



A COMPARATIVE ANALYSIS OF UNITED STATES AND EUROPEAN UNION AIRLINE OVERBOOKING POLICIES.

PART ONE

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Mr and Mrs Jones have been waiting eleven months for this vacation. Their two children are finally on summer vacation from school, they cleared their schedules at work for ten days, and they have saved enough money to pay for it. This family of four is off to Maui to soak up the sun and waves in total relaxation. The room at the Grand Wailea Resort is reserved, the bags are packed, and the airline tickets are confirmed. Finally, it is time to get away.

As they wait in Los Angeles International Airport to board their flight to Honolulu, airline personnel at the gate inform the waiting passengers that the flight is over capacity. They request that volunteers come forward to surrender their seats. Mr and Mrs Jones agree that they will not volunteer since they are a family of four travelling together, and this vacation has been long overdue. However Mr Jones grows concerned for no passengers have approached the desk to give up their seat. As he takes note of this, the loudspeaker in the terminal erupts with the message: "Paging passenger John Jones for Delta Flight 5324 to Honolulu. Will you please see the attendant at gate twelve." Mr Jones warily approached the desk with a thumping heart.

"This flight to Honolulu is full, sir. Therefore, you have been selected to be bumped from your seat to Honolulu. We will be with you shortly to inform you of future flights to Honolulu." Mr Jones quickly becomes angry. He is being asked to separate from his family on the way to his hard-earned vacation. As he gazes down at his now-worthless ticket, he asks the gate attendant: "How did this happen? I have a confirmed ticket for this flight!" The gate attendant replies, "Standard overbooking procedures, sir." What can he do?

Although this unfortunate scenario did not happen in reality, it is an all-too-common one for airline passengers. The unhappy practice of airline overbooking affects thousands of travellers every year. It seems unfair and unethical. For those it affects, the compensation offered may not be enough. What is the current compensation structure for these passengers, and how is it determined?

A Look Into The Unhappy Practice of Airline Overbooking

This comparative analysis begins by explaining the concept of airline overbooking and why it is practised. Then the structure and policies of the United States' regulatory body, the Federal Aviation Administration, are examined to show how US-based airlines implement them. Thereafter, the policies and overbooking history of the world's largest and US-based airline, Delta Air Lines, is analysed. This is the subject of Part One of this article. Part Two will take a

structurally similar approach to examine the overbooking standards of the European Union.

The EU's regulatory body, the European Commission, sets forth its standards under Regulation 261/2004, which was enacted to increase the rights of European travellers. The examination of the EU's standards is followed up with a look into the policies and overbooking history of Lufthansa, Germany's largest airline, based in the EU.

The overall objective of this analysis is to bring to light the similarities and differences between the policies of the US and EU. In conclusion, proposals as to how the legislation can be improved will be suggested, taking into account passengers' rights and convenience in an effort to make flying the skies a less problematic enterprise.

What is Airline Overbooking?

The practice of denied boarding, more commonly referred to as 'bumping', occurs when a passenger with a confirmed reservation is denied a seat on a flight as a result of the airline selling more tickets than available seats for a flight.¹ Although one may think that such a practice is unethical, or even illegal, both the Federal Aviation Administration and European Commission have enacted legislation that permits overbooking to occur.²

Why is Overbooking Practised?

Like most other companies, airlines strive to earn the highest profit possible during their business operations. Basic economic principles provide that in order to receive maximum profit, there must be a positive inverse relationship between revenue and cost. With airlines being aware of this principle, the practice of overbooking was born.

In simple terms, overbooking is based on increasing revenue. By increasing the number of tickets sold to passengers, airlines achieve greater cash flows. These revenues are essential to the survival of airlines today like never before. Record oil prices in recent years have brought fuel costs to never-before-seen highs. In a report issued for the third quarter of 2010, nearly one-quarter of all costs for US airlines were attributed to fuel.³ Overbooking assists airlines in paying for higher fuel prices without the need to transfer substantial costs onto each passenger who purchases a ticket.

To earn this extra revenue, airlines must operate most of their flights with an average minimum 'capacity load factor,' alternatively known as 'passenger load factor.' This load factor measures the ratio of passengers to available seats. If airlines were to operate a majority of flights with mostly empty seats, costs would be higher than revenues, leading to debt rather than profit. The figures presented by some of the US's largest airlines indicate that a passenger load factor of approximately 85%, or at least 85 passengers for every 100 seats onboard, is necessary to remain profitable.⁴

1. David M. Rowell, *Why and How Airlines Overbook Flights*, The Travel Insider, Sept. 28, 2011, <http://thetravelinsider.info/airlinemismangement/allaboutoverbookingflights.htm> (visited 29/9/11).

