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

Issued by the Department of Transportation
on the 27th day of May, 2004

Complaint of **Irvin Rosenfeld *v.*** **Delta Air Lines, Inc.** **Violations of 49 U.S.C. § 41705**	**Served May 27, 2004** **OST 2002-14808**

ORDER AFFIRMING DISMISSAL OF COMPLAINT

By Order 2004-3-27, the Office of Aviation Enforcement and Proceedings (Enforcement Office) dismissed a third-party enforcement complaint filed by Mr. Irvin Rosenfeld (the Complainant) against Delta Air Lines (Delta). The complaint alleged that the carrier had discriminated against Mr. Rosenfeld as a disabled passenger in violation of the Air Carrier Access Act (ACAA; 49 U.S.C. § 41705) and 14 CFR Part 382 by refusing to allow him to board a flight because he insisted on bringing with him a supply of what he described as "medically-prescribed marijuana." On April 9, 2004, Mr. Rosenfeld filed a petition for reconsideration of Order 2004-5-3. Although the Department's rules do not specifically provide for such petitions with respect to dismissal orders, as a matter of discretion we will treat the pleading on its merits as a petition for review of staff action. (See 14 CFR Part 385, Subpart C).

The Enforcement Office concluded in Order 2004-3-27 that enforcement action was not warranted on the basis of Mr. Rosenfeld's complaint. The decision was reached after an investigation of the background of his complaint, the receipt of an answer and supplemental information from Delta, and consultation with the Drug Enforcement Administration (DEA) and the Food and Drug Administration (FDA). As confirmed in the investigation of the complaint conducted by the Enforcement Office, Mr. Rosenfeld has been a subject in an Investigational New Drug (IND) trial regulated by the FDA since 1983 which allows him to obtain marijuana cigarettes for use under medical supervision to relieve pain associated with a chronic bone condition. Currently, fewer than 10 subjects in the U.S. are enrolled in similar IND trials.

The exemption, the Enforcement Office found, entitles Mr. Rosenfeld, and others enrolled in the IND trials, to have marijuana received from the government in their possession during their domestic travel. However, the Enforcement Office concluded that

the documentation tendered by Mr. Rosenfeld to Delta agents to corroborate his exemption was not definitive enough under the circumstances and could reasonably have given rise to doubts among Delta's employees as to the veracity of his claims at the time of the incident. In view of these facts, the Enforcement Office did not believe a violation of the applicable statute or regulations occurred and found that it was not in the public interest to pursue his complaint through formal enforcement action.

Mr. Rosenfeld cites a number of reasons for review of the dismissal order. First, he claims that the findings in Order 2004-3-27 imply a lesser standard of enforcement of the ACAA and Part 382 when the disability involved is rare or infrequently encountered. Second, Mr. Rosenfeld asserts that the documentation he presented to Delta ticket agents amply demonstrated that he was in fact subject to a federal exemption that allowed him to use and carry marijuana. The same documentation, according to Mr. Rosenfeld, had not been questioned on previous flights, and the Enforcement Office was mistaken in concluding that his right to carry marijuana was "ambiguous." Finally, with respect to the relationship between state law requirements and the FDA IND trials, Mr. Rosenfeld argues that the implication in the order that his carrying marijuana would be legal only if there were no applicable state laws that prohibited such possession is not proper.[1]

Delta, in its answer of April 22, supported the Enforcement Office's decision in Order 2004-3-27. Denying that the order created a "less favored class of disabled persons," as alleged by the Complainant, the carrier points out that the order explicitly held that those participating in the FDA IND trials may travel with marijuana provided they have available for inspection by airline employees pertinent documentation confirming their participation in the program.

