



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

**Issued by the Department of Transportation
on the 9th day of February 2022**

Air China Limited

**Violations of 14 CFR Part 259 and
49 U.S.C. § 41712**

Docket DOT-OST-2022-0001

Served February 9, 2022

CONSENT ORDER

This consent order concerns violations by Air China Limited (Air China) of 14 CFR Part 259 and 49 U.S.C. § 41712 with respect to flights that experienced an excessive tarmac delay in January and November 2018. Specifically, Air China failed to adhere to the assurance in its contingency plan for lengthy tarmac delays that the carrier would not permit an international flight to remain on the tarmac for more than four hours without providing passengers an opportunity to deplane. This order directs Air China to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and assesses the carrier \$300,000 in civil penalties.

Applicable Law

Pursuant to 14 CFR 259.4,¹ foreign air carriers that operate scheduled passenger service or public charter service with at least one aircraft having a designed seating capacity of 30 or more seats, are required to adopt, implement, and adhere to contingency plans for lengthy tarmac delays at each large hub, medium hub, small hub, and non-hub airport. According to the version of section 259.4(b)(2) that was in effect at the time the violations in this order occurred, covered carriers could not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours for international flights that depart from or arrive at a U.S. airport without providing passengers the opportunity to deplane, with the following exceptions: (1) the pilot-in-command determines there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac to deplane passengers (e.g., weather, a directive from an appropriate government agency, etc.); or (2) Air Traffic Control (ATC) advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers

¹ 14 CFR 259.4 was amended by Final Rule, Tarmac Delay Rule, 86 Fed. Reg. 23260 on June 2, 2021. The changes to the rule do not impact the violations at issue in this case. The citations contained in this order are to the rule that was in effect at the time of the violations.

would significantly disrupt airport operations.² Section 259.4 also requires carriers to ensure sufficient resources to implement the carriers' plans, among other assurances. A covered carrier's failure to comply with the assurances required by Part 259, and as contained in its contingency plan for lengthy tarmac delays, is considered to be an unfair and deceptive practice within the meaning of 49 U.S.C. § 41712. Because the purpose of section 259.4 is to protect individual passengers from being forced to remain on the aircraft for more than four hours in the case of international flights without being provided the opportunity to deplane or being informed when an opportunity to deplane exists, the U.S. Department of Transportation's Office of Aviation Consumer Protection (OACP)³ takes the position that a separate violation is considered to have occurred for each passenger who is forced to remain on board an aircraft for longer than the set amount of time without the opportunity to deplane.

Facts and Conclusions

Air China is a foreign air carrier as defined by 49 U.S.C. § 40102(a)(21)⁴ that operates scheduled service from John F. Kennedy International Airport (JFK), among other large hub airports, using at least one aircraft having a design capacity of more than 30 passenger seats. The carrier has a tarmac delay contingency plan that states that it "will not permit its aircraft to remain on the tarmac for more than four hours before allowing passengers to deplane," with specific exceptions permitted by law. The plan also states that the carrier has coordinated its plan with airport authorities and terminal operators, including at designated alternate airports. Air China's plan also states that it has sufficient resources to implement its plan.

January 2018 Delay

On January 4, 2018, Winter Storm Grayson, a powerful Nor'easter, arrived in the New York Metropolitan area and severely disrupted air transportation operations at JFK. The storm caused below-freezing temperatures, strong winds (approximately 45 knots), low visibility, and approximately 8.5 inches of snow.

On the morning of January 4th, the Port Authority of New York and New Jersey (Port Authority) announced that it would close the airport for a few hours, and then ultimately decided to close the airport for the remainder of the day. JFK remained closed for approximately 19 hours starting the morning of January 4th until the morning of January 5th. Although the airport reopened on January 5, operations at JFK were disrupted through Sunday, January 7.

