

DEPARTMENT OF TRANSPORTATION

14 CFR Parts 254 and 382

[Docket OST-99-5099]

RIN 2105-AC77

Nondiscrimination on the Basis of Disability in Air Travel; Compensation for Damage to Wheelchairs and Other Assistive Devices

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department is amending its rules implementing the Air Carrier Access Act of 1986 (ACAA) to lift an existing cap on the amount of compensation airlines have to pay to passengers for loss or damage of their wheelchairs and other assistive devices. The rule is intended to provide additional relief to passengers who use expensive assistive devices that are lost, destroyed or damaged in the course of airline travel.

EFFECTIVE DATE: This final rule becomes effective on September 1, 1999.

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SUPPLEMENTARY INFORMATION: This final rule concerns the issue of compensation for loss of or damage to wheelchairs or other assistive devices. The current regulation provides that:

With respect to domestic flights, carriers shall not limit liability for loss, damage or delay concerning wheelchairs or other mobility aids to any amount less than twice the liability limits established for passengers' luggage under 14 CFR Part 254. (14 CFR 382.43(b))

This means that carriers are not required to pay compensation exceeding \$2500 for loss of or damage to wheelchairs or other assistive devices, given the present \$1250 liability limit for luggage that Part 254 permits carriers to impose in domestic transportation. (The Department has recently proposed raising this limit to \$2500, which would have the effect, under the present ACAA rule, of raising the liability limit for wheelchairs and other assistive devices to \$5000.) People with disabilities have complained that this does not provide adequate compensation for the loss of or serious damage to expensive equipment, such as power wheelchairs that may cost \$15,000 or more. Given that a passenger whose wheelchair is lost or

seriously damaged will lose his or her mobility at the destination, people with disabilities believe that the Department should require airlines to do more, such as pay full compensation for the loss and make repair or loaner service available.

The Department considered this issue in the original ACAA rulemaking (see 55 FR 8038; March 6, 1990). In response to similar disability group comments at that time, the Department responded that requiring carriers to pay full replacement value did not sufficiently recognize the ability of passengers to purchase insurance for such expensive items. Consequently, the final rule permitted airlines to cap their liability at twice the liability limit for general baggage.

On February 17, 1999, the Department reopened the issue and published a notice of proposed rulemaking (NPRM) in the **Federal Register** (64 FR 7833). Based on anecdotal information, the Department believed that the majority of wheelchairs used in air travel are manual wheelchairs, many of which cost less than \$2500. However, the Department further believed that other travelers used power wheelchairs, which typically are stowed as checked baggage and many of which, if lost, damaged, or destroyed, could cost substantially more than \$2500 to repair or replace (e.g., over \$13,000 in one case brought to our attention). However, we believed that there would be relatively few instances of wheelchair loss or damage that would exceed \$2500, limiting the cost exposure to airlines of removing the current cap.

Comments

The Department received thirty-two comments from individuals, associations, and interest groups. These included the Air Transport Association of America (ATA), representing the views of major airlines, and various individuals and groups in the disability community.

Claim Experience

Both the ATA and the disability community agreed that the majority of damage to wheelchairs occurs to manual units, with repair or replacement costs under \$2500. The ATA said that ATA member airlines receive less than fifty complaints a year related to wheelchairs and ninety percent of them are for less than \$500. The ATA also reported that claims for standard wheelchairs average \$450 to \$500 per claim and claims for electric wheelchairs average \$1500 per claim. ATA mentioned that its members had voluntarily paid a few claims in excess of \$20,000. Also, the Eastern

Paralyzed Veterans Association (EPVA), which does wheelchair repairs at New York City airports, reported that it repaired 31 wheelchairs in 1998, at an average cost of \$467.95 per repair.