2. 14 C.F.R. § 250; Commission Regulation 2004/261, 2004 O.J. (L 46) 1 (EC).

3. Airlines For America, *Financial Results: A4A Quarterly Cost Index for Passenger Airlines*, <http://www.airlines.org/Pages/ATA-Quarterly-Cost-Index-US-Passenger-Airlines.aspx> (visited 21/12/11).

4. Terry Maxon, *Airlines Report July 2011 Traffic, Capacity Load Factors*, Dallas News Aviation Blog, Aug. 10, 2011, <http://aviationblog.dallasnews.com/archives/2011/08/airlines-report-july-2011-traf.html> (visited 22/9/11).

With the average rate of 'no-show' passengers hovering around 15%, airlines take advantage by overbooking flights in an attempt to come as close as possible to the goal of 100% capacity for each flight.⁵ This hedging practice allows seats that were purchased by no-show passengers to be given to those present. Not only does this allow airlines to come closer to achieving maximum capacity, but it also can provide 'double dip' benefits where a seat on a flight is essentially paid for by both a no-show passenger and the passenger who occupies it.⁶

Despite its reputation, airlines claim that overbooking is more beneficial than harmful for passengers. If an airline must generate a certain amount of revenue for a flight to be profitable, overbooking allows them to generate that revenue while charging less per ticket. Michael Rowell of *The Travel Insider* explains the airlines' support for this concept in this simplified example:

*"If an airline says to itself 'I need to earn \$15,000 from this flight,' and if it has 100 seats on the plane, it needs to get an average of \$150 a ticket if it sells 100 tickets. But if it says 'I'm going to oversell the flight' and it sells 150 tickets – i.e., by overselling the flight by 50% – it only needs to get an average of \$100 per ticket."*⁷

The US Department of Transportation reported that between July and September 2011, 0.8 out of every 10,000 passengers were bumped.⁸ Although this does make bumping seem rather remote, it does not provide relief to those who encounter the aggravation.

When is Overbooking Most Likely to be Practised?

When choosing which flights to overbook, and by how many seats, airlines do not leave the decision to chance. Airlines look to historical data to determine which routes to overbook the most. Generally, the more popular a route is, the greater the chance that it will be oversold.⁹ The reason for this is simple. Popular routes, or those between major destinations, are travelled most by business travellers. These business passengers generally qualify as 'no-shows' in one of several ways. For instance, a business passenger may purchase multiple tickets for more than one flight to a particular destination based on the time of their departure. This allows more flexibility in scheduling by giving the passenger several options in the event that business dealings take more or less time to complete.¹⁰ Another scenario that often occurs is when a business passenger chooses to pay the airline's fee for switching flights if he or she is unable to make the scheduled flight on time. Either way, the empty seat that the business passenger originally bought has generated revenue for the airline. Airlines use overbooking to ensure that this now-available seat generates further revenue.

5. Cheapflights.com, Overbooking, <http://www.cheapflights.com/travel-tips/getting-bumped> (visited 22/9/11).

6. Steven Berconi, *America's Most Overbooked Airlines*, Forbes Magazine, Apr. 16, 2009, <http://www.forbes.com/2009/04/16/airline-tickets-flights-lifestyle-travel-airlines-overbooked.html> (visited 29/9/11).

7. Rowell, *supra* note 1.

8. Office of Aviation Enforcement and Proceedings, *Air Travel Consumer Report*, Dec. 2011, available at <http://airconsumer.ost.dot.gov/reports/2011/December/2011DecemberATCR.PDF> (visited 21/12/11).

9. Rowell, *supra* note 1.

10. *Id.*

Who is at Highest Risk of Being 'Bumped'?

