



Taming the Beast: Reforming DOT's Third-Party Complaint Procedures Can Help Consumers and Airlines

By Barbara M. Marrin

Until recently, the U.S. Department of Transportation's (DOT) procedural regulations at 14 C.F.R. Part 302 for handling formal complaints filed by third parties (third-party complaints)¹ were little known and sparsely used by the general public. Although passenger rights advocates would initiate third-party complaints to strategically advance desired policy or regulatory changes²—sometimes alleging an airline violation of a DOT aviation consumer protection or disability accommodation requirement³ and sometimes not—the third-party complaint system was a largely esoteric area of administrative law.

This all changed in March 2020 as the COVID-19 pandemic forced airlines to cancel thousands of flights, pushing them into an unprecedented financial crisis. In an attempt to staunch the tide of massive economic losses, several carriers were unable to meet regulatory obligations to provide timely refunds for canceled flights.⁴ Unhappy with how informal complaints were being handled by DOT's Office of Aviation Consumer Protection, including DOT's processing time given the sheer number of informal complaints received, consumers turned to Part 302. In 2020 alone, almost 150 third-party complaints, mostly related to refunds, were filed with DOT, representing a significant increase from the previous eight years, when DOT averaged barely six such complaints annually.

Amidst this avalanche of complaints, it became apparent that the third-party complaint system, which has essentially not been substantively updated for more than 35 years, is ill-equipped to filter meritorious claims and adjudicate decisions in a timely manner. Now that this system is more widely known, consumers can reasonably be expected to turn to it more often, with a large number of pending third-party complaints potentially becoming the new normal at any given time, notwithstanding significant shortcomings in the procedures applied under Part 302.⁵ This article provides suggestions to improve and reform the third-party complaint system under Part 302, thereby providing consumers and carriers with a more efficient process for the resolution of DOT complaints.

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Background

When DOT took over enforcement functions from the Civil Aeronautics Board (CAB) in 1985, it adopted the CAB's procedural regulations for enforcement proceedings, then found at 14 C.F.R. § 302.200 et seq. Although Part 302 has been reorganized several times since then, there has been little in the way of substantive updates addressing third-party complaints.

Filing of Complaints

Part 302 addresses the filing of both informal complaints and third-party complaints (referred to as "formal complaints" in the regulation). Through these mechanisms, consumers can seek DOT enforcement action against airlines for alleged violations of DOT's aviation consumer protection statutes, regulations, orders, and "other requirements."⁶ As a consequence, the potential scope and subject of complaints, which any person may file, are far-reaching.

Additionally, DOT has made it easy to file informal complaints, including via an online complaint form that gathers details for review by an analyst in DOT's Office of Aviation Consumer Protection, and thus the informal process has proven to be very popular with consumers.⁷ Informal complaints are handled by DOT analysts who facilitate communication directly between the consumer and the airline. These complaints are not made public, except when DOT publishes aggregate complaint data in the monthly *Air Travel Consumer Report*. For consumers with specific problems, seeking DOT involvement through the informal process is often more expedient than the formal process for the airline to review and substantively address its problems. However, the DOT informal complaint system was overwhelmed by refund complaints during the first several months of the COVID-19 pandemic.⁸

Answers

Unlike informal complaints filed through DOT's Aviation Consumer Protection website, third-party complaints are filed in a public docket, and thus practically all matters at issue are developed as a matter of agency record. Airline respondents generally are obligated to file detailed responses (answers) by established deadlines or else potentially suffer a

default judgment—regardless of whether the complainant has actually articulated a claim within DOT’s jurisdiction or suffered any cognizable harm.

From the complainant’s perspective, one perceived benefit of third-party complaints is Part 302’s requirement that carriers file an answer in the DOT docket within 15 days of the service of the complaint, which is public and, depending on the allegations, potentially newsworthy.⁹ The answer must specifically admit or deny each and every allegation in the third-party complaint, as is the case with litigation in most civil courts.¹⁰

Although DOT will extend the deadline for the filing of an answer upon “good cause shown,” the preparation of an answer is often time-consuming given the necessity for the carrier to conduct a thorough internal investigation in order to comply with Part 302’s requirement to properly answer each and

every allegation. Oftentimes, carrier employees must be interviewed, and phone recordings and electronic records must be reviewed. And although DOT regulations do not permit further rounds of pleadings after the filing of an answer,¹¹ complainants will often file their own reply to a carrier’s answer (without seeking appropriate leave from DOT to do so), for which the carrier is often compelled to file a sur-reply to ensure that the administrative record is accurate and complete.

