

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

_____)
In the Matter of)
)
NORTHWEST AIRLINES, INC.)
_____)

Docket No. OST-04-16939

Dated: September 20, 2004

**PETITION OF THE ELECTRONIC PRIVACY INFORMATION CENTER
FOR REVIEW OF ORDER DISMISSING COMPLAINT**

The Electronic Privacy Information Center (“EPIC”) hereby submits this Petition for Review to the Department of Transportation (“DOT”), seeking reversal of the DOT’s September 10, 2004 (“Order”) finding that Northwest Airlines (“NWA”) did not engage in an unfair or deceptive trade practice by providing sensitive customer data to a government agency, contrary to the plain meaning of the NWA privacy policy, and in the absence of a legal obligation to do so. The DOT concluded that the disclosure did not constitute an unfair or deceptive trade practice under 49 U.S.C. § 41712.

INTRODUCTION

The DOT erred by failing to correctly apply the test for a violation of consumer protection law. While the Order announces the appropriate test for unfair and deceptive trade practices set out by statute and adopted by the Federal Trade Commission (“FTC”), it subsequently ignores the established analysis for deceptive trade practices. Rather than apply the proper test for deceptive practices, the DOT engaged in a contrived ends-oriented interpretation of NWA’s privacy policy that is inconsistent with relevant precedent and the reasonable consumer test.

The Order also misconstrues EPIC's complaint. EPIC did not argue that NWA's privacy policy would preclude it from providing customer data to the government if required to do so by law. It is precisely the absence of a legal process supported by a judicial determination in this matter that gives rise to the focus on NWA's discretionary disclosure of millions of customer records.

The Order's quasi-statutory analysis also blatantly undermines the DOT's stated position that "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[.]"¹

For the purpose of determining whether NWA engaged in a deceptive trade practice, the DOT was required to determine whether NWA made a material representation, omission or practice that was likely to mislead a reasonable consumer. As outlined above and described further below, the DOT did not engage in such an analysis. Because NWA made precisely such a representation to consumers on its Web site, the Order should be reversed the DOT should find that NWA violated its privacy policy and committed a deceptive trade practice, and the DOT should enforce NWA's privacy policy.

I. THE ORDER IGNORES THE ESTABLISHED TEST FOR DECEPTIVE TRADE PRACTICES AND OTHER RELEVANT PRECEDENT.

The DOT concedes that the Federal Trade Commission Act, 15 U.S.C. § 45(a), "is the mold from which section 41712 was cast."² Despite this finding, the DOT failed to consider or apply the proper test for deceptive trade practices established under 49 U.S.C.

¹ Order at 9.

² Order at 4.

§ 41712 and FTC precedent. The DOT reached a legal conclusion that is contrary to established law and relevant precedent.

A. The Order fails to address whether NWA’s privacy policy included material representations that were likely to mislead reasonable consumers.

The Order focuses on a strained quasi-statutory interpretation of NWA’s privacy policy, rather than the established test to determine the existence of a deceptive trade practice. A deceptive trade practice is committed when (1) there is a “representation, omission or practice,” (2) the representation, omission or practice is likely to mislead a “reasonable consumer,” and (3) the representation, omission or practice is material.³

It is well established both by the FTC and federal courts that deceptive trade practices are to be viewed in light of a company’s representations as a whole.⁴ As the Third Circuit stated in *FTC v. Patriot Alcohol Testers*, “[t]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.”⁵

NWA’s privacy policy constitutes a representation to consumers. In this representation, NWA failed to inform potential Internet customers that it would voluntarily offer their sensitive personal information to a government agency in the absence of any obligation to comply with “existing laws and legal process,” or law enforcement requests. Many reasonable, law-abiding consumers would consider such an omission to be material when choosing an air carrier. However, the Order fails to apply

³ Letter from James C. Miller, FTC Chairman, to John D. Dingell, Chairman, House Comm. On Energy and Commerce (Oct. 14, 1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (last accessed Sept. 20, 2004).

⁴ *See* Letter from James Miller to John Dingell, *supra* note 1, and Order at 12.