² When the Department amended its tarmac delay rule, 14 CFR 259.4, in 2021, it added an exception that applies to departure flights to ensure that the Department's rules conformed to changes made to 49 U.S.C. § 42301(d)(1) as a result of the FAA Extension, Safety, and Security Act of 2016 (FAA Act). Prior to the amendment of 14 CFR 259.4, the Office of Aviation Consumer Protection (OACP) relied on 49 U.S.C. § 42301(d)(1) and the Department's Enforcement Policy on Extended Tarmac Delays, which was issued November 22, 2016, and is available at <https://www.transportation.gov/sites/dot.gov/files/docs/Enforcement%20Policy%20on%20Extended%20Tarmac%20Delays.pdf>, to implement the departure delay standard mandated by the FAA Act.

³ The Office of Aviation Consumer Protection was formerly known as the Office of Aviation Enforcement and Proceedings.

⁴ 49 U.S.C. § 40102(a)(21) defines a foreign air carrier as "a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation."

Air China Flight 981, traveling from Beijing Capital International Airport (PEK) to JFK on January 4, 2018, was diverted to Chicago O'Hare International Airport (ORD) as a result of severe weather conditions at JFK.

Flight 981 remained overnight in ORD, and passengers were provided accommodations. When JFK re-opened to traffic, Air China contacted the airport to inquire about a time that the JFK terminal at which it operates, Terminal 1 (T1), could accept Flight 981. T1 informed Air China that the flight would have a gate available if it arrived at 2:04 p.m. ET on January 5th. As a result of having to wait for gate space to service Flight 981's departure from ORD, as well as insufficient personnel and other resources at ORD, Flight 981 was not able to depart for JFK until 9:16 p.m. ET (8:16 p.m. CT). Despite this delay in departure, the carrier did not contact T1 again to inquire further about available gates prior to the flight's departure. When the aircraft arrived at JFK, T1 did not have an available gate for the flight, and 192 passengers remained on board without an opportunity to deplane for five hours and eighteen minutes.

November 2018 Delay

On November 15, 2018, Air China Flight 982, traveling from JFK to PEK, encountered significant winter weather conditions and airport congestion during its departure from JFK. The main aircraft door was closed at 4:52 p.m. (with the jet bridge removed a minute later), but the aircraft was blocked by other traffic and was not able to depart from the gate until 5:55 p.m. Due to weather conditions, the aircraft proceeded to a queue for deicing, with the deicing process initiated on the aircraft at 8:32 p.m., three hours and forty minutes into the tarmac delay. Because the deicing process typically takes much longer than 20 minutes, the carrier knew or should have known that it would violate the tarmac delay requirements well before the deicing process was initiated. The deicing process was completed at 9:21 p.m., and the aircraft departed from JFK at 10:13 p.m. The 279 passengers on Flight 982 experienced a tarmac delay of five hours and twenty-one minutes.

Passengers on Flight 981 and Flight 982 experienced excessive tarmac delays when there was no applicable safety, security, or ATC-related exception to the tarmac delay rule. By failing to provide passengers on Flight 981 and Flight 982 an opportunity to deplane before the tarmac delay exceeded four hours, Air China failed to adhere to the terms of its contingency plan and violated 49 U.S.C. § 41712 and 14 CFR 259.4.

Response

In response, Air China states that it takes very seriously its obligations under the Department's tarmac delay regulation and that in the chaotic and unpredictable circumstances surrounding Winter Storm Grayson it took steps consistent with safety and the requirements of relevant government agencies to meet the four-hour deadline established by the regulation. Air China states that through its efforts 105 of the 297 passengers on CA981 were reaccommodated on other flights at ORD on January 4 and were able to complete their travel.

Air China states it took numerous steps to ensure the remaining 192 passengers on CA981 would not be delayed upon arrival at JFK on January 5. Air China states that on January 4, at considerable expense and inconvenience to booked passengers and in consultation with Terminal 1, it proactively canceled its January 5 frequency of CA981 scheduled to operate PEK-JFK as well as CA982 scheduled to operate JFK-PEK on January 6, based on its understanding this would free a gate at Terminal 1 for the operation of diverted CA981 from ORD to JFK on January 5. Air China states Terminal 1 was informed of and agreed with Air China's plan.

