

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

January 12, 1981

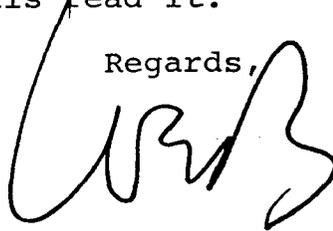
RE: 79-814 - Delta Air Lines, Inc. v. August

MEMORANDUM TO THE CONFERENCE:

This case has given me trouble from the beginning, but I now conclude to reverse and join an opinion along the lines of Bill Rehnquist's dissent circulated at the time of the discussion on granting cert.

The Rules Committee can, of course, rewrite the Rule as the Court of Appeals read it.

Regards,



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U.S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF
THE CHIEF JUSTICE

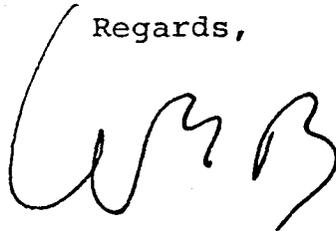
January 15, 1981

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

Dear John:

Proceed with your memo and Bill Rehnquist can send out his views as a memo if he wishes.

Regards,

A handwritten signature in black ink, appearing to be 'WJS', written in a cursive style.

Justice Stevens

Copies to the Conference

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NATIONAL ARCHIVES MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

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

CHAMBERS OF
THE CHIEF JUSTICE

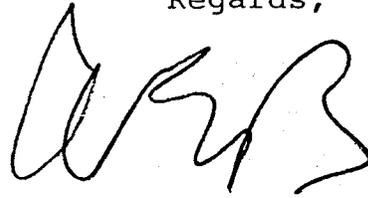
March 3, 1981

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

Dear Bill:

I join.

Regards,



Justice Rehnquist

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OF THE MANUSCRIPT DIVISION

U.S. SUPREME COURT ARCHIVES

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 26, 1981

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

Dear John:

I agree with your memorandum and will be happy
to join it as an opinion for the Court.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 4, 1981

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

Dear Bill:

I agree with your memorandum circulated
yesterday.

Sincerely yours,

P.S.
/

Justice Rehnquist

Copies to the Conference

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NATIONAL MANUSCRIPT DIVISION

U.S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 23, 1981

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

Dear John,

Your thorough memorandum in this case has convinced me that I have been in error from the outset. Thanks for getting me in line. I join, and I hope you command a court.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

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MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

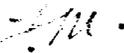
January 23, 1981

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

Dear John:

I agree with your memorandum.

Sincerely,



T.M.

Justice Stevens

cc: The Conference

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NATIONAL MANUSCRIPT DIVISION

U.S. LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 2, 1981

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

Dear John:

I agree with your memorandum and shall join it when it is converted into an opinion for the Court.

Sincerely,



Mr. Justice Stevens

cc: The Conference

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U.S. SENATE LIBRARY OF CONGRESS

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

February 5, 1981

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

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

Dear John:

This is now a formal joinder in your recirculation of
February 5.

Sincerely,



Mr. Justice Stevens

cc: The Conference

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION

LIBRARY OF CONGRESS

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

From: Mr. Justice Powell

Circulated: FEB 3 1981

Recirculated: _____

2-3-81

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, }
v. } On Writ of Certiorari to
Rosemary August. } the United States Court
of Appeals for the Seventh Circuit.

[January —, 1981]

JUSTICE POWELL, concurring in the result.

I agree with most of the views expressed in the dissenting opinion of JUSTICE REHNQUIST. It is anomalous that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*.

I nevertheless concur in the result reached by the Court because I do not think that the terms of the offer made in this particular case constituted a proper offer of judgment within the scope of Rule 68.

I

Rule 68 provides, in pertinent part:

"At any time more than 10 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*" (emphasis added).