Required Action

Once the pleadings have been filed, Part 302 requires DOT to take one of the following actions: (i) institute a formal enforcement proceeding before an administrative law judge (ALJ); (ii) pursue other enforcement action through a negotiated settlement with the respondent; or (iii) dismiss the third-party complaint.¹²

Although DOT must do so within a “reasonable time,”¹³ no specific timeline is specified in Part 302. Over the last eight years, the average time for DOT to reach a decision (in cases where the parties have not voluntarily withdrawn the matter) has run about 21 months.¹⁴ Moreover, if (i) DOT on the basis of a third-party complaint initiates enforcement, (ii) the respondent carrier and DOT fail to reach settlement through a negotiated consent order, and (iii) DOT files its own complaint before an ALJ, complainants face further delay in receiving a determination in

their case.¹⁵ Therefore, from the consumer perspective, informal complaints—not docketed third-party complaints—are often the best way to have an issue addressed expeditiously.¹⁶

In informal complaints, while DOT will often require the airline to respond directly to the passenger, the passenger rarely will receive an official determination from DOT as to whether the airline violated an aviation consumer protection regulation. Thus, for complainants seeking to strategically litigate an issue, such as by arguing in favor of a novel agency interpretation or position, which some third-party complaints have done, the third-party complaint system is the more attractive of the two mechanisms.

Despite the advantage of being able to obtain a response on the record from an airline and an official determination from DOT, third-party complaints at DOT were for many years relatively infrequent. Passengers often found that specific personal concerns were more expeditiously resolved through the informal complaint process. From the carrier perspective, informal complaints were and continue to be the preferred mechanism because the carrier may communicate directly with the complainant to resolve an issue. Although parties can discuss settlement of third-party complaints, most substantive issues are resolved through filings in the public docket. There is no doubt, though, that filing a third-party complaint gets the attention of both the respondent carrier and DOT in a way that informal complaints do not.

The COVID Crisis Drives Up Third-Party Complaints

The procedural and investigative tasks necessary to prepare responses to third-party complaints became even more burdensome during the challenging COVID-19 economic environment for carriers.

During the first half of 2020, customers faced increased difficulties in obtaining refunds for canceled flights and were not successful using the DOT informal complaint process. DOT reports that it received 87,629 informal complaints in 2020 against U.S. and foreign carriers, of which 75,543 concerned refunds.¹⁷ Not surprisingly, DOT could not keep up with this volume of informal complaints, especially when DOT would normally only receive an average of about 16,000 complaints concerning carriers in a given year, of which only about 1,400 concerned refunds.

Because customers have been desperate to find other alternatives, especially against carriers that had taken aggressive positions regarding the availability of refunds, the number of third-party complaints increased dramatically, reaching nearly 150 by the end of the year, 89 of which were filed against one carrier. In some cases, though, it could not be determined from the initial pleadings whether the complainant was a U.S. resident (the category of consumer that DOT regulations are intended to protect)¹⁸ or whether

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the itinerary involved a flight to, from, or within the U.S. (the only air travel over which DOT has jurisdiction). Despite the potential lack of DOT subject matter jurisdiction, airlines devoted considerable resources to answering these third-party complaints on the record.

Substantive Updates Would Improve Efficiency for DOT and Provide Consumers with Swiftly Adjudicated Complaints

The last arguably substantive update to Part 302 was made 20 years ago,¹⁹ and since then the landscape for seeking enforcement has changed. Pleadings can be filed with DOT electronically via www.regulations.gov, greatly simplifying the process for filing and serving.²⁰ The third-party complaint mechanism is now widely publicized on internet blogs and forums related to commercial air travel issues. A frequent complainant has posted a template for formal complaints on his personal website.²¹ And using that template, along with assistance from another consumer rights advocate, one company has established a “DOT Complaint Generator.”²² It is easier than ever for individuals to file third-party complaints with DOT.

