

**Before the U.S. Department of Transportation
Office of Aviation Enforcement and Proceedings
Washington, D.C. 20590**

In the Matter of)
)
)
)
Northwest Airlines, Inc.)
)
_____)

**COMPLAINT AND REQUEST FOR INVESTIGATION,
INJUNCTION, AND FOR OTHER RELIEF**

Introduction

1. This complaint concerns the privacy practices of Northwest Airlines, Inc. ("NWA"). As set forth in detail below, NWA has engaged in an unfair and deceptive practice by disclosing consumer personal information to the National Aeronautics and Space Administration ("NASA"), in violation of 49 U.S.C. § 41712.
2. NWA engaged in this activity without the knowledge or consent of the affected consumers, and in contravention of public assurances that the personal information it collects would not be shared with third parties without individuals' consent. The compelling public interest in this case requires the Secretary of Transportation to investigate NWA's practices, to enjoin NWA from continuing the practice, and to provide such remedies as the Secretary deems appropriate.

Parties

3. The Electronic Privacy Information Center ("EPIC") is a non-profit, public interest research organization incorporated in the District of Columbia. EPIC's activities include the review of government and private sector policies and practices to determine their possible impacts on individuals' rights. Among its other activities, EPIC has prepared reports and presented Congressional testimony on Internet and privacy issues. EPIC also maintains a heavily visited site on the World Wide Web (www.epic.org) containing extensive information on privacy issues, including information EPIC has obtained from federal agencies under the Freedom of Information Act ("FOIA").
4. NWA is the world's fourth-largest commercial air carrier. It commenced passenger operations in 1927 and currently employs approximately 40,000 people worldwide. NWA and its partners operate over 1,500 flights to more than 750 destinations in 120 countries. Amsterdam is NWA's hub city in Europe and also where NWA maintains its in-flight office. NWA's world headquarters are located in Minneapolis/St. Paul. In 2000,

NWA carried more than 60 million passengers. In 2001, NWA carried over 54 million passengers. In each of 2002 and 2003, NWA carried approximately 52 million passengers. NWA's parent company Northwest Airlines Corporation is a widely-held company traded on NASDAQ.

The Importance of Privacy Protection

5. The right of privacy is a personal and fundamental right in the law of the United States. The privacy of an individual is directly implicated by the collection, use and disclosure of personal information. The opportunities for an individual to secure employment, insurance, and credit, to obtain medical services, and the rights of due process may be jeopardized by the misuse of personal information.
6. United States privacy law has by tradition protected the privacy of consumers in the offering of new commercial services enabled by new technologies, and increasingly recognizes the importance of purpose specification and use limitation when companies use consumers' personal information. The Privacy Act of 1974 regulates the government's collection, maintenance, use and dissemination of personal information.
7. Public opinion surveys consistently show that many Americans today are "concerned" or "very concerned" about the loss of privacy, particularly with regard to commercial transactions that take place over the Internet.
8. Government use of airline passenger information is a particularly important issue of public interest and concern. In September 2003, a number of news agencies reported that JetBlue Airways disclosed over one million passenger records to a Department of Defense contractor for use in association with a military study.¹ The procurement and use of airline passenger data by government agencies raises serious privacy implications that have received considerable media attention following the revelation of JetBlue's disclosure.

¹ See, e.g., Ryan Singel, *Jet Blue Shared Passenger Data*, Wired News, Sept. 18, 2002, available at <http://www.wired.com/news/privacy/0,1848,60489,00.html>.

9. The European Union (EU) has expressed concern that the United States government's collection and use of passenger information from European airlines may violate EU data protection laws.² Officials from the United States and EU recently reached a temporary agreement on the matter after extensive negotiation.³ Moreover, privacy officials around the world have urged the establishment of privacy safeguards for airline passenger information.⁴

10. Pursuant to 49 U.S.C. § 41712, and with an express view to the public interest, the Secretary of Transportation plays a critical role with respect to the unfair and deceptive practices of air carriers. Pursuant to that authority, the Department of Transportation, Office of Aviation Enforcement and Proceedings ("OAEP") has affirmatively committed itself to enforcing privacy assurances made by airlines to the public (see attached Exhibit A).⁵

Statement of Facts

NWA's Representations to Consumers

11. NWA maintains a website located at <http://www.nwa.com> that, among other things, allows consumers to make online travel reservations. NWA collects consumer information in the course of, *inter alia*, its online ticketing activities.