In Title VII cases, the scope of "costs" is defined in the statute itself. Except in unusual circumstances, Title VII requires that a prevailing plaintiff receive "a reasonable attorney's fee as part of the costs." 42 U. S. C. § 2000e-5 (k); See *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412, 416-

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pgs 1, 2, 3, 4, 5

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

From: Mr. Justice Powell

2-6-81

2nd DRAFT

Circulated: _____
FEB 6 1981
Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, } On Writ of Certiorari to
v, } the United States Court
Rosemary August. } of Appeals for the Sev-
enths Circuit.

[February —, 1981]

JUSTICE POWELL, concurring in the result.

I agree with most of the views expressed in the dissenting opinion of JUSTICE REHNQUIST, and do not agree with the Court's reading of Rule 68. It is anomalous, indeed, that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*.

I nevertheless concur in the result reached by the Court because I do not think that the terms of the offer made in this case constituted a proper offer of judgment within the scope of Rule 68.

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Rule 68 provides, in pertinent part:

"At any time more than 10 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*" (emphasis added).

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typographical errors corrected

Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2-20-81

From: Mr. Justice Powell

3rd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: FEB 20 1981

No. 79-814

Delta Air Lines, Inc., Petitioner, }
v. } On Writ of Certiorari to
Rosemary August. } the United States Court
of Appeals for the Sev-
enth Circuit.

[February —, 1981]

JUSTICE POWELL, concurring in the result.

I agree with most of the views expressed in the dissenting opinion of JUSTICE REHNQUIST, and do not agree with the Court's reading of Rule 68. It is anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*.

I nevertheless concur in the result reached by the Court because I do not think that the terms of the offer made in this case constituted a proper offer of judgment within the scope of Rule 68.

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Rule 68 provides, in pertinent part:

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MANUSCRIPT DIVISION

LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 22, 1981

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

Dear John:

I hope to have a reply "memorandum" in circulation
by the middle of next week.

Sincerely,

WHS

Justice Stevens

Copies to the Conference

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IN THE MANUSCRIPT DIVISION

U.S. SUPREME COURT RECORDS

REPRODUCED FROM THE COLLECTION OF THE MANUSCRIPT DIVISION OF THE SUPREME COURT OF THE UNITED STATES

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

1st DRAFT

Circulated: FEB 8 1981

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, } On Writ of Certiorari to
v. } the United States Court
Rosemary August. } of Appeals for the Sev-
enth Circuit.

[February —, 1981]

Memorandum of JUSTICE REHNQUIST.

Of the several remarkable aspects of by Brother STEVENS' Memorandum in this case, not the least is that, save for the docket number and the name of the case, it bears virtually no resemblance to the judgment and opinion of the Court of Appeals for the Seventh Circuit which we granted certiorari to review. The question presented by the petition for certiorari, albeit in somewhat laborious form, is best captured in the first of the three questions:

"Whether the Court of Appeals erred in nullifying a clear and unambiguous mandatory imposition of costs under Rule 68?" Pet. 2.

My Brother STEVENS' Memorandum (hereafter JPS Memo) states that "The narrow question presented by this case is whether the words 'judgment obtained by the offeree' as used in that Rule should be construed to encompass a judgment against the offeree as well as a judgment in favor of the offeree." JPS Memo, pp. 1-2. After reciting the procedural history of the case in the lower courts, he criticizes the Court of Appeals for its failure to confront "the threshold question whether Rule 68 has any application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror." JPS Memo, p. 3. My Brother STEVENS' resolution of the case turns on that threshold ques-

✓
STYLISTIC CHANGES THROUGHOUT

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: _____

1st DRAFT

Recirculated: FEB 26 1981

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, } On Writ of Certiorari to
v. } the United States Court
Rosemary August. } of Appeals for the Sev-
enth Circuit.

[February —, 1981]

JUSTICE REHNQUIST, with whom JUSTICE STEWART joins, dissenting.