Regardless of the questionable motives behind the overbooking, passengers have the ability to improve their chances of not being bumped. Airlines are required by the Federal Aviation Administration (FAA) to establish and publish 'boarding priority factors.' Airlines take these factors into consideration when selecting which passengers to bump from an overbooked flight. These factors include a passenger's time of check-in, whether a passenger has a chosen seat assignment before reaching the departure gate, the fare paid by the passenger, a passenger's frequent flyer status, and a passenger's disability or status as an unaccompanied minor.¹¹

Although these factors are taken into account, the Department of Transportation provides that generally passengers with the lowest fares and those who are the last to check in are the most likely to be bumped.¹² By simply paying a moderate fare and arriving more than one hour prior to the airline's scheduled check-in time, passengers can improve the likelihood that they will not be bumped.¹³

Federal Aviation Administration Policies on Airline Overbooking

With the Airline Deregulation Act of 1978, the FAA became the branch of the Department of Transportation responsible for creating and enforcing all procedural and economic guidelines for commercial airlines.¹⁴ The goal of the Act was to promote lower fares through competition among airlines. The FAA seeks to ensure that passengers are not unjustly treated by commercial airlines in the midst of this competition. The FAA sets forth its guidelines under Title 14 of the Federal Code of Regulations (Code), with section 250 providing the standards for overbooking. For the purpose of this analysis, all references to the Code and its respective sections are to Title 14.

Applicable Aircraft

Section 250.1 defines a 'carrier' as any aircraft, excluding helicopters, that holds a certificate issued by the US Department of Transportation that is "fit to conduct commuter operations under 49 USC. 41738 ... authorising the scheduled transportation of passengers."¹⁵ This definition also includes international airlines that hold a permit authorising the scheduled foreign air transportation of passengers.¹⁶

However, the Code imposes an additional restriction on applicable aircraft. A passenger flying with a commuter airline should take note that the definition of a 'carrier' applies only to

11. 14 C.F.R. § 250.3.

12. Aviation Consumer Protection and Enforcement, *Fly-Rights: A Consumer Guide to Air Travel*, <http://airconsumer.dot.gov/publications/flyrights.htm> (visited 21/12/11).

13. *Id*

14. Federal Aviation Administration, *A Brief History of the FAA*, Feb. 1, 2010, http://www.faa.gov/about/history/brief_history (visited 21/12/11).

15. 14 C.F.R. § 250.1.

16. *Id*

aircraft with a capacity of thirty passengers or more.¹⁷ These ‘commuter flights’ tend to have the most reports of bumping since smaller planes are more likely to be forced to reduce weight loads for safety reasons.¹⁸

Procedure for Finding Volunteers

The FAA provides that certain measures must be taken by an airline before it may begin to bump passengers. The airline must make an announcement calling for passengers to voluntarily surrender their seats.¹⁹ If an insufficient number of volunteers come forward, only then may an airline decide to begin bumping passengers against their will.²⁰

Furthermore, if a passenger comes forward to voluntarily give up their seat, or is interested in doing so, several pieces of information must be provided. The airline must advise the passenger that he or she is in danger of being bumped, as well as the current amount of compensation offered for voluntarily surrendering the seat, and any restrictions applicable to compensation offered in the form of free or reduced rate air transportation, or ‘vouchers.’²¹ It is important to note that the amount of compensation provided for *volunteers* is not regulated by the FAA. This particular form of compensation is strictly determined between the airline and the volunteer.²²

The FAA does provide, however, that if a passenger comes forward as a volunteer, and then decides to hold his or her seat, he or she may not subsequently plead for compensation as a volunteer. The passenger must accept the compensation as a standing volunteer in order to negotiate with the airline.²³ Therefore, passengers should be aware that if a flight is overbooked, volunteering may provide them with additional compensation than would be provided by the airline in accordance with section 250.5.

Compensation for Bumped Passengers

Section 250.5 provides that an airline must provide a minimum amount of compensation to each passenger who is involuntarily bumped. This form of compensation does not fall under the category of a ‘refund.’ The compensation is paid in addition to the ticket the passenger holds, which may be used in the near future, or be transformed into an airline credit to be used at a later time.

The compensation is determined by two factors: the number of hours the passenger is delayed in arriving at their next destination and whether the flight’s destination is domestic or international.²⁴ Section 250.5(a) governs the amount of compensation due to a bumped passenger flying domestically, with subsections (1)–(3) generally providing that:

17. *Id.* § 250.2.

18. Berconi, *supra* note 6.

19. *Id.* § 250.2b(a).

20. *Id.* § 250.2b(b).

21. *Id.* § 250.2b(b-c).

22. *Id.* § 250.2b(a).

23. *Id.*

24. *Id.*; *Id.* § 250.5(b).