² See, e.g., EPIC Air Travel Privacy Page, at <http://www.epic.org/privacy/airtravel> (last visited Jan. 20, 2004); European Parliament Resolution on Transfer of Personal Data by 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>; Address of European Commissioner Frits Bolkestein to the European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and Legal Affairs and the Internal Market, Brussels, Dec. 1, 2003, available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/586|0|RAPID&lg=EN&display=; Declaration of Marco Cappato, radical Member of the European Parliament, Dec. 17, 2003, available at http://coranet.radicalparty.org/pressreleases/press_release.php?func=detail&par=6409.

³ See MARC ROTENBERG, ED., THE PRIVACY LAW SOURCEBOOK 2003: UNITED STATES LAW, INTERNATIONAL LAW AND RECENT DEVELOPMENTS 450-59 (EPIC 2003); see also David Cay Johnston, Travel Advisory: Agreement Is Reason on Air-Passenger Data, The New York Times, Jan. 4, 2004.

⁴ See Commissioner Resolution Concerning the Transfer of Passenger's Data, 25th Annual Conference of Data Protection and Privacy Commissioners, Sept. 10-12, 2003, available at <http://www.privacyconference2003.org/commissioners.asp>.

⁵ Exhibit A is a 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 513-15 (EPIC 2001).

12. The passenger information collected by NWA almost certainly includes that of children for whom travel arrangements are made through NWA's website.

13. It is likely that NWA collects information on European citizens who make online travel arrangements through NWA's website or through its European partner, KLM. When NWA and KLM sought approval from DOT of an agreement to "integrate" their operations, they asserted that "[t]he objective of the Agreement is to establish a legal framework under which the two carriers may operate as if they were a single firm."⁶

14. NWA assures passengers that they will be in "complete control of . . . the use of information [they] provide to Northwest Airlines." The airline further assures customers that it has "put in place safeguards to . . . prevent unauthorized access or disclosure" of the information it collects. NWA's current privacy policy and usage agreement, both located on its website, provide in pertinent part that:

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, its airline affiliates, and WorldPerks partners.

[...]

When you reserve or purchase travel services through Northwest Airlines nwa.com Reservations, we provide only the relevant information required by the car rental agency, hotel, or other involved third party to ensure the successful fulfillment of your travel arrangements. We also use information you provide during User registration or as part of the reservation process to customize the content of our site to meet your specific needs and to make product improvements to Northwest Airlines nwa.com.

We do not **sell** individual customer names 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 only for specific and pertinent promotional use **but only** if our customers have opted to receive promotional emails from Northwest and our WorldPerks partners. (emphasis in original)

15. NWA's privacy policy has included terms virtually identical to the above since at least 1998.⁷

⁶ Application for Approval and Antitrust Immunity of Commercial Cooperation and Integration Agreement, OST-95-579-1 (September 9, 1992) *available at* http://dmses.dot.gov/docimages/pdf3/4070_web.pdf.

⁷ Archived copies of NWA's earlier privacy policies can be accessed using the Wayback Machine, *available at* <http://www.archive.org>.

16. At its current Security Commitment page on its website, NWA makes further representations to the public regarding its handling of customer information:

At Northwest Airlines we take great care and use the latest technologies to ensure the security and safety of all your transactions with nwa.com.

We have put in place safeguards to secure the information we collect online, prevent unauthorized access or disclosure, maintain data accuracy, and ensure the appropriate use of information. Our servers use the latest encryption technology, Secure Sockets Layer (SSL), to protect the transfer of your data from unauthorized parties.

With our commitment to data security, your online shopping is safe and secure.

