

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

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

Docket No. OST-04-16939

Dated: March 9, 2004

**REQUEST OF THE ELECTRONIC PRIVACY INFORMATION CENTER
FOR LEAVE TO FILE A REPLY**

The Electronic Privacy Information Center (“EPIC”) respectfully requests leave to file the attached reply to the answer of Northwest Airlines, Inc. pursuant to Department of Transportation Rule § 302.408(c), which gives the Department of Transportation decisionmaker authority to, “in his or her discretion, . . . permit the filing of a reply in appropriate cases[.]” Counsel for Northwest Airlines, Inc. has consented to EPIC’s submission of a reply. Therefore, EPIC respectfully requests permission to file the attached reply.

Respectfully submitted,

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REPLY OF THE ELECTRONIC PRIVACY INFORMATION CENTER

In its February 27, 2004 answer to the complaint, Northwest Airlines, Inc. (“NWA”) argues that its disclosure of millions of passenger records to the National Aeronautics and Space Administration (“NASA”), in violation of its publicly posted privacy policy, was “entirely appropriate” and in contravention of no law or policy. The Electronic Privacy Information Center (“EPIC”) asserts in this reply that NWA’s actions clearly constitute an unfair and deceptive trade practice under 49 U.S.C. § 41712, as construed by the Department, and that EPIC has properly filed a formal complaint against the airline.

While the Department has maintained that “self-regulation is the least intrusive and most efficient means of ensuring the privacy of information provided by consumers to airlines,”¹ NWA’s wrongful disclosure of passenger records to NASA clearly demonstrates that the airline’s express assurances to its passengers must be subject to the kind of oversight and

¹ 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>, *reprinted in* MARC ROTENBERG, ED., THE PRIVACY LAW SOURCEBOOK 2001: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 514 (EPIC 2001) (hereinafter “Podberesky Letter”).

enforcement that EPIC requests here, and that the Department has the authority to pursue. For this reason, the Department should investigate this matter and impose such remedies as it deems appropriate. Indeed, this proceeding poses the first test of the privacy enforcement mechanisms the Department has publicly undertaken to pursue in cases of this kind.

I. NWA's Disclosure of Millions of Passenger Records in Violation of Its Publicly Posted Privacy Policy Violates 49 U.S.C. § 41712.

EPIC does not dispute that the horrific events of September 11, 2001 fundamentally changed the way the airline industry operates. However, NWA should not be permitted to rely on those events as an excuse for being dishonest with passengers about what the airline does with their personal information. The Department has a responsibility set out in law, in public representations, and in official communications to foreign governments to enforce representations that airlines make to consumers regarding use of passengers' personal information. NWA, at all times relevant to the complaint, assured consumers who provided personal information through NWA's website that they had "complete control" over the use of that information. At no time did NWA inform passengers that it would disclose personal information to the government without the knowledge or consent of the affected consumers, despite the fact that it expressly and specifically disclosed other uses of passenger information. In fact, a company spokesman and NWA's CEO expressly told the public that NWA had not disclosed this type of information to the government. For these reasons, the Department should investigate NWA's privacy practices and impose appropriate sanctions for unfair and deceptive trade practices in violation of 49 U.S.C. § 41712.

A. This Case Tests the Commitment of the Department to the Assurances it Provided to the European Union.

Contrary to NWA's assertion that the Department lacks authority to enforce representations that airlines make to the public regarding privacy protection, the Department has assured the European Commission that, "using its existing consumer protection statutory authority, the Department will ensure airline compliance with privacy commitments made to the public."² This matter is, in effect, a test case to see whether the Department will stand by the representations it has made to the American public and to the European Commission that privacy violations by airlines will not be tolerated.³

The Department has determined that its authority "to take enforcement action in this area is found in 49 U.S.C. § 41712 which prohibits a carrier from engaging in an 'unfair or deceptive trade practice or an unfair method of competition' in the sale of air transportation that results or is likely to result in harm."⁴ The Department has noted that 49 U.S.C. § 41712 "is patterned after Section 5 of the Federal Trade Commission Act."⁵ Though NWA has not committed to comply with the "safe harbor" principles, and the Department has stated that "the failure by a carrier to maintain the privacy of information obtained by passengers would not be a *per se* violation of section 41712," this is a situation in which an airline has not merely failed to maintain a non-

² Podberesky Letter at 514.