⁵ 798 F. Supp. 851, 855 (D. Mass. 1992) (quoting *Beneficial Corporation v. FTC* 542 F.2d 611, 617 (3rd Cir. 1976)).

this test, instead proclaiming, in a remarkable failing-to-resolve-the-central-question manner, that “Northwest has not violated its privacy policy, and . . . if it did, such a violation does not warrant the initiation of enforcement proceedings.”⁶

The FTC has found the use of a privacy policy to be a deceptive practice if it “expressly or by *implication*” misrepresents that users maintain control over personal information, except where users have consented to such sharing or as otherwise provided in the policy.⁷ [Emphasis added.]

The first two sentences of NWA’s privacy policy read as follows:

As a User of nwa.com Reservations 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.

[Emphasis added.]

The Order interprets the absence of the word “complete” in the second sentence of NWA’s privacy policy to open the door for NWA to provide sensitive personal data to a non-law enforcement governmental body in the absence of any legal obligation. No reasonable consumer is likely to apply such a tortured analysis to the plain meaning of this language. NWA’s privacy policy, which NWA chose to write the way it did, misleads reasonable customers into thinking that they are in control of how their information is used.

Even if the Order’s quasi-statutory analysis were appropriate (which it is not), the DOT came to the wrong conclusion in its own analysis. The use of the phrase “this includes” in the second sentence merely provides a list of what customers are in

⁶ Order at 11, fn 10.

⁷ *In the Matter of Microsoft Corporation*, Complaint, Federal Trade Commission, Docket No. C-4069, ¶¶18-20 (Dec. 24, 2002) available at <http://www.ftc.gov/os/2002/12/microsoftcomplaint.pdf> (last accessed Sept. 20, 2004).

“complete control” of. The pronoun “this” is used in substitution for the preceding predicate. Without the use of pronouns, the reasonable consumer would read this sentence: “The complete control of your travel planning needs includes controlling the use of information you provide to Northwest Airlines[.]”

NWA’s usage agreement (which is on a different web page than NWA’s privacy policy) listed numerous circumstances under which NWA would not be required to protect its customers’ personal data, including, for example, “if our customers have opted to receive [promotional] information,” “to comply with law enforcement requests,” and “subject to existing laws and legal process.”⁸ The reasonable consumer would interpret these specific exclusions to be a representation “expressly or by implication” that this list is comprehensive. Consumers were given every reason to believe that their data would be protected, as NWA promised in the privacy policy, unless the usage agreement expressly stated otherwise.

This interpretation is reinforced by FTC precedent. *In the Matter of Educational Research Center of America, Inc. and Student Marketing Group* involved companies that compiled surveys of high school and middle school students, purportedly to “help students further their education and professional development by enabling institutions of higher learning to identify potential students and to provide them with information about curricula, extracurricular activities and financial aid programs.”⁹ The Educational Research Center of America’s (“ERCA”) literature listed several potential uses of

⁸ See Usage Agreement.

⁹ *In the Matter of Educational Research Center of America, Inc., and Student Marketing Group Inc.*, Complaint, Federal Trade Commission, Docket No. C-4079 ¶10 (May 9, 2003), available at <http://www.ftc.gov/os/2003/05/ERCAcomplaint.pdf> (last accessed Sept. 20, 2004).

personal information, all related to educational and professional development.¹⁰ The FTC found that ERCA committed unfair and deceptive trade practices by selling this information to commercial entities, even though ERCA policies contained no express guarantee of the privacy of the information provided by students.¹¹ The FTC held that by listing the potential uses for information provided by students, ERCA “represented, expressly or by implication, that information collected from students through the Surveys is shared only with colleges, universities, and other entities providing education-related services.”¹²

Like the unfair and deceptive trade practice in *ERCA*, NWA’s voluntary decision to disseminate its customers’ personal information to the National Aeronautics and Space Administration (“NASA”) does not fall under any of the enumerated exceptions to NWA’s privacy policy. The Order concedes that NWA’s “decision to share data with NASA was not made ‘to comply with law enforcement requests.’”¹³ The Order goes on to declare that:

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.¹⁴

This is not one of those instances. Nowhere does the Order state exactly what “statute, regulation or court order” compelled NWA to share its customer’s private information with NASA. The fact is that there is no such statute, regulation or court order in this case.

¹⁰ *Id.*, at ¶10.

¹¹ *Id.*, at ¶¶10-15.

¹² *Id.*, at ¶11; *see also In the Matter of NRCCUA* (Survey company that sold student information after express assurances that the data would be shared only with “entities providing education-related services” committed unfair and deceptive trade practices.).