Elimination of Liability Limit

A common theme throughout the disability community comments was that wheelchairs and other assistive devices are not ordinary luggage. Disabled people must take their assistive devices because their mobility, independence, and health depend on them. When a disabled person travels with an air carrier, he or she places his or her means of mobility and livelihood into the hands of the airline. According to some of the comments, airline personnel sometimes disregard the instructions given to them by the passenger concerning how to properly handle the assistive device, or may misunderstand the instructions because they are not fluent in English. Furthermore, commenters said that fear of having to make an expensive repair if their device is damaged may deter some people from traveling by air.

Disability community comments also asserted that the amount of damages should be the full replacement or repair cost because depreciation in value is too hard to calculate. They also asked for some sort of system through which the airline would provide a loaner device during the period when the passenger's own device was being repaired. Some comments also addressed the issue of insurance. The comments asserted that coverage for assistive devices is often excluded from homeowner policies. They said it would be unfair to require passengers to purchase extra insurance for something they had no choice but to take with them. Finally, these comments expressed a belief that lifting the liability cap will provide an incentive for airlines to train their employees to comply with ACAA regulations and properly handle assistive devices.

The ATA's comment said that the proposed rule did not address all of the issues associated with wheelchair handling. Instead of a final rule, ATA supported issuing a broader advance notice of proposed rulemaking (ANPRM) on the general issue of wheelchair handling. ATA also suggested that passengers should remain responsible for some part of the risk of transporting expensive equipment, such as through obtaining insurance.

ATA stressed three other points. First, a two-hour advance check in deadline should be required for people wishing to transport an assistive device. This extra time would allow airlines to prepare adequately for carrying of these

devices, while avoiding flight delays. Additional time is particularly important if more than one electric wheelchair is to be transported on the same flight. Second, ATA said that passengers should be required to provide written instructions on how to disassemble batteries and delicate units. Third, ATA questioned the practicality of requiring airlines to maintain an adequate supply of wheelchairs at more than 500 commercial airports in order to provide loaners. ATA pointed out that local supply stores are available if a loaner is needed.

Cost Calculation

In the NPRM, the Department sought comment on whether additional guidance is necessary on how compensation should be calculated (e.g., depreciated vs. replacement cost). Disability community comments said that there is no market for used, customized assistive devices, thus making depreciation in value too hard to calculate. Most of these comments supported requiring airlines to pay the full replacement cost for a destroyed wheelchair (i.e., the cost of a new wheelchair, regardless of the value of the device that had been destroyed). ATA did not comment specifically on this issue, but did express concern about paying for damage that was done before the chair was given to the airline for transport. ATA also expressed concern that lifting the liability cap would allow higher consequential damages to be assessed against carriers in claims resulting from damaged or destroyed wheelchairs.

DOT Response

The Department is persuaded by the comments of the disability community that wheelchairs and other assistive devices should be viewed differently from other baggage. For wheelchair users, their devices are essential, not only to the purpose of a trip, but for all daily activities. The information provided in the comments confirms the Department's impression that there are likely to be relatively few instances where carriers will have to pay large claims, even in the absence of the current regulatory provision allowing carriers to limit their liability. For this reason, the cost exposure to carriers of changing the rule will not be large.

On the other hand, from the perspective of an individual whose expensive electric wheelchair is lost or destroyed, the expense of replacing it can be very difficult to bear. Consequently, we believe that the fairest solution is to remove the current liability cap. The issue is a

straightforward one, which commenters discussed thoroughly, and we see no need for an ANPRM as ATA suggested. Wheelchair users may still want to purchase insurance, which may expedite the payment of claims. The ultimate responsibility for damage that occurs while a passenger's device is in the hands of the carrier should rest with the carrier, however.

Under existing DOT baggage rules, carriers are responsible for consequential damages (see 14 CFR part 254). There is no DOT administrative mechanism for awarding these damages; they would be paid through the carriers' claims processes or awarded by the courts. This rule, while removing a regulatory provision allowing carriers to limit their liability for consequential as well as other damages, would not change this basic pattern. It is possible that, as some disability community comments suggested, the possibility of larger consequential damage awards would increase carriers' incentive to ensure that personnel who handle wheelchairs are well trained.

