

# The Burger Court Opinion Writing Database

## *Delta Air Lines, Inc. v. August*

450 U.S. 346 (1981)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

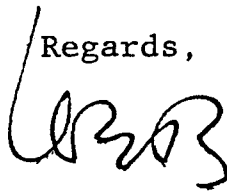
April 10, 1980

Re: 79-814 - Delta Air Lines, Inc. v. August

Dear Bill:

I am willing to join a summary reversal if you  
can muster the troops.

Regards,



Mr. Justice Rehnquist

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Washington, D. C. 20543

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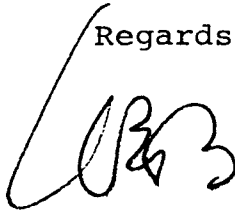
April 17, 1980

RE: 79-814 - Delta Air Lines, Inc. v. August

Dear Bill:

I join the April 14 Per Curiam summarily reversing.  
As a "fall back", I will vote to grant cert.

Regards,



Mr. Justice Rehnquist

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U.S. DEPARTMENT OF JUSTICE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

April 1, 1980

Re: No. 79-814, Delta Air Lines Inc v.  
August

Dear Bill,

I would grant certiorari and summarily reverse the judgment in this case, if a sufficient number of others are so-minded. I would not, however, grant certiorari and hear argument. For the moment, please add my name to your dissenting opinion.

Sincerely yours,

Mr. Justice Rehnquist

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P.S.  
/

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 7, 1980

Re: No. 79-814 - Delta Air Lines, Inc.  
v. Rosemary August

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Dear Bill,

Because I would either grant or  
summarily reverse in this case, I join  
your dissent.

Sincerely yours,



Mr. Justice Rehnquist

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cmc

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 11, 1980

Re: No. 79-814 - Delta Air Lines v. August

Dear John:

Please join me in your dissent.

Sincerely,

*J.M.*  
T.M.

Mr. Justice Stevens

cc: The Conference

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THE MANUSCRIPT DIVISION

SECRETARY OF THE SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 11, 1980

Re: No. 79-814 - Delta Air Lines v. August

Dear John:

If you will permit me to do so, please add my name to  
your dissenting opinion.

Sincerely,

*Harry*

Mr. Justice Stevens

cc: The Conference

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THE MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 8, 1980

No. 79-814 Delta Air Lines, Inc. v. August

Dear Bill:

Please add my name to your dissent in this case.

Sincerely,

*Lewis*

Mr. Justice Rehnquist

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LFP/lab

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U.S. DEPARTMENT OF COMMERCE



To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 1 APR 1980

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

DELTA AIR LINES, INC. v. ROSEMARY AUGUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-814. Decided April —, 1980

MR. JUSTICE REHNQUIST, dissenting.

The question presented is whether an award of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. Rule 68 provides in pertinent part:

"At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the cost incurred after the making of the offer." (Emphasis added.)

The language of the rule is obviously mandatory. The Court of Appeals for the Seventh Circuit nonetheless held that a "trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case." Petition, p. A-7.

The Court of Appeals' sole justification for this holding was that the "policy" embodied in Title VII authorizes federal courts to give Rule 68 "a liberal, not a technical, reading." In my view this justification, without more, is a wholly

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

2nd DRAFT

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SUPREME COURT OF THE UNITED STATES

Circulated: 2 APR 1980

DELTA AIR LINES, INC. v. ROSEMARY AUGUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-814. Decided April —, 1980

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART  
joins, dissenting.

The question presented is whether an award of costs under  
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or discretionary if the final judgment obtained by plaintiff  
is not more favorable than the defendant's offer. Rule 68  
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Petition, p. A-7.

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courts to give Rule 68 "a liberal, not a technical, read-

changes: p 2

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

3d  
2nd DRAFT

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Re-circulated: 7 APR 1980

## SUPREME COURT OF THE UNITED STATES

DELTA AIR LINES, INC. v. ROSEMARY AUGUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-814. Decided April —, 1980

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART  
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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: \_\_\_\_\_  
7 APR 1980

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

DELTA AIR LINES, INC. v. ROSEMARY AUGUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-814. Decided April —, 1980

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART  
and MR. JUSTICE WHITE join, dissenting.

The question presented is whether an award of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. Rule 68 provides in pertinent part:

"At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the cost incurred after the making of the offer." (Emphasis added.)

The language of the rule is obviously mandatory. The Court of Appeals for the Seventh Circuit nonetheless held that a "trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case." Petition, p. A-7.

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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Recirculated: APR 9 1980

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

DELTA AIR LINES, INC. v. ROSEMARY AUGUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-814. Decided April —, 1980

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART,  
MR. JUSTICE WHITE, and MR. JUSTICE POWELL join, dissenting.