Providing an administrative mechanism for individuals to seek agency enforcement action is, of course, necessary and appropriate. However, the inescapable fact remains that some third-party complaints either allege conduct that is not a violation of any DOT requirement (including matters not within the jurisdiction of DOT); contain inaccurate, misleading, or woefully incomplete information (including the omission of key material facts that would undercut the claim or take the claim outside of DOT’s jurisdiction); or do not conform to DOT’s rules of practice (including, for example, service on the respondent carrier and the inclusion in the complaint of a verification made under Title 18 of the U.S. Code affirming the truthfulness of the filing). Yet carriers must devote the same resources to answering complaints that merit dismissal as to those complaints that are legitimately before DOT to resolve.

Against this backdrop, the time has come for DOT to give serious attention to streamlining the third-party complaint procedures—and in the process strike the right balance of interests to ensure that (i) complainants receive a fair opportunity to be heard; (ii) respondents are not required to file answers unless and until DOT determines that a legitimate complaint has been properly filed and thus accepted by DOT; and (iii) the parties are provided with prompt adjudication.

Although some streamlining measures may require amendments to Part 302, many are already covered by existing regulations or are inherently within DOT’s prosecutorial discretion. For example:

- Before requiring an answer, DOT should screen third-party complaints to ensure that the

complainant has stated a claim within the jurisdiction of DOT and alleged sufficient facts in support of that claim. As most complainants proceed pro se, DOT can always construe the third-party complaint in the light most favorable to the complainant, accepting—purely for purposes of deciding whether to continue the proceeding—the allegations as true.

- If no cognizable claim is asserted, DOT should dismiss the claim or, in the alternative, stay the proceeding to allow a finite period of time for the complainant to amend the third-party complaint. DOT also can (and should) *sua sponte* dismiss claims based on a novel interpretation of a regulation unsupported by any DOT guidance or seeking a change in agency enforcement position. The third-party complaint system is not the proper venue to request rule changes²³ or the adoption of new enforcement policies.

The regulations, of course, allow DOT to review the sufficiency of the complaint of its own initiative.²⁴ However, a review of recent third-party complaints shows that DOT rarely, if ever, does so before an answer has been filed, and then only in response to a deficiency (such as a lack of subject matter jurisdiction) that the airline raised in its answer. Indeed, out of approximately 150 third-party complaints filed last year, DOT dismissed four on such deficiency grounds, but not without the airline first having to develop an answer fully addressing each and every allegation.²⁵ These four complaints were dismissed on various grounds, including those arising when (1) a complainant canceled his own transportation and was therefore not entitled to a refund under any DOT statute or regulation and (2) a complainant was impacted by the cancellation of a flight over which DOT does not have jurisdiction. In each case, the complaints were improperly before DOT, and the respondent carrier was forced to file an answer.

If a complaint, on its face, does not present a prima facie case properly before DOT, DOT should require the filing of an amended complaint

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with more specificity before carriers are forced to respond to a potentially frivolous filing.

Dismissing a complaint prior to the filing of a formal answer is a common practice in other administrative adjudicatory contexts. For example, under 14 C.F.R. Part 16,²⁶ the Federal Aviation Administration (FAA) may dismiss a complaint if (i) the complaint, on its face, appears outside the jurisdiction of a Part 16 proceeding; (ii) the complaint, on its face, does not warrant further investigation or action by the FAA; or (iii) the complainant lacks standing.²⁷