With respect to the way in which costs of settlements are calculated, the Department is persuaded by disability community comments that it is difficult to establish an accurate depreciated value for electric wheelchairs. In the absence of a significant aftermarket for these often individually-tailored devices, there is no parallel to a "blue book" value that can be accurately assigned. On the other hand, it may not be fair to airlines to assess the current replacement cost of a device. For example, a wheelchair that cost \$10,000 two years ago may today, because of changes in the equipment or in the market for new wheelchairs, cost \$12,000. The \$2000 difference in the purchase price of the device cannot be attributed to any action on the airlines' part. For this reason, in the case of a device that is lost or damaged so badly that it must be replaced, the airline would be responsible for the original purchase price (\$10,000 in the example above) rather than the total cost of a new device. The statement of this criterion in the rule refers only to the cost of repair or replacement of the device itself; it does not, for example, establish a limit on consequential damages.

The Department believes that requiring the payment of the original purchase price strikes a reasonable balance between the current industry practice of using depreciated value and the proposal, advocated by disability community comments, of requiring carriers to pay the current replacement cost of a wheelchair. In addition, this method should simplify the payment of

claims and minimize the number and scope of disputes between passengers and airlines. As is the case today, carriers would remain free to require passengers to document the original purchase price of a lost or damaged assistive device (e.g., purchase receipt, credit card statement, canceled check). In a case where an assistive device is damaged but repairable, the proper measure of compensation is quite clearly the cost of the repair. The Department believes that airlines can avoid the potential problem of being asked to pay for pre-existing damage by inspecting the device and documenting anything that is wrong with it when the passenger checks in, as carriers commonly do with baggage.

The Department's ACAA rule is not intended to require compensation, to any greater extent than courts might award, merely for minor cosmetic damage to wheelchairs or assistive devices. Neither this provision nor —382.43(a), which requires carriers to return wheelchairs and assistive devices to passengers in the condition received by the carrier, would require the carrier, for example, to replace a wheelchair frame that had suffered a small dent or scratch that did not impair the structural soundness or functioning of the device.

In the NPRM, the Department sought comment on whether it is desirable and practical to require that airlines provide a "loaner" device during the period when the damaged device is being repaired or replaced. While a wheelchair is essential equipment, without which the passenger can be stranded, the Department agrees with the ATA that it would be impractical to require each airline to maintain an adequate supply of wheelchairs at more than 500 commercial airports. As pointed out in the comments, many devices are customized to fit an individual's specific needs, and it could be extremely burdensome to require airlines to come up with the same or similar type of wheelchair. Information about where to obtain a "loaner" is available in many locations from the disability community, medical equipment suppliers, or the airlines themselves. We note that the cost of a loaner could constitute consequential damages for which, in some circumstances, a carrier could be liable.

The ATA recommended permitting carriers to require a two-hour advance check-in for passengers wishing to transport electric wheelchairs. The Department does not have, nor did the ATA present, any data to support a contention that a mandatory check-in period of this length would have a

significant effect on preventing damage to wheelchairs. On the other hand, carrier personnel are more likely to do a good job of preparing the wheelchair for transportation if they are not trying to do so at the last minute.

The Department's existing ACAA regulation has two provisions that can help carriers avoid "last-minute" problems. First, § 382.41(g)(1) permits carriers to require passengers wanting to transport electric wheelchairs to check in an hour before the scheduled departure time of the flight. This is consistent with the now-pervasive industry recommendation that all passengers arrive an hour before flight time.

As an interpretive matter, we emphasize that the purpose of the one-hour advance check-in deadline is to give carrier personnel enough time to prepare an electric wheelchair for transportation. Therefore, in this context, checking in means not just reporting at the gate or ticket counter but actually turning the wheelchair over to carrier personnel to prepare it for shipment. If a passenger checks in at the gate at 1:00 for a 2:00 flight, but does not surrender the wheelchair to carrier personnel until 1:45, the value of the one-hour advance check-in is diminished. Of course, the airline has the responsibility of providing the passenger, on request, a boarding chair and any necessary assistance in boarding of the aircraft.