³ The recent controversy within the European Union concerning the transfer of passenger data to the U.S. government belies NWA's suggestion that passenger privacy concerns extend only to the "commercial" sharing of such data. *See, e.g.,* European Parliament Resolution of Transfer of Personal Data by the Airlines in the Case of Transatlantic Flights: State of Negotiations with the USA (Oct. 9, 2003), *available at* <http://www.epic.org/privacy/airtravel/profiling/epresolution.html>. As EPIC noted in its complaint, and as NWA admits, the disclosure at issue here included personal data concerning European citizens as a result of NWA's relationship with KLM. Complaint, ¶ 13; Answer, ¶ 13.

⁴ Podberesky Letter at 514.

⁵ *Id.*

specific notion of passenger privacy. Rather, NWA has affirmatively misrepresented to consumers how their personal information will and will not be disclosed, and has omitted from its privacy policy the fact that passenger information will be disclosed to the government without passengers' knowledge or consent, though it readily and specifically identifies other parties to whom information may be disclosed such as WorldPerks partners and, in a separate "Usage Agreement," law enforcement.

In defense of its actions, NWA asserts that "federal law at times requires the provision of passenger information to federal authorities," citing the fact that current regulations require airlines to provide passenger and crew manifest information to the Bureau of Customs and Border Protection.⁶ The fact remains that NWA was not obligated to provide passenger information to NASA, and certainly had no reason to do so without giving passengers notice that such disclosure might occur. To the contrary, NASA Administrator Sean O'Keefe told the Senate Commerce Science and Transportation Committee that NWA initiated the disclosure of passenger data: "Northwest requested that we help with some analysis to see if there was [sic] some trend patterns that could be devised or derived from looking at this information."⁷ Moreover, NWA provided this information to a government agency in the absence of a warrant, subpoena, 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. This was, simply stated, an unlawful disclosure of confidential customer information.

⁶ Answer at 12.

⁷ *Hearing on Administration Space Initiative Before the Senate Commerce Comm. on Science and Transportation*, 108th Cong. (Jan. 28, 2004) (hereinafter *Hearing*).

Other airlines have exhibited great reluctance to disclose voluntarily passenger information to the government for aviation security enhancement or any other purpose. The Transportation Security Administration, more directly involved in developing aviation security than NASA, has been unable to obtain passenger information from NWA or any other airline to test the controversial second-generation Computer Assisted Passenger Prescreening System (CAPPS II) due to “privacy concerns associated with its access to the data.”⁸ NWA’s insinuation that it was somehow obligated to give NASA passenger information post 9-11 because NASA is a government agency is simply a *post hoc* attempt by the airline to avoid responsibility for its actions.

In any event, the information disclosure at issue here went beyond the categories of information that airlines are required to provide the Bureau of Customs and Border Protection. First, the “passenger manifest” requirements apply only to flights originating outside of the United States.⁹ Second, the disclosure here apparently included “personal information such as phone number, method of payment, and credit card information if the passenger paid with a credit card.”¹⁰ None of that information is included in the manifest data required for arriving international flights.¹¹

1. Because a Finding of Unfairness Can Be Based Upon Minor

⁸ General Accounting Office, *Aviation Security: Computer Assisted Passenger Prescreening System Faces Significant Implementation Challenges*, GAO-04-385 16 (Feb. 2004) [hereinafter *Aviation Security*].

⁹ 19 CFR § 122.49a(a).

¹⁰ Exhibit 2 (attached to Answer).

¹¹ 19 CFR § 122.49a(c)(2).

**Injury to Many Consumers, Northwest Airlines Indisputably
Committed an Unfair Trade Practice.**

NWA devotes a considerable portion of its answer to explaining why its disclosure of passenger information to NASA violated no federal privacy law.¹² Indeed, EPIC has not alleged that NWA's disclosure violated any law intended solely to protect airline passenger privacy. Rather, EPIC contends that NWA'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 trade practice under 49 U.S.C. § 41712.¹³

NWA contends that its conduct does not rise to the level of an unfair trade practice because "there is no established 'public policy' supporting the expansive privacy rights EPIC and MCLU advocate"¹⁴ and because "[g]iven that the public does not reasonably expect the type of privacy that EPIC and MCLU advocate, there is no 'substantial' injury in the disclosure of passenger information[.]"¹⁵ There can be no more compelling public policy than assuring that businesses conduct honest, straightforward business with consumers. A body of consumer protection law exists to 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 protection.¹⁶

¹² Answer at 13-16.

¹³ See EPIC Complaint ¶¶ 38-41.

¹⁴ Answer at 13.