We have decided to affirm the dismissal of Mr. Rosenfeld's complaint. Contrary to Mr. Rosenfeld's claim, the Enforcement Office's decision in Order 2004-3-27 does not establish implicitly a lower standard of enforcement of the mandates of the ACAA and

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[1] Mr. Rosenfeld also raises two other points in his petition. Alluding to Delta's failure to reimburse Mr. Rosenfeld for certain expenses incurred allegedly as a result of the disruption of his travel plans, Mr. Rosenfeld states that Delta has "never represented to Mr. Rosenfeld that it was willing to reimburse him for these out of pocket costs." The Complainant also alleges for the first time in his petition that "Mr. Rosenfeld's physical condition deteriorated because of Delta's actions," and describes significant physical inconvenience and pain resulting from his altered travel plans. In his original complaint, Mr. Rosenfeld made no specific allegations of deterioration in his physical condition as a result of the alleged disruption in his travel.

With respect to Mr. Rosenfeld's objections regarding reimbursement for his additional costs, we note that as part of the Enforcement Office's efforts to resolve this case, it contacted Delta which indicated that it is at this point willing to reimburse the Complainant for these costs once it receives suitable corroborating documentation. Delta has recently confirmed its willingness to provide reimbursement under those circumstances. With respect to Mr. Rosenfeld's new allegations that he suffered significant physical pain and suffering as a result of Delta's action, Mr. Rosenfeld may wish to seek redress for those claims in a state court tort or contract action, as we have no authority to adjudicate such claims or to make monetary awards for the injury he alleges.

Part 382 with regard to rare disabilities. The order endorsed the right of the Complainant and others enrolled in these FDA IND trials to travel with marijuana, provided they have adequate documentation in their possession confirming their enrollment in the program. As a matter of ACAA compliance policy, the rarity of a disability or the highly unusual nature of the accommodation sought by a disabled traveler[2] are properly taken into account, along with other factors, in determining whether pursuit of enforcement action is in the public interest and the nature of any enforcement action that may be pursued.

Mr. Rosenfeld also argues that the Enforcement Office misconstrued or failed properly to assess the documentation that he made available to Delta's agents at the time of the incident. We affirm the Enforcement Office's factual conclusion that Mr. Rosenfeld's documentation was "incomplete and ambiguous," as stated in Order 2004-3-27. The principal documentation provided by Mr. Rosenfeld to Delta agents and to the Enforcement Office in this proceeding confirming his participation in this FDA IND trial was a blurred, heavily creased copy of a letter dated March 1983, portions of which were nearly illegible. The letter offers the assurance that, "Mr. Rosenfeld's use of those [marijuana] cigarettes under the terms of the exemption to *our knowledge* violates no federal law," (emphasis added) and contains inconsistent dates. We believe that it was entirely understandable under the existing circumstances that Delta agents might be reluctant to allow Mr. Rosenfeld to board a flight when presented with such documentation.[3]

Finally, Mr. Rosenfeld asserts that the Enforcement Office erred in concluding that state law considerations affect his right to travel on air carriers providing interstate air transportation. Mr. Rosenfeld thus takes issue with the statement in Order 2004-3-27 that he was entitled to have marijuana in his possession on his air travel "absent evidence of any state laws prohibiting such possession." Without addressing the merits of this contention, we are amending Order 2004-3-27 to delete the quoted language since it is unnecessary to the decision in that order.

ACCORDINGLY,

1. I affirm the dismissal of the third-party complaint in this docket; and

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[2] As indicated above, FDA and DEA have advised that fewer than ten persons have the authorization, pursuant to the FDA IND trials, to carry and use marijuana in public.

[3] We note that a copy of Order 2004-3-27 with the March 1983 letter will serve as adequate documentation in the future, so long as Mr. Rosenfeld continues as a subject in an FDA IND trial. DEA has advised the Enforcement Office that in his IND trial, the marijuana in Mr. Rosenfeld's possession must be obtained from the Federal Government.

2. Order 2004-3-27 is amended to strike the phrase "absent evidence of any state laws prohibiting such possession" on page 3.

This order is issued under authority assigned in 14 CFR 385.34(b) and shall be effective as the final action of the Department 30 days after service.

By:

Rosalind A. Knapp
Deputy General Counsel

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