form of records maintained by carriers, and "at any time may ... inspect records kept or required to be kept" by carriers); 14 CFR § 240.2 (Department has authority to "inspect and examine all accounts, records, memorandums, documents, papers and correspondence now or hereafter existing, and kept or required to be kept by the air carrier ... [and to] make such notes or copies as [the Department or its agent] deems appropriate"); 14 CFR Part 241 § 407(e) (same); 14 CFR § 249.20 (carrier required to maintain "[r]eservation reports and records," including "passengers' names, telephone numbers, etc.," for period of at least 2 months). *See also CAB v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976) (to gain access to records, Department's demand need only be "reasonably definite and reasonably relevant to some proper investigative purpose").

Northwest appears to argue this point when it cites its obligation, under 19 CFR § 122.49a, to provide passenger and crew manifest information to the Bureau of Customs and Border Protection in the event of an aviation disaster involving that flight. *Ans.* at 12. *See* 49 U.S.C. 44909(a) (codifying data transmission requirement). *See also* 19 CFR § 122.49b (specifically requiring transmission of PNR data *upon request* by the Bureau). These requirements mirror the requirements of 14 CFR Part 243, which places specific data retention obligations on each carrier, and compels data transmission in the event of an "aviation disaster." 14 CFR § 243.11. *See also* 14 CFR § 243.17 (Department "may require the airline to produce a passenger manifest ... for a specified covered flight segment to ascertain the effectiveness of the carrier's system."). EPIC argues that these provisions are largely irrelevant because Northwest shared more data with NASA than it would be required to share with the Bureau. *Reply* at 5. The point, however, is that *any* data transmission would appear to contradict EPIC's preferred reading of the privacy policy.

Third, there is no record evidence that a significant number of Northwest's customers interpreted the policy according to the reading suggested by EPIC and MnCLU, or that Northwest encouraged such a reading. If either were the case, and Northwest knowingly or negligently led its customers to believe that it would not permit the government to have access to its business records, such conduct might constitute a deceptive practice in violation of

¹⁴ Indeed, the statements themselves are at worst ambiguously in tension with Northwest's actual conduct. Both gentlemen stated that Northwest did not do, and would not do what JetBlue appears to have done. JetBlue has been accused of sharing passenger data with a Department of Defense contractor, and has acknowledged publicly that such conduct was inconsistent with its own privacy policy. *See, e.g., Compl. Ex. K.* While we take no position on the propriety of JetBlue's conduct, Northwest is not alleged to have shared data with a private contractor.

§ 41712, as it would not be able to both satisfy customer expectations and comply with existing law. Here, however, neither EPIC nor MnCLU has provided any evidence that customers actually believed the policy prevented Northwest from making its records available to unnamed governmental entities, including this Department, or that Northwest encouraged such a reading prior to or during the months of July, August and September, 2001.¹⁵

Public policy accordingly supports Northwest's interpretation of its policy rather than the interpretation urged by EPIC and MnCLU. This is true even though we agree that privacy is an important value in our Nation's social, political and economic life. Nevertheless, privacy is not, as EPIC would have it, an absolute "personal and fundamental right," Compl. ¶ 5, particularly in the context of air travel. The privacy expectations of persons traveling by air have long been tempered by the sometimes-countervailing expectation of reliably arriving at one's destination safely. *See, e.g., City of Indianapolis v. Edmund*, 531 U.S. 32, 47-48 (2000) (reaffirming, in passing, "the validity of border searches or searches at places like airports ... where the need for such measures to ensure public safety can be particularly acute."); *United States v. Edwards*, 498 F.2d 496, 500 (2^d Cir. 1974) (quoting *United States v. Bell*, 464 F.2d 667, 675 (2^d Cir. 1972) (Friendly, J., concurring)) (upholding warrantless searches of carry-on baggage in air transportation absent particularized suspicion).¹⁶ We see no reason why the diminished expectation of privacy coincident with air travel, typically cited in upholding the legality of physically invasive passenger screening at airports, cannot also countenance the use of passenger data by a carrier in developing more reliable and less invasive methods of passenger screening.¹⁷

III. NORTHWEST'S CONDUCT WAS MORALLY DEFENSIBLE

Quite apart from the degree of Northwest's compliance with its published privacy policy, it can scarcely be said that Northwest acted in a morally repugnant manner when it sought NASA's aid in developing a more effective passenger screening system. On the other hand, we also agree that it would not clearly offend morality if Northwest chose to not release its data to NASA, for fear that the privacy of its passengers would be placed at risk of public

¹⁵ While it is regrettable that Northwest did not correct the misstatements made by Mr. Ebenhoch and Mr. Anderson for nearly four months, these comments were made public in September 2003, and are simply irrelevant to the perception of those customers whose data were shared with NASA. Affected customers had given Northwest their personal information more than two years earlier. As far as the present record reveals, the only statements such customers could have relied upon are those contained in the published policy itself.

¹⁶ This case is even further removed from the difficult tensions that dominate these precedents, as Northwest Airlines is not itself a state actor, and was not acting on behalf of federal or state law enforcement officials when it collected the data or when it shared the data with NASA. *Cf. United States v. Jacobsen*, 466 U.S. 109, 119 (1984) (no Fourth Amendment invasion of privacy where package opened by Federal Express employees of their own accord, and federal agents then invited to observe contents).