¹³ Order at 12.

¹⁴ *Id.*, at 12.

There is no basis in law for NWA's disclosure of private customer information to a government agency for research purposes. Judicial authority is necessary precisely to prevent the misuse of data that could otherwise result from such boundless disclosures of personal information to government agencies.

The DOT should follow the precedent set by the FTC and find that NWA's misrepresentation "expressly or by implication" that customer information would be used only for the enumerated purposes was a deceptive trade practice.

B. Whether NWA's privacy policy was enforceable under the law or caused "significant" harm is irrelevant to whether NWA committed a deceptive trade practice.

EPIC does not argue that NWA's privacy policy would have precluded it from sharing customer data with the government if "existing laws and legal process" so required. Indeed, the enforceability of the privacy policy under the law is immaterial. The relevant inquiry in a claim of deceptive trade practices is whether NWA made a material representation, omission or practice that was likely to mislead a reasonable consumer.

In this case, the deceptive trade practice was not the dissemination of customer information to NASA, but the misrepresentation to consumers regarding the protection of their personal data. The statements in NWA's privacy policy are made, in part, to persuade consumers to choose its service rather than that of a competing retailer that does not guarantee the privacy of its customers. If NWA has been unwilling to fulfill the promises it made to induce consumers to become its customers, it has committed a deceptive trade practice.

The Order declines to initiate formal enforcement proceedings "most convincingly" because there is no showing of actual or likely harm. However, the

standard for deceptive trade practices, discussed *supra*, does not include a requirement of harm to the consumer. Moreover, while EPIC submits that the dissemination of customers' sensitive personal information without their knowledge or consent constitutes actual harm (and that other resulting harms may yet come to pass), all that is required to establish a claim of a deceptive trade practice is that NWA made a material representation, omission or practice that was likely to mislead a reasonable consumer.

II. THE DOT'S FAILURE TO ENSURE COMPLIANCE WITH NWA'S PRIVACY POLICY BREACHES AN OBLIGATION MADE BY THE U.S. GOVERNMENT TO THE EUROPEAN GOVERNMENT TO UPHOLD THE PRINCIPLES OF THE SAFE HARBOR AGREEMENT.

In a July 14, 2000 letter to European Union Director General John Mogg, the DOT publicly represented that it “encourages self-regulation as the least intrusive and most efficient means of ensuring the privacy of information provided by consumers to airlines.”¹⁵ This position is identical to that taken by the FTC before the U.S. Senate.¹⁶ The DOT's conclusion that even if NWA had violated its privacy policy “such a violation does not warrant the initiation of enforcement proceedings” blatantly flies in the face of the commitments the agency has made to the public and the European Union.

The DOT's failure to enforce NWA's privacy policy eviscerates its commitment to adhere to the provisions of the Safe Harbor agreement. In its letter to Director General Mogg, the DOT stated that “the Department will ensure airline compliance with privacy

¹⁵ Letter from Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceeding, U.S. Department of Transportation to John Mogg, Director General, European Commission (July 14, 2000), *available at* <http://www.export.gov/safeharbor/DOTLETTERFINAL.htm> (last accessed Sept. 20, 2004), reprinted in Marc Rotenberg, ed., *THE PRIVACY LAW SOURCEBOOK 2001: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS* 514 (EPIC 2001).

¹⁶ Prepared Statement of the Federal Trade Commission on “Self-Regulation and Privacy Online” before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation of the United States Senate (July 27, 1999) *available at* <http://www.ftc.gov/os/1999/07/privacyonlinetestimony.pdf> (last accessed Sept. 20, 2004).

commitments made to the public, and pursue referrals of alleged non-compliance that we receive from self-regulatory organizations and others.”¹⁷ In this case, NWA made clear privacy commitments to the public which it did not live up to. By failing to hold NWA to its representations to the public, the Order in this case has called into question not only the representations of a major airline carrier, but also of a significant federal agency.

CONCLUSION

The DOT should reverse the Order, find that NWA violated its privacy policy and committed a deceptive trade practice by disclosing passenger records to NASA and enforce the privacy policy of NWA.

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¹⁷ See Letter from Samuel Podberesky to John Mogg, *supra* note 8.

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing reply has been served on the following parties via priority mail on September 20, 2004:

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