¹⁵ Answer at 15.

¹⁶ See, e.g., *In re GeoCities*, FTC No. C-3850 (1999); *In the Matter of Eli Lilly*, FTC No. 012-3214 (2002); *In the Matter of Microsoft Corp.*, FTC No. 012-3240 (2002).

Likewise, it is not for NWA to determine the degree to which its actions harmed its passengers. At least two class action lawsuits arising from the disclosure have been filed against the airline, suggesting that some consumers believe they have suffered injury as a result of NWA's disclosure.¹⁷ Regardless of the extent of the harm, as noted in EPIC's complaint, substantial injury may be found when a business practice causes a relatively small injury to a large number of consumers.¹⁸ Here, millions of consumers have been affected by NWA's disclosure of passenger information to NASA, so the injury caused to each consumer need not be substantial to support a finding of unfairness.

NWA's answer fails to address a third factor contributing to a finding of unfairness, which is whether the practice is unethical and unscrupulous.¹⁹ Given the extensive, negative media attention and class action lawsuits NWA's disclosure has spawned, this factor should not be ignored in the Department's consideration of this matter. After it was first reported on the Washington Post's front page that NWA disclosed millions of passenger records to NASA for research purposes,²⁰ NWA asserted that its "current policy is to not provide passenger name record data to private contractors or federal government agencies for use in aviation security research projects."²¹ If the airline truly believes, as it asserts here, that disclosing passenger

¹⁷ *Povitz v. Northwest Airlines Co. et al.*, No. CV-04-136 (D. Minn. filed Jan. 20, 2004); *Vergeldt v. Northwest Airlines Co. et al.*, No. CV-04-126 (D. Minn. filed Jan. 20, 2004).

¹⁸ See FTC Policy Statement on Unfairness (1980), at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

¹⁹ *Id.*

²⁰ Sara Kehaulani Goo, *Northwest Gave U.S. Data on Passengers*, The Washington Post, Jan. 18, 2004 at A1.

²¹ Press Release, Northwest Airlines, Northwest Airlines Statement On Media Reports Regarding NASA Aviation Security Research Study (Jan. 18, 2004), *available at*

information to the government without the knowledge or consent of those who were affected is “entirely appropriate,”²² it seems odd that it would change its practices now.

2. NWA Committed a Deceptive Trade Practice Because a Consumer Reading the Airline’s Privacy Policy Could Reasonably Believe that His Personal Information Would Not be Disclosed to the Government.

NWA contends that it has not committed a deceptive trade practice because it has complied with all representations made on its website. When evaluating whether a practice is deceptive, however, the Federal Trade Commission (“FTC”) takes into account not only representations, but omissions as well.²³ The FTC evaluates representations and omissions for deception based on three factors: the representation or omission’s likelihood to be misleading, rather than whether a consumer has actually been misled; whether a reasonable consumer is likely to be misled by the representation or omission; and whether the representation or omission is material, or likely to affect a consumer’s conduct toward a product or service.²⁴ NWA’s failure to state in its privacy policy that the airline would disclose personal information to the government is misleading because the policy assured consumers they have “complete control” over the use of their information, and specifically identified other entities to which the airline might make disclosures. It is highly likely that reasonable consumers were misled by NWA’s failure to mention in its privacy policy that the airline would disclose passenger

<http://www.nwa.com/corpinfo/newsc/2004/pr012120041269.html> (hereinafter Northwest Airlines Statement).

²² Answer at 8.

²³ FTC Policy Statement on Deception (1983) at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

²⁴ *Id.*

information to the government without passengers' knowledge or consent, and this material omission may well have affected some consumers' choice in air carrier.

The privacy policy located on NWA's website unequivocally assures customers: "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[.]**"²⁵ NWA's privacy policy makes no mention that the airline may disclose consumer information to the government, though it describes in detail how information will be used and may be disclosed for other purposes, stating "We do not **sell** individual customer information or other private profile information to third parties and have no intention of doing so in the future. We do share User names and email addresses with our WorldPerks partners **but only** for specific and pertinent promotional use but only if our customers have opted to receive promotional emails from Northwest and our WorldPerks partners."²⁶ In a separate "Usage Agreement," NWA also states that consumer information may be disclosed at the request of law enforcement,²⁷ which would not, by any stretch, include an agency like NASA.

