

BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION  
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS

ALLERGY & ASTHMA NETWORK, )  
ASTHMA AND ALLERGY )  
FOUNDATION OF AMERICA, )  
FOOD ALLERGY & ANAPHYLAXIS )  
CONNECTION TEAM, NO NUT )  
TRAVELER, )  
)  
Complainants, )  
)  
v. )  
)  
SOUTHWEST AIRLINES, CO. )  
)  
Respondent. )

Docket DOT-OST-2022-0134

**COMPLAINANTS' MOTION FOR LEAVE TO REPLY TO ANSWER**  
**OF RESPONDENT SOUTHWEST AIRLINES CO. AND**  
**COMPLAINANTS' REPLY**

Comments with respect to this docket entry should be directed to:

Mary C. Vargas  
Stein & Vargas, LLP  
10 G Street NE, Suite 600  
Washington, DC 20002  
Mary.Vargas@steinvargas.com  
240-793-3185

Laurel Francoeur  
Francoeur Law Office  
63 Shore Road, Suite 24  
Winchester, MA 01890

Dated: December 22, 2022

BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION  
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS

ALLERGY & ASTHMA NETWORK, )  
ASTHMA AND ALLERGY )  
FOUNDATION OF AMERICA, )  
FOOD ALLERGY & ANAPHYLAXIS )  
CONNECTION TEAM, NO NUT )  
TRAVELER, )  
 )  
Complainants, )  
 )  
v. )  
 )  
SOUTHWEST AIRLINES, CO. )  
 )  
Respondent. )

Docket DOT-OST-2022-0134

**COMPLAINANTS’ MOTION FOR LEAVE TO FILE A REPLY TO  
ANSWER OF RESPONDENT SOUTHWEST AIRLINES CO.**

Pursuant to 42 C.F.R. § 302.408(c), Complainants respectfully seek leave to file a Reply to the Answer filed by Southwest Airlines, Co. (“Southwest”). In support thereof, Complainants state and aver as follows:

1. Southwest claims in its Answer that the Complaint is moot. Plaintiffs’ Complaint is not moot for the reasons outlined in the attached Reply and requires action by DOT to protect the public and to ensure compliance with the Air Carrier Access Act.
2. In its Answer, Southwest reveals and purports to rely on in defense of its discrimination an Equivalent Alternative Resolution Request (“EAD”) from DOT, a copy of which Southwest attached to its Answer. To the extent Southwest relies on and/or references this EAD, Complainants require an opportunity to respond to this new information in the first instance.
3. Southwest’s reliance on the EAD to excuse discrimination demonstrates that DOT

should revoke the operable EAD due to non-compliance by the airline.

4. Complainants requested that Southwest consent to this Motion but Southwest refused consent for Complainants to respond. This refusal to permit those impacted by the discrimination of Southwest to respond underscores the need for DOT to impose sanctions and otherwise respond strongly.

DATED: December 22, 2022

/s/Mary C. Vargas  
Mary C. Vargas  
STEIN & VARGAS, LLP  
10 G Street NE, Suite 600  
Washington, DC 20002  
240-793-3185 Telephone  
888-778-4620 Facsimile  
[Mary.Vargas@steinvargas.com](mailto:Mary.Vargas@steinvargas.com)

Laurel Francoeur  
Francoeur Law Office 63  
Shore Road, Suite 24  
Winchester, MA 01890  
781-705-2552  
[laurel@francoeurlaw.com](mailto:laurel@francoeurlaw.com)

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following via electronic mail on December 22, 2022:

Maren Matal  
Senior Attorney  
Southwest Airlines Co.  
919 18<sup>th</sup> Street NW, Suite Suite 600  
Washington, DC 20006

Mark Shaw  
EVP Chief Legal & Regulatory Officer  
Southwest Airlines Co.  
2702 Love Field Drive  
Dallas, TX 75235

/s/Mary C. Vargas  
Mary C. Vargas

BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION  
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS

ALLERGY & ASTHMA NETWORK,	)	
ASTHMA AND ALLERGY	)	
FOUNDATION OF AMERICA,	)	
FOOD ALLERGY & ANAPHYLAXIS	)	
CONNECTION TEAM, NO NUT	)	
TRAVELER,	)	
	)	
Complainants,	)	
	)	
v.	)	Docket DOT-OST-2022-0134
	)	
SOUTHWEST AIRLINES, CO.	)	
	)	
Respondent.	)	

**COMPLAINANTS' RESPONSE TO ANSWER OF RESPONDENT**  
**SOUTHWEST AIRLINES CO.**

Now come Complainants in the above-entitled action and respectfully submit the following Reply to the Answer of Southwest Airlines Co. (hereinafter "Southwest").

**I. SOUTHWEST CONTINUES TO DISCRIMINATE AGAINST TRAVELERS WITH FOOD ALLERGIES**

The answer of Southwest Airlines Co. describes its policy in regard to passengers with "severe nut allergies." Southwest fails to address accommodations for individuals who are severely allergic to any other food, claims which are clearly presented in the Complaint. Any individual with a food allergy for whom *any allergen* can cause anaphylactic shock or respiratory distress or otherwise require emergency treatment is an individual with a disability.<sup>1</sup> Neither the ACAA nor the Department of Transportation makes a distinction between allergies to peanuts and allergies to other foods. All passengers with severe food allergies need pre-boarding in order to secure their

---

<sup>1</sup> For example, the U.S. Food and Drug Administration officially recognizes nine foods as known allergens - milk, egg, soy, wheat, shellfish, sesame, fish, peanuts and tree nuts. See Food Allergen Labeling and Consumer Protection Act of 2004, 21 USC § 301, *et seq.*

seating area for a safe flight, regardless of the type of allergen as detailed in the Complaint in this matter.