NWA's Disclosure of Consumer Personal Information to NASA

17. On or about July 31, 2002, EPIC received 22 pages of documents from the Transportation Security Administration in response to a FOIA request. The records were created by NASA and indicated that NASA was developing technology for aviation security. Among the documents released was a letter from Thomas A. Edwards, Chief, Aviation Systems Division of NASA's Ames Research Center, to Jay Dombrowski of NWA (attached hereto as Exhibit B). This letter states in relevant part:

I would first like to convey my appreciation to you and the other people at Northwest Airlines who made our NASA visit earlier this week so profitable. We all found the technical exchanges extremely valuable as together we investigate approaches and roles in the area of automatic passenger identification and threat assessment.

In conversations on Tuesday with you, the [sic] some of the NASA personnel discussed our need for three months of Northwest Airlines passenger data (your PNR) data to be used in our research and development work. At that time you suggested a letter be sent from NASA Ames to Northwest Airlines requesting this data.

We would like to request system-wide Northwest Airlines passenger data from July, August and September 2001. . . . We would like to begin to use this data as soon as possible since we are planning on having a demonstration of our technology in this area near the end of January.

18. A fax transmission line and hand-written notation on the letter indicates that it was faxed December 20, 2001 to "NWA Audit & Security."

19. On October 3, 2003, EPIC wrote to NASA's Ames Research Center and requested under the FOIA:

- a. Any correspondence between representatives of Northwest Airlines and NASA officials or employees regarding the disclosure of Northwest passenger data to NASA;
- b. Any documents detailing, describing, or concerning the disclosure of Northwest passenger data to NASA; and/or
- c. Any materials related to negotiations or communications between NASA and other commercial airlines for passenger data.

20. By letter to EPIC dated December 16, 2003, NASA released 37 pages of agency records responsive to EPIC's FOIA request. These documents included a briefing by NASA to NWA dated December 10-11, 2001, a study regarding NASA's use of passenger information co-authored by a NASA researcher, and a series of emails between NWA and NASA personnel confirming that NWA had disclosed passenger records to NASA.

21. The December 10-11, 2001 briefing (attached hereto as Exhibit C) indicates, among other things, that NASA wanted to build a passenger screening testbed that would include biometrics, smart cards, and software for data mining and threat assessment.

22. In a December 19, 2001 email from Patricia M. Jones of NASA to Jay Dombrowski of NASA (attached hereto as Exhibit D), NASA requested copies of NWA materials regarding CAPPS as well as access to NWA's facilities.

23. The study regarding NASA's use of passenger data is a data mining study (attached hereto as Exhibit E) co-authored by NASA Ames researcher Mark Schwabacher (who attended the December 10-11, 2001 briefing). The study includes the following passage:

Airline Passenger. We obtained 90 days' worth of passenger data from a major U.S. airline. This database includes the information that each passenger provided to the airline (or to a travel agent) when buying an airline ticket.

24. The study goes on to discuss how NASA used the passenger information in its research and development. References to airline passenger data in the study can be found at sections 3 and 5 and in the Acknowledgements. Although the study itself is undated, Schwabacher's curriculum vitae (attached hereto as Exhibit F) indicates that the paper was presented to the Workshop on Data Mining for Counter Terrorism and Security at the May 2003 SIAM Data Mining Conference in San Francisco.

25. On September 23, 2003, Schwabacher wrote the following email to Jay Dombrowski at NWA (attached hereto as Exhibit G):

As you have probably heard by now, our data mining for aviation security project did not receive any FY2003 funds. My interpretation is that NASA management decided that they did not want to continue working with passenger data in order to avoid creating the appearance that we are violating people's privacy. You may have heard about the problems that JetBlue is now having after providing passenger data for a project similar to ours:

http://abcnews.go.com/wire/Business/ap20030923_695.html

I would like to return to you the PNR CDs that you loaned us. To what address should I send them?

26. On the same day as Schwabacher's email, the New York Times published a story regarding JetBlue's disclosure of passenger data (attached hereto as Exhibit H). In that context, Kurt Ebenhoch, a spokesman for NWA, was quoted as stating "We do not provide that type of information to anyone."⁸

27. On September 24, 2003, the St. Paul Pioneer Press published a news brief (attached hereto as Exhibit I) stating that "Northwest Airlines will not share customer information as JetBlue Airways has, Northwest CEO Richard Anderson said Tuesday in brief remarks after addressing the St. Paul Rotary."⁹

28. Subsequent emails between Schwabacher and Dombrowski (attached hereto as Exhibit J) confirm that NASA shipped the CDs to NWA Security on September 25, 2003.