Furthermore, outside of its privacy policy, NWA made explicit representations to the public that passenger information would not be disclosed to the government. Shortly after JetBlue Airways' disclosure of passenger data to a Defense Department contractor, NWA spokesman Kurt Ebenhoch told the New York Times that "we do not provide that type of

²⁵ *Northwest Airlines nwa.com Reservations and WorldPerks Award Travel Reservations Privacy Policy* at <http://www.nwa.com/legal2.html> (last accessed Mar. 4, 2004) (emphasis added).

²⁶ *Id.* (emphasis in original).

²⁷ *Nwa.com Reservations and WorldPerks Award Travel Reservations Usage Agreement And Notices* at <http://www.nwa.com/legal4.html> (last accessed Mar. 4, 2004).

information to anyone.”²⁸ NWA CEO Richard Anderson similarly told the St. Paul Rotary Club, “Northwest Airlines will not share customer information, as JetBlue Airways has.”²⁹ Although NWA later claimed that these company officials had “no knowledge” of the disclosure at the time they made these representations to the public,³⁰ the company made no attempt to correct these false statements after Mr. Anderson and other NWA officials learned that it was, indeed, NWA’s policy and practice to share passenger information with the government.³¹

NWA’s public assurances of privacy protection in the wake of the JetBlue disclosure also belie the company’s suggestion that the type of disclosure at issue here – to the government as opposed to a “commercial” entity – is of little or no concern to the traveling public. Rather than defend JetBlue’s actions as an appropriate response to the events of September 11, NWA officials sought to distinguish their own practices from those of JetBlue.

Furthermore, if consumers had been informed that NWA’s policy was to disclose passenger information to the government, some might have elected to fly on more privacy-sensitive airlines (a reputation that NWA officials undeservedly sought to acquire after the JetBlue incident). The intense media interest in the JetBlue and NWA disclosures show that the public clearly is interested in how passenger information is handled and who has access to it. In a recent hearing of the Senate Commerce, Science and Transportation Committee on the future of space exploration, NASA Administrator O’Keefe was repeatedly questioned about the

²⁸ Micheline Maynard, *JetBlue Moves to Repair its Image After Sharing Files*, The New York Times, Sept. 23, 2003, at C4.

²⁹ Northwest Airlines Statement, *supra* n.13.

³⁰ *Id.*

³¹ Martin J. Moylan, *Groups Advise NWA to Back Down*, Saint Paul Pioneer Press, Jan. 20, 2004, at 1E.

propriety of NASA's use of NWA passenger information to conduct research without the knowledge of the affected individuals.³² At that hearing, Senator Gordon Smith stated that he and Senator Ron Wyden, both from Oregon, had been "inundated by concerned Oregonians who've wondered whether their privacy has been violated" as a result of Northwest's disclosure.³³ Similarly, TSA has been unable to find airlines willing to turn over passenger information for CAPPs II testing because of privacy concerns.³⁴ Reasonable consumers may very well have chosen not to fly with NWA had they known that the airline would disclose their credit card information and other personal data to the government without their knowledge or consent.

II. EPIC Has Standing to File a Formal Complaint Against NWA With the Department.

EPIC clearly has standing to file a formal complaint with the Department against NWA. The applicable regulation, 14 C.F.R. § 302.404, states that "[a]ny person may make a formal complaint to the Assistant General Counsel about any violation" of applicable law or the Department's rules or regulations.³⁵ Furthermore, EPIC has standing to file a formal complaint because actual injury to a consumer is not required for an airline to violate 49 U.S.C. § 41712. The Department has stated that "49 U.S.C. § 41712 prohibits a carrier from engaging in an

³² *Hearing*, supra n.7.

³³ *Id.*

³⁴ *Aviation Security*, supra n.6, at 16.

³⁵ 14 C.F.R. § 302.404(a) (emphasis added).

‘unfair or deceptive trade practice or an unfair method of competition’ in the sale of air transportation that results **or is likely to result** in harm.’³⁶

Regardless of whether EPIC lacks standing to file a formal complaint, NWA concedes that EPIC may file an informal complaint,³⁷ and the Secretary indisputably has authority to open an investigation at his own initiative into NWA’s disclosure of passenger information.³⁸

CONCLUSION

For the foregoing reasons, the Department of Transportation should investigate the privacy practices of Northwest Airlines and impose such remedies as the Department deems appropriate.

Respectfully submitted,

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³⁶ Podberesky Letter at 514 (emphasis added).

³⁷ Answer at 20.

³⁸ 49 U.S.C. § 41712(a).

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing reply has been served on the following parties

via priority mail on March 9, 2004:

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