Air China also states that it does not believe that Terminal 1 told Air China it could only accommodate CA981 up until 2:04 p.m. (ET) on January 5.⁵ Air China adds that after CA981 arrived at JFK at 10:58 p.m., it learned for the first time that Terminal 1 had canceled its gate assignment and that there were several aircraft that later became disabled at gates at Terminal 1.⁶ Air China asserts that after CA981's arrival at JFK it proactively contacted the Port Authority, Terminal 1, and Terminal 4 for deplaning assistance in an effort to avoid violation of the tarmac delay rule, to no avail. Air China states further that it provided compensation to a number of passengers who were delayed upon arrival at JFK.

With respect to November 15, 2018, Air China states CA982 was delayed by circumstances beyond Air China's control including not only unexpectedly severe winter weather but other aircraft that blocked CA982's movement and a de-icing process that took longer than expected. Air China asserts it was led to believe by JFK that CA982 would be able to complete the de-icing process and depart JFK without incurring a tarmac delay. According to Air China, had JFK informed it that CA982 would not be able to complete de-icing and depart without violating the tarmac delay requirements, CA982 would have returned to the gate.

Finally, Air China states that it respectfully disagrees with OACP's determination that civil penalties for excessive tarmac delays may be assessed on a per-passenger basis. Air China believes that the applicable statute provides for penalties to be assessed on a per flight-basis. Nevertheless, Air China has agreed to this settlement in the interest of avoiding litigation.

Decision

The OACP views seriously Air China's violations of 14 CFR Part 259 and 49 U.S.C. § 41712. Accordingly, after carefully considering all the facts in this case, including those set forth above, OACP believes that enforcement action is warranted. In order to avoid litigation, and without admitting or denying the violations described above, Air China consents to the issuance of this order to cease and desist from future violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and to the assessment of \$300,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. The compromise assessment is appropriate considering

⁵ Air China states it informed Terminal 1 that CA981 would be delayed in departing ORD and would not arrive at JFK until approximately 6:30 p.m. (ET). Air China states Terminal 1 did not inform it that reconfirmation of CA981's later arrival time at JFK was required and that email correspondence from Terminal 1 led Air China to believe reconfirmation was not required.

⁶ Air China states that when CA981 departed ORD for JFK, ten gates were available at Terminal 1. Air China states that upon CA981's arrival at JFK it was placed in a queue behind four other widebody aircraft and that the Port Authority assigned only two buses to deplane passengers on the five aircraft despite requests for additional buses.

the nature and extent of the violations described herein and the unprecedented impact of the Novel Coronavirus Disease (COVID-19) public health emergency on air travel. This order serves the public interest by establishing a strong deterrent against future similar unlawful practices by Air China and other carriers.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Air China Limited violated 14 CFR 259.4(b)(2) by failing, for Flight 981 on January 5, 2018 and for Flight 982 on November 15, 2018, to adhere to the assurances in its contingency plan for lengthy tarmac delays that the carrier would not permit an international flight to remain on the tarmac for more than four hours without providing passengers an opportunity to deplane;
3. We find that by engaging in the conduct described in ordering paragraph 2 above, Air China Limited engaged in unfair and deceptive practices in violation of 49 U.S.C. § 41712;
4. We order Air China Limited and its successors and assigns to cease and desist from further violations of 14 CFR 259.4(b) and 49 U.S.C. § 41712;
5. We assess Air China Limited \$300,000 in compromise of civil penalties that might otherwise be assessed for the violations described above.
 - a. \$143,000 shall be due and payable within 30 days of the issuance date of this order,
 - b. \$14,000 shall be credited to Air China Limited for compensation provided to passengers onboard CA981 on January 5, 2018, and
 - c. The remaining amount, \$143,000, will become due and payable if, within one year of the date of issuance of this order, Air China Limited violates the order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Air China Limited may be subject to additional enforcement action for violation of this order;
6. We order Air China Limited to pay within 30 days of the issuance of this order the penalty assessed in Ordering Paragraph 5, above, through Pay.gov to the account of the U.S. Treasury. Payment shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Air China Limited to the assessment of interest, penalty, and collection charges under the Debt

Collection Act and to further enforcement action for failing to comply with this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

BLANE A. WORKIE
Assistant General Counsel for the
Office of Aviation Consumer Protection

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