- Before requiring an answer, DOT should ensure that the complaint has met Part 302's rules of practice, including the requirement that third-party complaints are properly served on the respondent carrier and verified under Title 18 of the U.S. Code as to their truthfulness. Given that many complainants proceed pro se, DOT can always grant the complainant leave to amend or otherwise "cure" the procedural defect without dismissing the complaint.²⁸ Ensuring, however, that all pleadings filed in a formal complaint proceeding are properly prepared and served is an important matter of due process, and requiring them to be verified as to their truthfulness is an important step to maintain the integrity of the process.
- Some third-party complaints allege a violation of only 49 U.S.C. § 41712, which is a general statute prohibiting unfair and deceptive practices in air transportation or the sale of air transportation and which DOT relies upon when promulgating specific discretionary aviation consumer protection regulations. DOT should require that any claim based solely on section 41712 invoke an established DOT decisional or guidance document that has placed the industry on notice regarding DOT's enforcement position. A third-party complaint proceeding is not the appropriate venue for DOT to advance a novel interpretation of 49 U.S.C. § 41712.²⁹
- DOT should not require answers unless and until the respondent is directed by DOT to provide one; this will allow DOT sufficient time to assess the third-party complaint to determine whether (i) an actionable claim has been stated and (ii) the complainant has satisfied the procedural requirements.
- Under DOT's regulations, DOT may consolidate cases involving issues that are the same or closely related.³⁰ DOT has used this mechanism in the past to consolidate third-party complaints that arise out of the same set of operative facts.³¹ Upon request from a carrier respondent, such as, for example, a request to provide one consolidated answer as opposed to many answers covering the

same set of facts, DOT should use this mechanism to promote greater efficiency in reviewing and responding to third-party complaints.

- DOT should update Part 302 to establish a set time frame for its resolution of third-party complaints following the submission of an answer. Complainants and respondents alike deserve to have pending matters expeditiously resolved—rather than waiting nearly two years (as noted above). Although DOT rejected the inclusion of a decisional deadline when last updating the applicable regulations 20 years ago, the landscape today is much different for filing third-party complaints than it was then.

Conclusion

While having a formal complaint process in place is an important feature of government consumer protection, the third-party complaint mechanism in its current form presents quandaries for DOT, carriers, and, ultimately, consumers with potentially meritorious claims. There are nearly 150 third-party complaints now pending before DOT (though several have been combined into one enforcement proceeding by DOT).³² Not all are related to the COVID-19 pandemic, however, and the continued propagation of third-party complaints as a means of addressing matters better suited for resolution through the informal process is almost assured. Given the finite resources of DOT, streamlining the third-party complaint procedures will allow DOT to better ensure that both complainants and respondents receive a fair, expeditious review of cognizable claims.

Endnotes

1. 14 C.F.R. § 302.400 et seq.
2. *See, e.g.*, Order Denying Petition and Dismissing Complaint in the Matter of Petition for Rulemaking and Third-Party Complaint of Donald Pevsner, Esq., Order No. 2012-11-4 (Dep't of Transp., issued on Nov. 6, 2012) (declining to take enforcement action and open an investigation concerning the refund practices of a carrier).
3. *See, e.g.*, Order of Dismissal in the Matter of Benjamin Edelman v. American Airlines, Order No. 2018-5-30 (Dep't of Transp., served May 22, 2018) (dismissing a complaint that, although involving a technical violation of the baggage disclosure rule, did not warrant enforcement action based on the "totality of the circumstances").
4. *See* Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel (Dep't of Transp., issued Apr. 3, 2020), <https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020.pdf>.
5. As of this writing, eight complaints have been filed in 2021.
6. The DOT regulation providing for the filing of third-party complaints is 14 C.F.R. § 302.404(a).

7. See U.S. DEP'T OF TRANSP., AIR TRAVEL SERVICE COMPLAINT OR COMMENT FORM, <https://airconsumer.dot.gov/escomplaint/ConsumerForm.cfm> (last visited July 21, 2021).

8. For example, in 2019, 14,694 informal complaints were filed with DOT against U.S. and foreign air carriers. See OFF. OF AVIATION ENF'T & PROC., U.S. DEP'T OF TRANSP., AIR TRAVEL CONSUMER REPORT (Feb. 2020), <https://www.transportation.gov/sites/dot.gov/files/2020-02/February%202020%20ATCR.pdf>. In contrast, zero formal complaints (third-party complaints) were filed with DOT.

9. 14 C.F.R. § 302.405(a). The requirement is 15 days from the date when the third-party complaint is served on the respondent.

10. *Id.* § 302.408(b).

11. *Id.* § 302.408(c).

12. *Id.* § 302.406(a).

13. *Id.* The prior version of DOT's procedural requirements required DOT to process a formal complaint within 60 days of receipt. DOT, in adopting the "reasonable time" standard, stated that "[o]ur experience is that the 60 days set forth in the existing rule rarely, if ever, permits enough time to conduct an investigation and satisfactorily resolve issues that may be raised." Rules of Practice in Proceedings, 65 Fed. Reg. 6446, 6452 (Feb. 9, 2000) (final rule).