¹⁷ Our use of the phrase "expectation of privacy" in this context is specifically keyed to the "public policy" value accorded such an expectation under existing law, and should not be confused with the more personal "expectation" discussed below in the context of harm. We also note in passing that the balance between the public value of privacy and the public value of safety may have been affected by the events of September 11, 2001, but that any such shift has no relevance to the propriety of Northwest's conduct in this case. We are not concerned here with the treatment of passenger data collected by a carrier during the months following that fateful day, but collected during several months preceding, where a certain unreal prescience must be assumed on the part of passengers if we are to believe that they should have expected that their privacy would yield to the exigencies of a national emergency.

disclosure. Nevertheless, such a collision of values is not the sort of moral turpitude that will offend § 41712. *Cf. American Society of Travel Agents*, Order 2002-9-2, *supra* (“immoral” conduct sanctionable as unfair practice under § 41712); *Association of Discount Travel Brokers*, Order 92-5-60, *surpa* (same). Accordingly, we decline to sanction Northwest on purely moral grounds under § 41712.

IV. NORTHWEST’S CONDUCT DID NOT AND WAS NOT LIKELY TO RESULT IN “SIGNIFICANT” OR “SUBSTANTIAL” INJURY TO CUSTOMERS

Ultimately, and most convincingly, we decline to initiate formal enforcement proceedings in this case because there does not appear to have been any actual or likely harm to Northwest’s customers. While injury to the public is not the *sine qua non* of an unfair and deceptive practice under § 41712, it is difficult to see how the public interest would be served by bringing an enforcement action in this case, where measurable harm is so utterly lacking.

We are not dealing in this case with the willful, reckless or negligent release of ostensibly private customer information by a carrier to the public at large. Neither are we dealing in this case with a transfer of data by the carrier that ultimately results in or represents a substantial risk of resulting in such a release by a third party (in this case NASA). There is no allegation here that Northwest obtained, or hoped to obtain, a financial or economic gain by sharing a limited amount of passenger data with NASA. There is also no tenable allegation that Northwest’s customers experienced, or were in danger of experiencing, an economic, reputational, physical or psychic injury as a result of Northwest’s collaboration with NASA.¹⁸ Indeed, the sole allegation of injury (at least implicitly alleged) is that certain Northwest customers did not expect that a small group of NASA researchers would have access to their travel plans, and were disappointed when they learned they had.

When NASA received the data from Northwest, it “followed the procedures that it traditionally uses to protect sensitive data.”¹⁹ *See Letter from D. Lee Forsgren to Sen. Gordon Smith*, Jan. 27, 2004, Ans. Ex. 2. Indeed, a statement from NASA addressed to Senator Gordon Smith, and pertaining to its handling of the Northwest data, details substantial security measures taken to ensure that the data would not leave the NASA facility, and would only be used as part of the research project. *Id.* After NASA abandoned the research project, but before the data were returned to Northwest, they were stored on CD-ROMs in a locked file cabinet in a locked office. *Id.*

¹⁸ We note that the U.S. District Court for the District of Minnesota reached a similar conclusion when it found that Northwest had not committed a trespass against its customers (as Northwest owns its PNR data), and did not commit an intrusion upon seclusion (as the sharing of data with NASA was “not offensive to a reasonable person”). *See In re Northwest Airlines Privacy Litigation*, No. 04-126, at 8-10.

¹⁹ Indeed, there is some evidence that the NASA laboratory involved in this case would have employed strict security measures to protect the data in question and would have been a great deal better positioned than many other agencies of the federal government to maintain the privacy of personal information contained therein. The Ames Research Center is centrally involved with NASA’s Aviation Performance Measuring System (APMS) and the Computational Division’s Aviation Data Integration System (ADIS), which maintain and rely upon strict measures of confidentiality with respect to the data supplied by the airlines and their personnel. *See APMS Homepage*, at <<http://human-factors.arc.nasa.gov/ihs/activities/APMS/>>, last visited August 27, 2004; *NASA: Computational Sciences Division*, at <<http://ic.arc.nasa.gov/story.php?sid=103&sec=>>, last visited August 27, 2004.

Northwest's release of a small portion of its PNR data to a data analysis laboratory at NASA is far removed from the perceived scourges of the digital age. The risks of identity theft, in the extreme case, or of unsolicited commercial contact or profiling, appear to have been exceedingly remote in this case. Northwest's passenger data scarcely could have been safer if kept within Northwest's own file servers.

CONCLUSION

As a result of the foregoing, we conclude that Northwest's privacy policy did not mislead its customers, with respect to either its intentions or its acts, and that by sharing passenger data with NASA for noncommercial research purposes Northwest did not violate the express or intended meaning of that policy. In addition, there is no evidence that customers were harmed, or likely to be harmed, by Northwest's effort to develop a more reliable passenger screening system with the help of NASA. Therefore, we find that it is not in the public interest to pursue an enforcement action in this case.

ACCORDINGLY, acting under the authority of 14 CFR 302.406(a)(2),

1. We dismiss the complaint; and
2. We will serve a copy of this order of dismissal on Northwest Airlines, EPIC and MnCLU.

This order will become a final order of the Department 10 days after its service unless a timely petition for review is filed or the Department takes review on its own initiative.

By:

Samuel Podberesky
Assistant General Counsel for
Aviation Enforcement and Proceedings

(SEAL)

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