Southwest also goes to great lengths to explain that it has stopped serving peanuts on its flights. However, this fact is irrelevant. Southwest continues to serve food on its planes and allows passengers to bring food onto their planes. Residues of other allergenic foods could be, and commonly are, present on tray tables, seats, and armrests. Thus, a person with a milk allergy, for example, may encounter milk residue in their seating area which could provoke an allergic reaction just as peanut residue could provoke an allergic reaction for a passenger with peanut allergy. It is as important for the passenger with a milk allergy to be able to preboard to wipe down the tray table as it is for the passenger allergic to peanuts to do so. Southwest's limited view that only people with peanut allergies need accommodations is in and of itself discriminatory with respect to individuals with other types of food allergies. Southwest's Answer admits its discrimination because it allows pre-boarding for peanut allergies and not other food allergies. Therefore, the Complaint is not moot insofar as the Complainants advocate on behalf of individuals with food allergies and presented the claims on behalf of individuals with allergies to foods other than peanuts in their Complaint. Southwest's disregard for the federally mandated rights of passengers with allergies to foods other than peanuts requires swift and strong response from DOT.

## **II. BECAUSE SOUTHWEST ADMITS TO VIOLATING THE ACAA, DOT SHOULD REQUIRE SOUTHWEST TO REIMBURSE AFFECTED PASSENGERS**

In its Answer, Southwest admits that it had passengers with allergies pay an extra fee in order to preboard in violation of the ACAA. Southwest only granted this privilege to passengers who paid this extra fee. The money that food allergic individuals were forced to pay and are continuing to have to pay if their allergy is to a food other than peanuts is clearly an illegal surcharge pursuant to 14 C.F.R. § 382.31(a). Southwest has been and continues to be unjustly

enriched by its illegal policies. In light of this admission, Complainants respectfully request that all passengers who were affected by the discriminatory policy be reimbursed by Southwest for the unlawful fees charged by Southwest and that DOT impose a meaningful penalty against Southwest for its actions which continue to this date.

**III. SOUTHWEST’S ONGOING REFUSAL TO PERMIT PREBOARDING FOR PASSENGERS WITH FOOD ALLERGIES REQUIRES REVOCATION OF THE EAD.**

In its Answer, Southwest asserted that the EAD issued by DOT absolves it of obligation to comply with the ACAA. The EAD in fact does the opposite insofar as it explicitly cautioned Southwest that DOT had previously held preboarding to be required for passengers with food allergies. Therefore, Southwest’s denial of preboarding to passengers with peanut allergies and ongoing denial of preboarding to passengers with other food allergies amounts to knowing violation of the ACAA and direct disregard of DOT’s explicit conditions for issuance of the EAD. The EAD must therefore be revoked to protect the civil rights of passengers with food allergies.

**IV. SOUTHWEST’S ANSWER MAKES CLEAR THAT IT NEEDS TRAINING ON THE SUBJECT OF FOOD ALLERGIES**

A key component of the remedy sought by Complainants is that Southwest employees undergo mandatory training about food allergies. It would be remiss to dismiss the Complaint without addressing this important need.

Southwest’s answer makes it clear that Southwest lacks a fundamental understanding of food allergies. First, Southwest uses the words “nut” and “peanut” interchangeably when describing their allergy policy. Peanuts are not nuts but are legumes. People can be allergic to only peanuts or only to tree nuts. Eliminating peanuts from a flight would not help a person who is only allergic to tree nuts. Moreover, people who are allergic to peanuts may be allergic to other foods. Southwest’s failure to understand this important difference is worrisome and puts passengers at

risk.

Second, Southwest’s singular focus on accommodations for “severe nut allergies” shows that the company does not understand that passengers can be allergic to foods other than nuts. Training about allergies would help enlighten Southwest staff about why a passenger with any severe food allergy would need accommodations.

**V. CONCLUSION**

For these reasons, the Complaint is not moot and action by DOT is necessary to protect the rights of passengers with food allergies.

DATED: December 22, 2022

/s/Mary C. Vargas  
Mary C. Vargas  
STEIN & VARGAS, LLP  
10 G Street NE, Suite 600  
Washington, DC 20002  
240-793-3185 Telephone  
888-778-4620 Facsimile  
[Mary.Vargas@steinvargas.com](mailto:Mary.Vargas@steinvargas.com)

Laurel Francoeur  
Francoeur Law Office 63  
Shore Road, Suite 24  
Winchester, MA 01890  
781-705-2552  
[laurel@francoeurlaw.com](mailto:laurel@francoeurlaw.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following via electronic mail on December 22, 2022:

Maren Matal  
Senior Attorney  
Southwest Airlines Co.

919 18<sup>th</sup> Street NW, Suite Suite 600  
Washington, DC 20006

Mark Shaw  
EVP Chief Legal & Regulatory Officer  
Southwest Airlines Co.  
2702 Love Field Drive  
Dallas, TX 75235

/s/Mary C. Vargas  
Mary C. Vargas