14. A review of DOT third-party complaint dockets shows four complaints pending from 2018, one from 2017, one from 2016, and one from 2015. As for the complaints filed in 2020, DOT recently issued a Notice of Administrative Action closing 85 of 89 complaints filed against a single carrier as DOT has decided to pursue enforcement action related to those claims. See Notice of Administrative Action *in re* Air Canada Formal Complaints, Docket No. DOT-OST-2020-0055 et seq. (Dep't of Transp., served June 15, 2021). DOT decided to dismiss the remaining four complaints. See Order of Dismissal in the Matter of the Complaints of Simon Cyr, David Chain, Lindsay Miles, and Lana Harrison, Order No. 2021-6-11 (Dep't of Transp., served June 15, 2021).

15. Although not initiated through a third-party complaint by a passenger, an enforcement proceeding was instituted by DOT against Delta Air Lines before an ALJ in December 2014. Delta filed a motion to dismiss in January 2015. The ALJ issued an order granting Delta's motion to dismiss in January 2018. See Order Granting Respondent's Rule 12(b) (6) Motion to Dismiss, Docket No. DOT-OST-2014-0229 (Dep't of Transp., served Jan. 12, 2018).

16. Under 14 C.F.R. § 259.7(c), carriers must acknowledge receipt of a written complaint within 30 days and provide a substantive answer within 60 days of receipt.

17. See OFF. OF AVIATION ENF'T & PROC., U.S. DEP'T OF TRANSP., AIR TRAVEL CONSUMER REPORT (Feb. 2021), https://www.transportation.gov/sites/dot.gov/files/2021-02/February_%202021%20ATCR.pdf.

18. Although DOT procedural regulations require complainants to provide a mailing address on the initial filing, many complainants do not do so. 14 C.F.R. § 302.4(a)(2)(i)(d).

19. 65 Fed. Reg. 6446 (Feb. 9, 2000).

20. Prior to the establishment of www.regulations.gov, third-party complaints were required to be filed either by mail with DOT's Documentary Services Division or on DOT's little-known Document Management System website.

21. *How to File and Pursue a Consumer Complaint Against an Airline—and the DOT “Formal Complaint” Process*, BENEDELMAN.ORG (Nov. 16, 2016), <http://www.benedelman.org/dot-complaints>. At the time of this article, all of the refund-related third-party complaints filed due to COVID-19 cancellations follow this template.

22. *Law Students Create Free Airline Refund Complaint Generator for Covid-19 Related Cancellations for Flights to, from or Connecting in the USA*, CANADIAN AVIATION NEWS (Aug. 7, 2020), <https://canadianaviationnews.wordpress.com/2020/08/07/law-students-create-free-airline-refund-complaint-generator-for-covid-19-related-cancellations-for-flights-to-from-or-connecting-in-the-usa>.

23. 14 C.F.R. § 302.16 allows for petitions for rulemaking.

24. 14 C.F.R. § 302.404(c).

25. Order of Dismissal in the Matter of the Complaints of Simon Cyr et al., *supra* note 14.

26. Part 16 governs the rules of proceeding for enforcement actions related to federally-assisted airports.

27. 14 C.F.R. § 16.25.

28. 14 C.F.R. § 302.404(a) (requiring formal complaints to meet the procedural requirements of §§ 302.3 and 302.4, which specify the form of the document as well that all documents must be verified); 14 C.F.R. § 302.7(d) (specifying on whom service should be made).

29. See *generally* 14 C.F.R. § 399.75 (setting forth procedures for issuing a regulation declaring a practice to be unfair or deceptive when the regulation is not required by statute); 14 C.F.R. § 399.79 (setting forth definitions for *unfair practice* and *deceptive practice*).

30. 14 C.F.R. § 302.13.

31. See Notice of Consolidation of Proceedings, Docket No. DOT-OST-2018-0137 (Dep't of Transp., served Oct. 18, 2018) (consolidating several formal complaints that arose out of the same incident).

32. See Notice of Administrative Action, *supra* note 14.