The question presented is whether an award of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. Rule 68 provides in pertinent part:

"At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the cost incurred after the making of the offer." (Emphasis added.)

The language of the rule is obviously mandatory. The Court of Appeals for the Seventh Circuit nonetheless held that a "trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case." Petition, p. A-7.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 14, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-814 -Delta Air Lines v. August

Attached is a substantially re-written draft of the previous opinion dissenting from denial of certiorari in this case, showing as having joined it all those who had sent "join" letters with respect to the previous draft. Since the enclosed draft is so substantially rewritten -- in good part to respond to the objections contained in John's draft dissent circulated late Thursday -- I would not consider any of the previous "joiners" as renegades were they to take a new look at the whole question and change their votes. My own further study has convinced me that if there are not the votes to summarily reverse, the question is sufficiently substantial and bound to recur as to warrant an outright "grant".

*Am*

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U.S. DEPARTMENT OF JUSTICE

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

SIXTH DRAFT

Circulated: APR 14 1980

Recirculated: \_\_\_\_\_

Re: No. 79-814 Delta Airlines, Inc. v. August

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE POWELL join, dissenting.

The question presented is whether an award of costs under Rule 68 of the Federal Rules of Civil Procedure is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer. Rule 68 provides in pertinent part:

"At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer." (emphasis added).

The language of the rule is obviously mandatory. The Court of Appeals for the Seventh Circuit nonetheless held that a "trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with considerations . . .

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U.S. SUPREME COURT

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 1, 1980

Re: 79-814 - Delta Air Lines v. August

Dear Bill:

In response to your dissenting opinion, I would like to suggest that the express language of Rule 68 does not apply to this particular case.

The last sentence in the portion of Rule 68 which you quote, refers to the case in which there is a "judgment finally obtained by the offeree . . . ." In this case the offeree did not obtain a judgment; she was unsuccessful in the litigation. For that reason, the district court had the power to award costs to the prevailing party entirely apart from Rule 68.

Rule 68, as I understand it and as it is discussed in Wright and Miller 12 Fed. Practice & Pro. § 3001, p. 56, deals with the situation in which the plaintiff refuses an offer and then recovers an amount less than the offer. In that situation, the plaintiff is not entitled to the costs that would normally be recoverable for what happened after the offer was declined. In this case, in the face of a \$20,000 claim, the defendant made a \$450 offer. The rule would have applied if the plaintiff had recovered any amount less than \$450. But since the plaintiff recovered nothing, the case is not one in which there was a "judgment finally obtained by the offeree." The rule is therefore not applicable.

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SECRET



Since it is possible to overlook the fact that Rule 68 only applies to cases in which there is a "judgment obtained by the offeree," perhaps we should grant certiorari and summarily affirm.

Respectfully,

A handwritten signature, likely "John", in cursive script.

Mr. Justice Rehnquist

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*JS*  
*Please type the dissent*  
*my*

79-814 - Delta Airlines v. August

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Brennan

From: Mr. Justice Stevens

Circulated: APR 10 1980

Recirculated: \_\_\_\_\_

MR. JUSTICE STEVENS, dissenting.

The Court's summary reversal, read by itself, creates the impression that the Court of Appeals committed plain error. But that impression is dispelled by a brief reference to the facts of this case and the applicable language of Rule 68.

Respondent (the plaintiff below) filed a complaint against the petitioner airline, alleging that she had been discharged from her position as a flight attendant solely because of her race. She sought reinstatement, approximately \$20,000 in back pay and benefits, attorneys' fees and costs pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. A few months after the complaint was filed, petitioner made a formal offer of judgment to respondent in the amount of \$450. The offer was refused, the case was tried, and respondent lost. The District Court entered judgment in favor of petitioner and directed that each party bear its own costs. Petitioner then moved for modification of the judgment, contending that

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U.S. DEPARTMENT OF COMMERCE

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

April 14, 1980

Re: No. 79-814 - Delta Air Lines v. August

Dear Bill:

These observations are in response to your latest circulation :

1. For one who relies so heavily on a "plain language" argument, it seems to me that you devote surprisingly little attention to the meaning of the words "judgment finally obtained by the offeree".
2. Contrary to the impression your draft creates, I do not propose engrafting a "good faith" requirement into the Rule. Only if one ignores what I regard as the plain meaning of the language referred to above, is there any need or justification for a good faith requirement
3. If the Rule really has the "plain meaning" that you have so recently discovered, it is surprising that it took so long for the defense bar to learn of the advantage to be gained by making a routine settlement offer of \$5.00 in every case.

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4. I note you have withdrawn your previous reliance on Moore, and you still omit any reference to the revisor's notes or to Wright and Miller.

Since there may well be four votes to grant cert, I will not make any revisions in my previous circulation for the time being.

Respectfully

*Jh*

Mr. Justice Rehnquist

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