Of the several remarkable aspects of the Court's opinion in this case, not the least is that, save for the docket number and the name of the case, it bears virtually no resemblance to the judgment and opinion of the Court of Appeals for the Seventh Circuit which we granted certiorari to review. The question presented by the petition for certiorari, albeit in somewhat laborious form, is best captured in the first of the three questions:

"Whether the Court of Appeals erred in nullifying a clear and unambiguous mandatory imposition of costs under Rule 68?" Pet. 2.

The Court states that "The narrow question presented by this case is whether the words 'judgment obtained by the offeree' as used in that Rule should be construed to encompass a judgment *against* the offeree as well as a judgment *in favor of* the offeree." *Ante*, at 1-2. After reciting the procedural history of the case in the lower courts, the Court criticizes the Court of Appeals for its failure to confront "the threshold question whether Rule 68 has any application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror." *Ante*, at 3. The Court's resolution of the case turns on that threshold question and it finds that the answer "is dictated by the plain language, the purpose, and the history of Rule 68." *Ante*, at 3.

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OFFICE OF THE CLERK OF THE SUPREME COURT

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 15, 1981

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

Dear Chief:

Shortly after you assigned the opinion in this case you were kind enough to let me know that your vote was not solid and that I should not undertake the opinion until you had come to rest. I therefore postponed preparation of an opinion pending your further study of the case. After a few weeks passed, however--perhaps unwisely--I decided to go ahead with a draft and it is now almost ready for circulation. I trust that it will therefore be acceptable if I circulate it as a memorandum, since my Conference notes indicate that your vote may not be decisive--indeed, perhaps it may even persuade you to take another look at the case.

Respectfully,



The Chief Justice

Copies to the Conference

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10. THE CHIEF JUSTICE
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

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

From: Mr. Justice Stevens

Circulated: JAN 19 '81

Memorandum of JUSTICE STEVENS

Recirculated: _____

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, if a plaintiff rejects a defendant's formal settlement offer, and if "the judgment finally obtained by the offeree is not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer."¹ The narrow question

¹ Rule 68, as amended in 1966, provides:

"At any time more than 10 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 within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine

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SERIALS ACQUISITION DIVISION

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JAN 22 '81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, } On Writ of Certiorari to
v. } the United States Court
Rosemary August. } of Appeals for the Sev-
enth Circuit.

[February —, 1981]

Memorandum of JUSTICE STEVENS.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, if a plaintiff rejects a defendant's formal settlement offer, and if "the judgment finally obtained by the offeree is not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer."¹ The nar-

¹ Rule 68, as amended in 1966, provides:

"At any time more than 10 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 within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

Handwritten notes:
PS
Stylistic changes
throughout &
renumbered footnotes
8, 10, 11

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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 Rehnquist

P. 1, 11, 12, 14, 15

From: Mr. Justice Stevens

Circulated: _____

Recirculated: FEB 5 '81

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, } On Writ of Certiorari to
v. } the United States Court
Rosemary August. } of Appeals for the Sev-
enth Circuit.

[February —, 1981]

/ JUSTICE STEVENS delivered the opinion of the Court.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, if a plaintiff rejects a defendant's formal settlement offer, and if "the judgment finally obtained by the offeree is not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer."¹ The nar-

¹ Rule 68, as amended in 1966, provides:

"At any time more than 10 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 within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

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U.S. SUPREME COURT

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U.S. SUPREME COURT RECORDS

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

R. 7, 8, 11, 4

Stylistic changes

From: Mr. Justice Stevens

Circulated: _____

Recirculated: FEB 12 '81

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-814

Delta Air Lines, Inc., Petitioner, } On Writ of Certiorari to
v. } the United States Court
Rosemary August. } of Appeals for the Sev-
enth Circuit.

[February —, 1981]

JUSTICE STEVENS delivered the opinion of the Court.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, if a plaintiff rejects a defendant's formal settlement offer, and if "the judgment finally obtained by the offeree is not more favorable than the offer," the plaintiff "must pay the costs incurred after the making of the offer."¹ The nar-

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"At any time more than 10 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 within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."