(1) If the passenger is provided alternate transportation to the next domestic destination and arrives one hour or less later than the planned arrival time, the airline is not required to provide any compensation.²⁵

(2) If the passenger is provided alternate transportation to the next domestic destination and arrives more than one hour but less than two hours later than the planned arrival time, the passenger is entitled to compensation equal to 200% of the fare paid, with a maximum cap of \$650.²⁶

(3) If the passenger is provided alternate transportation to the next domestic destination and arrives more than two hours later than the planned arrival time, the passenger is entitled to compensation equal to 400% of the fare paid, with a maximum cap of \$1,300.²⁷

However, if the ticket the passenger holds is a 'zero fare ticket', such as a voucher or ticket purchased with frequent flyer miles, determining the amount of compensation becomes difficult since cash was not used in the purchase. The airline will award compensation in these cases by assigning zero fare tickets a value equal to the lowest fare paid in the passenger's respective class.²⁸ For example, a ticket purchased with frequent flyer miles will only be given the same amount of compensation as that of a passenger who paid the cheapest cash fare in the same class.

When determining the amount of compensation due to a bumped passenger flying internationally, the same structure provided for domestic destinations applies, but with a slight adjustment. The only change relates to the number of hours the passenger is delayed in arriving at the next destination. These alternate arrival time standards are set under subsections (1)–(3) of section 250.5(b), which generally provide that:

(1) If the passenger is provided alternate transportation to the next international destination and arrives one hour or less later than the planned arrival time, the airline is not required to provide any compensation.²⁹

(2) If the passenger is provided alternate transportation to the next international destination and arrives more than one hour but less than four hours later than the planned arrival time, the passenger entitled to compensation equal to 200% of the fare paid, with a maximum cap of \$650.³⁰

(3) If the passenger is provided alternate transportation to the next international destination and arrives more than four hours later than the planned arrival time, the passenger is entitled to compensation equal to 400% of the fare paid, with a maximum cap of \$1,300.³¹

25. *Id.* § 250.5(a)(1)

26. *Id.* § 250.5(a)(2).

27. *Id.* § 250.5(a)(3).

28. *Id.* § 250.5(d).

29. *Id.* § 250.5(b)(1).

30. *Id.* § 250.5(b)(2).

31. *Id.* § 250.5(b)(3).

As with domestic travel, the ‘zero fare ticket’ policy also applies to international passengers.

Despite the Code requiring a certain level of compensation, an airline may instead offer a passenger vouchers for future travel.³² If a passenger agrees to accept this form of compensation, the airline is still required to inform the passenger of the amount of cash that may be alternatively awarded in the voucher’s place, as well as any restrictions applicable to the voucher.³³ Furthermore, if the passenger paid for optional or premium services for the flight they were bumped from, such as for checked baggage or seat selection, the airline must refund those fees in full.³⁴

Exceptions to Compensation for Passengers Denied Boarding

In addition to passengers who accept alternate transportation to their destination and arrive less than one hour later than their planned arrival time, the FAA provides three additional scenarios under section 250.6 in which passengers will not be entitled to any compensation.

The FAA mandates that if a passenger refuses alternate transportation, or does not comply with the airline’s fees, check-in times or confirmation standards, he or she is not entitled to the compensation guidelines of section 250.5.³⁵ Furthermore, if the airline is forced to switch to an alternate plane with fewer seats, or uses an aircraft with less than sixty seats that requires a reduction in weight for safety concerns, a bumped passenger is not entitled to compensation.³⁶ Finally, if a passenger refuses to accept an airline’s request to switch seats, regardless of the seat’s class, the passenger cannot ask for compensation.³⁷ If the passenger does accept the airline’s request to change seats, and the change results in the passenger being seated in a lower class, the airline must provide a refund in the value of the amount paid by the passenger for the premium seat.³⁸

Airline Disclosure of Overbooking Practices

The FAA requires that all commercial airlines engaged in the practice of overbooking notify its passengers of the related policies. The FAA provides airlines with the mandatory language to be used under section 250.11. This notice must be displayed continuously during business hours in a conspicuous manner and must be provided to passengers once they are bumped.³⁹ When displayed for public viewing, the notice must be shown in print that is at least one-quarter of an inch high and emboldened.⁴⁰ In addition to this sign, any ticket sold by the airline must make the notice available either on a separate page in at least 12-point font, on the back of the ticket, on the ticket’s envelope, or available to a passenger upon request. Furthermore, the last two sentences of the notice must be displayed in an alternate type

32. *Id.* § 250.5(c).

33. *Id.* § 250.5(c)(2).; *Id.* § 250.5(c)(3).

34. *Id.* § 250.5(f).

35. *Id.* § 250.6(a).

36. *Id.* § 250.6(b).

37. *Id.* § 250.6(c).

38. *Id.*

39. *Id.* § 250.11(a).

40. *Id.*

face.⁴¹ These extensively detailed measures by the FAA are required so that passengers are not caught unaware of the airline's overbooking practices.