Second, § 382.41(g)(2) states that if a passenger's wheelchair battery has been labeled by the manufacturer as non-spillable, or if the wheelchair can be loaded, stored, and secured in an upright position, the carrier shall not require the battery to be removed and separately packaged. In such instances, the airline need not disassemble the chair or separately box the battery, but only disconnect the battery and tape or otherwise insulate the battery terminals to prevent short circuits. By following this rule, carriers would not only reduce the probability of damage to the chair, but also reduce significantly the time it takes to stow the wheelchair and return it to the passenger on arrival.

The ATA felt that passengers should be required to provide written instructions on the assembly and disassembly of batteries and other delicate equipment. The current rule authorizes individuals to provide written instructions concerning the assembly and disassembly of their wheelchairs, and we believe it is a good idea for them—and perhaps for wheelchair manufacturers as well—to do so. However, given that some passengers may not be fluent in English,

or that some disabilities may impair an individual's ability to provide such instructions, or that documents can get lost, we do not believe it would be prudent to require passengers to provide written instructions or to allow carriers to require it as a condition for transportation or compensation.

In order to avoid confusion for readers of 14 CFR part 254, the Department's baggage liability regulation, we have added a sentence pointing out that part 254's baggage liability limit does not apply to wheelchairs and other assistive devices used by passengers with disabilities.

Regulatory Analyses and Notices

This final rule is not a significant rule under Executive Order 12866 or a significant rule under the Department's Regulatory Policies and Procedures. Based on the data currently available to the Department and received in the comments, the Department estimates that the costs associated with this rule are not significant. The ATA submitted data indicating that ATA member airlines receive less than fifty complaints a year related to wheelchairs and that ninety percent of these claims are for less than \$2500. Furthermore, the ATA asserts that virtually all of its claims are paid in full, even the ones above \$2500. Therefore, the incremental costs of this rule are likely to be minimal.

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities. The basis for this statement is the probability that the overall national annual costs would be minimal. Also, the Department does not believe that there would be sufficient Federalism impacts to warrant the preparation of a Federalism Assessment.

List of Subjects

14 CFR Part 254

Air carriers, Consumer protection, Freight, Reporting and recordkeeping requirements.

14 CFR Part 382

Air carriers, Civil rights, Individuals with disabilities, Reporting and recordkeeping requirements.

Issued This 23rd Day of July 1999, at Washington, DC

Rodney E. Slater,

Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 14 CFR parts 254 and 382 as follows:

PART 254—DOMESTIC BAGGAGE LIABILITY

1. The authority citation for 14 CFR part 254 continues to read as follows:

Authority: Secs. 204, 403, 404 and 411, Pub. L. 85-726, as amended, 72 Stat. 743, 758, 760, 769; 49 U.S.C. 1324, 1373, 1374, 1381.

2. Section 254.4 is amended by adding a sentence at the end of the section to read as follows:

§ 254.4 Carrier liability.

* * * Pursuant to 14 CFR 382.43(b), this limit does not apply to wheelchairs or other assistive devices used by passengers with disabilities.

PART 382—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN AIR TRAVEL

3. The authority citation for 14 CFR part 382 continues to read as follows:

Authority: 49 U.S.C. 41702, 41705, and 41712.

4. In § 382.43, paragraph (b) is revised to read as follows:

§ 382.43 Treatment of mobility aids and assistive devices.

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(b) With respect to domestic transportation, the baggage liability limits of 14 CFR part 254 do not apply to liability for loss, damage, or delay concerning wheelchairs or other assistive devices. The criterion for calculating the compensation for a lost, damaged, or destroyed wheelchair or other assistive device shall be the original purchase price of the device.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 301, and 602

[TD 8823]

RIN 1545-AU31

Consolidated Returns, Limitations on the Use of Certain Losses and Deductions; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document contains corrections to final regulations which were published in the **Federal Register** on Friday, July 2, 1999, (64 FR 36092), relating to consolidated returns and