Before the

DEPARTMENT OF TRANSPORTATION

Washington, DC 20590

APPLICATION FOR APPROVAL OF AN AGREEMENT (RESOLUTION 787) BY THE INTERNATIONAL AIR TRANSPORT ASSOCIATION **(Docket No. OST-2013-0048)**	**REPLY COMMENTS OF EDWARD HASBROUCK**

Edward Hasbrouck
1130 Treat Ave.
San Francisco, CA 94110

telephone 415-824-0214
edward@hasbrouck.org
http://www.hasbrouck.org

21 February 2014

In their “Joint Motion for Leave to File Agreed Limitations Concerning Resolution 787” filed 22 January 2014 in this docket (document DOT-OST-2013-0048-0412), the International Air Transport Association (IATA) and Open Allies for Airfare Transparency state that:

> The parties agree that they would not oppose a reopening of this proceeding for a period of 30 days from the date of this Motion to permit other interested parties, all of whom have been served, to respond.

Accordingly, I request leave (which IATA has thus indicated it will not oppose) to respond to the “Agreed Limitations Concerning Resolution 787” (DOT-OST-2013-0048-0412), as well as to IATA's reply to my initial comments in this docket (DOT-OST-2013-0048-0337, 1 May 2013), as made by IATA in its “Reply and Motion for Leave to File an Otherwise Unauthorized Document” (DOT-OST-2013-0048-0403, 21 June 2013).

My initial comments focused on the fundamental incompatibility of "personalized pricing", as proposed in IATA Resolution 787, with the duty of a common carrier to sell transportation to all would-be customers on the basis of an impersonal, publicly disclosed tariff.

In its response (DOT-OST-2013-0048-0412, note 23 at page 17), IATA says:

> Commenter Edward Hasbrouck argues that airlines "are required to sell tickets according to publicly-disclosed, impersonal tariffs," Hasbrouck (DOT-OST-2013-0048-0337), p. 4. Prior to deregulation that was largely true, but it is not the law today. The U.S. negotiated liberal air transport agreements with most of its aviation partners and DOT exempted airlines from filing tariffs in these markets. 14 CFR §293.10(a) ("Air carriers and foreign air carriers are exempted from the duty to file passenger tariffs with the Department of Transportation"). So long as the liberal intergovernmental agreements remain in place, DOT is required to maintain that tariff filing exemption. 49 USC §40105(b)(A) (providing that the Department "shall act consistently with obligations of the United States Government under international agreement").

IATA's fundamental error in this response is to equate an exemption from the requirement to file tariffs with the U.S. government with an exemption from the requirements to have tariffs, to sell tickets only according to tariffs, and to make tariffs available to the public.

It is, of course, routine for regulated businesses in mnay secotrs, not just transportation, to be required to have policies of a specified type in place, to adhere to such policies in their operations, and to make those policies available to consumers and other members of the public, without being required to file those policies with any government agency.

The language of the exemption is plain, and IATA provides no basis for any claim that it was intended to apply to any tariff requirements other than those for filing with the government.

As I described in detail in my original comments (DOT-OST-2013-0048-0337 at page 5), there are multiple explicit provisions of both Federal statutes and DOT regulations, separate from the tariff filing requirements, which require airlines to have tariffs, to make them public, and to sell tickets only in accordance with those publicly-disclosed tariffs.

In addition, numerous bilateral and multilateral international agreements, Federal statutes, and DOT regulations all require airlines to be licensed and to operate as common carriers. Accommodation of all would-be passengers in accordance with a publicly-disclosed, impersonal tariff is an essential element – the essential element -- of the definition of a common carrier.

The statute cited by IATA, 49 USC §40105(b)(A), requires DOT to ensure that common carriers act as such. DOT has no regulatory or administrative discretion to derogate from U.S. treaty obligations by exempting airlines from their obligation to operate as common carriers, or to grant exemptions from statutory requirements for airlines to publish and adhere to tariffs.

DOT should reject IATA's proposal for approval of Resolution 787 as inconsistent with the explicit tariff requirements, and the tariff requirements implicit in the definition of a common carrier, in international agreements, Federal statutes, and DOT regulations. Dot should, instead, take this opportunity To remind airlines that exemption from tariff filing requirements of does not constitute exemption from any of the other tariff requirements: to have tariffs, to sell tickets only in accordance with them, and to make them available to the public.

I also wish to take this opportunity to comment on the proposed "Limitations Concerning Resolution 787". These fail to address either the legal bars to DOT approval of Resolution 787, as discussed above and in my initial comments, or the public policy reasons why it would be inappropriate for the DOT to approve Resolution 787, even if DOT had authority to do so.

With respect to requirements for the provision by passengers of personal information, the proposed "Limitations" (DOT-OST-2013-0048-0412 at page 2) are limited to the following:

> Approval of IATA Resolution 787 does not constitute approval of any agreement among IATA member airlines to require the disclosure by any passenger of personal information of any kind.

This "limitation" is not sufficient to ensure that airlines operate as common carriers and accept all would-be passengers willing to pay the fare and comply with the terms in their tariff. Nor is it sufficient to protect the public interests served by common carrier and tariff requirements, and which personalized pricing and Resolution 787 would undermine.

First, this "limitation" would only prohibit agreements between airlines to require disclosure of personal information. It would not prohibit individual airlines from requiring such disclosures. But a common carrier may not require a passenger to disclose any information as a condition of purchasing a ticket, regardless of whether it colludes with other carriers to do so.

Second, this "limitation" – if applied, as IATA intends it to be, to a system in which pricing by tariff is replaced with personalized pricing – would allow airlines to charge an arbitrarily higher price to a passenger who declines to provide requested personal information.

Accordingly, if DOT approves Resolution 787, which I believe it should not, DOT should at a minimum expand this limitation to provide that, "No airline may require the disclosure by any passenger of personal information of any kind, condition any fare or fee on the provision of personal information, or refuse to sell a ticket or provide other services at any otherwise-applicable fare or fee on the basis of failure or refusal to provide any personal information."

Respectfully submitted,

_____/s/_____

Edward Hasbrouck

1130 Treat Ave.
San Francisco, CA 94110

telephone 415-824-0214
edward@hasbrouck.org
http://www.hasbrouck.org