29. On September 27, 2003, the Washington Times published an article reporting that NWA refused to comment on whether it had disclosed passenger data to NASA (attached hereto as Exhibit K).¹⁰

⁸ Micheline Maynard, JetBlue Moves to Repair its Image After Sharing Files, The New York Times, Sept. 23, 2003, at C4.

⁹ See Anderson to Speak at the St. Paul Rotary, Newswire, Sept. 23, 2003, available at <http://mplsn006s.uswest.net/nwa/newswire.nsf/0/ae88ab46652c0cb686256da900766910?OpenDocument>; NWA Chief Says Airline Won't Share Flier Data, Saint Paul Pioneer Press, Sept. 24, 2003 at 2C.

¹⁰ Frank J. Murray, NASA Sought Airline's Records, The Washington Times, Sept. 27, 2003.

30. On January 18, 2004, the Washington Post published an article based upon the NASA documents obtained by EPIC (attached hereto as Exhibit L). The Post reported that NWA acknowledged that it had, in fact, disclosed passenger data to NASA. The disclosed data detailed passenger travel from October to December 2001. DOT statistics indicate that more than 10.9 million passengers traveled on NWA flights during that time.¹¹ This figure is significantly higher than the number of passenger records at issue in the JetBlue case.

31. There is no evidence that NWA provided notice or obtained consent from any of the millions of passengers whose personal information was disclosed to and used by NASA.

NWA HAS ENGAGED IN AN UNFAIR AND DECEPTIVE PRACTICE

32. The Secretary of Transportation has jurisdiction and authority under 49 U.S.C. § 41712 to investigate and prosecute cases regarding the unfair and deceptive practices of air carriers. The Office of Aviation Enforcement and Proceedings ("OAEP") has actively prosecuted cases under this section, including numerous cases regarding air carriers' fare advertising practices.

33. Where air carriers fail to live up to their privacy commitments, the OAEP has indicated, in an express assurance to the European Union, that it will aggressively pursue complaints such as the one EPIC presents here.¹² The OAEP has committed to prosecuting privacy cases on a "high-priority" basis in order to "ensure airline compliance with privacy commitments made to the public."¹³

34. The OAEP has also acknowledged that section 41712 is patterned after section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).¹⁴ The FTC has developed substantial expertise in cases of unfair and deceptive privacy practices.¹⁵ In this case, the OAEP should be guided by the FTC's application of the Federal Trade Commission Act.¹⁶

¹¹ Sara Kehaulani Goo, Northwest Gave U.S. Data on Passengers, The Washington Post, Jan. 18, 2004.

¹² See *supra* note 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, e.g., Federal Trade Commission, *Eli Lilly Settles FTC Charges Concerning Security Breach*, at <http://www.ftc.gov/opa/2002/01/elililly.htm>; Federal Trade Commission, *Microsoft Settles FTC Charges Alleging False Security and Privacy Promises*, at <http://www.ftc.gov/opa/2002/08/microsoft.htm>.

¹⁶ See *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956). See also DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW* 541-53 (Aspen 2003) ("Public Enforcement: The Role of the FTC").

35. In the context of privacy practices, the FTC generally identifies three factors that support a finding of unfairness: whether the practice injures consumers, whether it violates established public policy, and whether it is unethical or unscrupulous. To find unfairness, the consumer injury must be substantial, the injury must not be outweighed by countervailing benefits to competition or consumers produced by the practice, and it must be an injury that could not have been reasonably avoided. Substantial injury may also occur where a business practice causes a small harm to a large number of people.¹⁷

36. The FTC applies a three-prong test to evaluate whether a deceptive practice regarding privacy is actionable. First, the FTC evaluates representations and omissions based on their likelihood to mislead, rather than whether the consumer is actually misled. The second prong requires that the representation or omission be likely to mislead a reasonable consumer. In evaluating consumer reasonableness, the FTC examines the totality of the allegedly deceptive practice, weighing the clearness of the representation, whether there is conspicuous information that qualifies the representation, whether omitted information is important, and whether consumers are familiar with the product or service. Finally, the FTC considers whether the representation, omission, or practice is material. A material representation or practice is one that is likely to affect a consumer's course of or conduct regarding a product.¹⁸

