



The Lawfare Project
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August 10, 2015

Mr. Anthony Foxx
United States Secretary of Transportation
United States Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Foxx,

We are writing with regard to an issue already on your radar: the flagrantly discriminatory conduct of Kuwait Airways Corporation (KAC) in its United States operations, specifically its refusal to sell airline tickets to Israeli passport holders flying out of New York's JFK International Airport.

We are aware that the Department of Transportation (DOT) issued a response to this matter on February 20, 2014, in the case of *Eldad Gatt vs. Anthony Foxx, in his Official Capacity as Secretary of Transportation* and communicated its finding that KAC "has not violated any anti-discrimination laws" and the DOT was "closing [its] file on this matter."

In concluding that KAC's intentional discriminatory commercial conduct was not unlawful because Kuwaiti law requires KAC to refuse to offer its services to Israeli passport holders, it seems that the Secretary's determination is based more on KAC's obligations under Kuwaiti law than under U.S. law. KAC is obligated under the U.S.-Kuwait Open Skies Agreement to abide by the anti-discrimination, anti-boycott and other provisions of applicable U.S. state and federal law in its U.S. operations.

Further, the purpose and relevance of the Kuwaiti law in question is allegedly related to Kuwait's policies of denying visas to Israelis attempting to enter Kuwait. But the question raised in the *Gatt* matter, and in other related instances of discrimination at U.S. airport ticket counters, is not whether Kuwaiti law applies to Israeli passport holders who are physically in Kuwait and therefore under the jurisdiction of Kuwaiti law. This discrimination against Israeli passport holders is occurring as they attempt to purchase tickets on direct New York-London flights—aboard which the passengers will never enter the jurisdiction of Kuwaiti law—and therefore the domestic Kuwaiti law is inapplicable and irrelevant to the matter.

If Kuwaiti law were relevant, then KAC's consideration of the Kuwaiti law in its U.S. operations violates the federal anti-boycott laws put in effect to deter and criminalize precisely this type of

discriminatory business conduct against Israeli persons and corporations. The Kuwaiti law to which KAC is ostensibly abiding is part of the broader Arab League boycott regime originally declared in 1948 at the conclusion of the Israel-Arab war that broke out following Israel's declaration of independence. As part of the Arab League boycott, any adherence to the law by a Kuwaiti company doing business in the United States is a violation of U.S. anti-foreign boycott laws and regulations.

We are also aware that the Department of Justice has remanded the case back to DOT for further review and reconsideration. As you investigate the matter further, we wanted to provide you with our comprehensive legal analysis (attached) clarifying KAC's potential liability under a host of federal and state laws. As previously mentioned, these laws apply directly to KAC while it is operating in the United States under the U.S.-Kuwait Open Skies Agreement. Our analysis also includes potential liability of the Port Authority of New York and New Jersey, which may face claims from prospective passengers based on its status as KAC's landlord.

As you know, the issue of discrimination by Middle East airlines operating out of U.S. airports has received increasing media attention and has become an issue of importance to several United States Senators whose constituents regularly fly out of JFK, including Charles Schumer (D-NY), Cory Booker (D-NJ), and Richard Blumenthal (D-CT), among others. We hope that their public statements calling on DOT to investigate the matter demonstrate the importance of a speedy and effective resolution whereby the discrimination is eliminated and all travelers within the United States can expect to be treated equally in our nation's airports, no matter their ethnicity or national origin.

We would much appreciate an update on your investigation, and would be grateful for any information you can provide regarding an anticipated timeline for a decision to be rendered.

If we can help in any other way, please do not hesitate to be in touch.

Sincerely,



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CC: Malcolm Hoenlein, Executive Vice Chair and CEO, Conference of Presidents of Major American Jewish Organizations