A Look into the Policies of an American Carrier: Delta Air Lines

After Delta Air Lines' (Delta) acquisition of Northwest Airlines in October 2008, Delta became the largest airline in the world.⁴² The Atlanta-based carrier currently uses over 700 aircraft to serve 341 destinations around the world.⁴³ Such an extensive network requires Delta to pay close attention to the details of its operations so that FAA regulations are not violated, including those concerning the practice of overbooking.

Delta Air Lines and Compliance with FAA Overbooking Regulations

As an airline that overbooks, Delta must comply with the provision requiring each airline to conspicuously display a notice of the practice.⁴⁴ Delta complies with this provision by publicly providing the exact language provided by the Code on its website under 'Legal Notices.'⁴⁵ Delta also states under its 'Customer Commitment' that it will "handle bumped passengers ... as required by 14 CFR § 250" by providing its information and policies on overbooking upon request.⁴⁶ Delta further provides general information on their overbooking practices under the forum of 'Suspended Travel FAQs.' This webpage discusses overbooking, Delta's participation in the practice, and how these situations are handled. These numerous locations are evidence of Delta's efforts to follow the notice requirement of section 250.11.

Despite Delta's attempt to comply with the FAA's overbooking requirements, violations have occurred in recent years. On July 9, 2009, Delta was served with a Consent Order from the US Department of Transportation for violating FAA overbooking procedures.⁴⁷ An investigation by the Office of Aviation Enforcement and Proceedings found that between January and June of 2008, Delta had repeatedly failed to call for volunteers, furnish bumped passengers with the required written notice, and provide the required compensation under section 250.5.⁴⁸ Delta accepted a cease and desist order against any future violations, as well as a penalty of \$375,000.

41. *Id.* § 250.11(b).

42. Marilyn Adams & Dan Reed, *World's Largest Airline: Delta/Northwest in Merger Deal*, USA Today, May 1, 2008, http://www.usatoday.com/travel/flights/2008-04-14-delta-northwest-merge_N.htm (visited 4/12/11).

43. Delta Air Lines, *Stats & Facts*, Dec. 2011, <http://news.delta.com/index.php?s=18&cat=47> (visited 20/12/11).

44. 14 F.C.R. § 250.11(a).

45. Delta Air Lines, *Notice of Overbooking Flights*, Feb. 8, 2010, <http://www.delta.com/legal/index.jsp> (visited 5/12/11).

46. Delta Air Lines, *Delta Air Lines Customer Commitment*, Sept. 19, 2011, https://www.delta.com/legal/delta_customer_commitment/index.jsp (visited 5/12/11).

47. Office of the Sec'y, US Dep't of Transp, Consent Order 2009-7-7 (2009), *available at* http://airconsumer.ost.dot.gov/EO/eo_2009-07-07.pdf (visited 28/11/11).

48. *Id.*

Delta Air Lines' Boarding Priority Factors

Delta provides, under its Customer Commitment, that a passenger may request and be provided with Delta's boarding priority factors at any time. Although the FAA set forth these required factors under section 250.3, the Code's language indicates that the factors "may include, but are not limited to" those listed. This language allows an airline to create its own list of factors in a manner it feels is more courteous or beneficial to its operations.

Delta provides its three boarding priority factors under rule 245 of the "Delta Domestic General Rules Tariff." These factors are listed in order of priority, which state that:

- Highest priority will be given to those in First or Business Class, as well as SkyMiles members with Diamond, Platinum and Gold designations.⁴⁹
- The second priority level is for passengers holding boarding passes. If there are numerous passengers within this category, highest priority is determined by the earliest time of check-in.⁵⁰
- The third priority level includes passengers who have not yet received a boarding pass but have purchased a ticket. Within this group, highest priority is given to passengers rebooked due to irregular operations, such as delay or cancellation, followed by SkyMiles members with Silver designation, passengers with SkyTeam Elite or Elite Plus status, and passengers with no elite-status designation.⁵¹

Despite these factors, Delta states in rule 245(C)(4) that it reserves the right to give priority over all passengers to those with disabilities, unaccompanied minors, and members of the US Armed Forces on travel orders.⁵²

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49. Delta Air Lines, *Delta Domestic General Rules Tariff* p. 45, October 1, 2011, available at https://a248.e.akamai.net/7/248/19260/v1/images.delta.com/delta/pdfs/contract_of_carriage_intl.pdf (visited 21/12/11)

50. *Id.*

51. *Id.*

52. *Id.*