37. The FTC has been particularly intolerant of privacy violations that involve children's personal information.¹⁹ In a letter from the FTC to U.S. House Committee on Commerce, the agency wrote:

[I]n the view of Commission staff, the release of children's personally identifiable information online, without providing parents with adequate notice and an opportunity to control the information, may result in sufficient injury or risk of injury to meet the Section 5 unfairness standard.²⁰

¹⁷ See, e.g., *FTC v. ReverseAuction.com*, FTC File No. 002-3046, Jan. 6, 2000, available at <http://www.ftc.gov/os/2000/01/reversecmp.htm>. See FTC Policy Statement on Unfairness (1980), at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

¹⁸ See FTC Policy Statement on Deception (1983) at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>. See, e.g., *In the Matter of the National Research Center for College and University Admissions, Inc., American Student List, LLC, and Don M. Munce*, FTC File No. 022-3005, Jan. 29, 2003, available at <http://www.ftc.gov/os/2002/10/nrcuacmp.pdf>.

¹⁹ See, e.g., Agreement Containing Consent Order, *FTC v. GeoCities*, Docket No. C-3850, Feb. 12, 1999, available at <http://www.ftc.gov/os/1998/9808/geo-ord.htm>; Agreement Containing Consent Order, *FTC v. Liberty Financial Companies*, FTC File No. 01-23124, Nov. 6, 2001, available at <http://www.ftc.gov/os/1999/9905/lbtyord.htm>.

²⁰ FTC Responses to Questions Regarding Electronic Commerce to the Honorable Tom Bliley, Chairman, U.S. House Committee on Commerce, at <http://www.ftc.gov/os/1998/9804/bliley.htm>.

38. In this case, NWA publicly represented that customers controlled the use of the information that they provided to NWA and that the personal information NWA collected about its customers would not be sold or disclosed to third parties without individuals' consent. In its Security Commitment, NWA further represented that it had "put in place safeguards to secure the information NWA collect[s] online, prevent unauthorized access or disclosure, maintain data accuracy, and ensure the appropriate use of information."

39. Substantial injury to consumers occurred in this case because NWA's practice had the effect of causing harm to the fundamental privacy rights of a large number of people -- potentially over 10 million of them. The nature of the violation in this case is particularly harmful in light of the high importance individuals place on their privacy generally, and specifically on the procurement and use of personal information by the government. Further aggravating NWA's violation is the virtual certainty that children's personal information and European citizens' personal information comprised part of what was disclosed to NASA. These facts would support a finding of an unfair practice under the precedents established by the FTC.

40. The likelihood is great that NWA's customers were misled by NWA's privacy commitments and reasonable NWA customers were likely to believe that their personal information would not be disclosed to third parties. NWA's material misrepresentations may have materially affected NWA's customers' choice of airline carrier service. Under the FTC precedents, these facts support a finding of a deceptive practice.

41. EPIC respectfully submits that NWA's disclosure of passenger personal information to NASA was a violation of its public privacy commitments and constitutes an unfair and deceptive practice of critical public interest and importance.

REQUEST FOR RELIEF

42. EPIC requests that the Secretary of Transportation:

- A. Initiate an investigation into the information collection and dissemination practices of NWA;
- B. Order NWA to notify all affected individuals that their personal information was disclosed to NASA;
- C. Order NWA to obtain the express consent of any consumer whose information is disseminated in the future;
- D. Permanently enjoin NWA from engaging in unfair and deceptive practices in violation of 49 U.S.C. § 41712 as alleged herein;
- E. Order NWA to pay such civil penalties as may be appropriate; and

F. Provide such other relief as the Secretary of Transportation deems appropriate.

Respectfully submitted,

Marc Rotenberg
Executive Director

David L. Sobel
General Counsel

Marcia Hofmann
Staff Counsel

Alex Cameron
IPIOP Law Clerk

ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Avenue NW
Suite 200
Washington, D.C. 20009
(202) 483-1140
Attention: Marcia Hofmann

January 20, 2004