



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

**Issued by the Department of Transportation  
on the 23<sup>rd</sup> day of November, 2022**

**Air Canada rouge**

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

**Docket DOT-OST-2022-0001**

**Served November 23, 2022**

**CONSENT ORDER**

This consent order concerns violations by Air Canada rouge (Rouge) of 14 CFR Part 259 and 49 U.S.C. § 41712. Specifically, Rouge failed to adhere to the assurance in its contingency plan for lengthy tarmac delays that it will not remain on the tarmac for a lengthy period of time without deplaning passengers. This order directs Rouge to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712 and assesses the carrier \$100,000 in civil penalties.

**Applicable Law**

Pursuant to section 259.4(a)<sup>1</sup> of the Department's rules (14 CFR 259.4), covered carriers, which include any foreign air carriers conducting scheduled passenger service or public charter service with at least one aircraft having a design 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. For international flights, the rule requires covered carriers to provide assurance that they will not permit an aircraft to remain on the tarmac for more than four hours without providing passengers an opportunity to deplane, with the following exceptions: (1) where the pilot-in-command

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<sup>1</sup> 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.

determines there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac to deplane passengers; or (2) where Air Traffic Control (ATC) advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations. A carrier's failure to adhere to the assurances in its contingency plan constitutes violations of 14 CFR 259.4(a) and a prohibition against unfair and deceptive practices in 49 U.S.C. § 41712.

The FAA Extension, Safety, and Security Act of 2016 (2016 FAA Extension), which became law on July 15, 2016, requires the Department to issue regulations and take other actions to change the standard for when tarmac delay violations occur in the case of departure delays for U.S. carriers. In its amended form, 49 U.S.C. § 42301 provides that a tarmac delay ends for an arriving and departing flight when a passenger has the option to deplane an aircraft and return to the airport terminal; however, for a departing flight, under amended section 42301, it is not a violation of the assurance to permit an aircraft to remain on the tarmac for more than three hours for domestic flights and more than four hours for international flights if the air carrier begins to return the aircraft to a suitable disembarkation point to deplane passengers by those times.

On November 22, 2016, the Department's Office of Aviation Consumer Protection (OACP)<sup>2</sup> issued an interim Enforcement Policy to implement the statutory changes to the tarmac delay rule pending rulemaking. The enforcement policy, applicable to covered carriers, states that OACP considers a departing flight to have begun the process of returning to a suitable disembarkation point when permission to do so is granted by the Federal Aviation Administration (FAA) control tower, airport authority, or other relevant authority directing the aircraft's operations while it is on the tarmac. If the aircraft is in an area of the airport property that is under the carrier's control, OACP considers an aircraft to have begun the process of returning to a suitable disembarkation point when the pilot begins maneuvering the aircraft to the disembarkation point.<sup>3</sup>

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, OACP 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**

Rouge is a wholly owned subsidiary of Air Canada and is a foreign air carrier as defined by 49 U.S.C. § 40102(a)(21).<sup>4</sup> Rouge operates scheduled service to and from the United

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<sup>2</sup> The Office was formerly known as the Office of Aviation Enforcement and Proceedings.

<sup>3</sup> The Enforcement Policy can be found at <https://www.transportation.gov/airconsumer/enforcement-policy-extended-tarmac-delays>. The policy has since been superseded by the final rule noted above.

<sup>4</sup> 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."

States, including to and from Harry Reid International Airport (LAS), formerly known as McCarran International Airport, using at least one aircraft having a design capacity of more than 30 passenger seats.

Air Canada's tarmac delay contingency plan, which was adopted by Rouge, states that the carrier "will not permit an aircraft to remain on the tarmac at a U.S. Airport for more than four (4) hours. Prior to reaching four (4) hours, [Rouge] will return the aircraft to the gate or another suitable disembarkation point, where passengers will be allowed to deplane," with specific exceptions permitted by law.

An investigation by OACP revealed that Rouge Flight AC 1854 was scheduled to depart from LAS for Toronto Pearson International Airport (YYZ) late in the night on July 6, 2017. The flight was initially delayed until after midnight on July 7, 2017, due to the late arrival of incoming aircraft. When the flight pushed back from the gate at LAS, the aircraft's nose landing gear tire was damaged. As a result, the aircraft returned to the gate for maintenance approximately 14 minutes after pushback. Rouge's LAS maintenance provider did not have the correct size tool to conduct the required maintenance, and the tool could not be acquired for approximately two hours during the early morning period. Despite being positioned at a gate, passengers on Flight 1854 were not provided an opportunity to deplane during the entirety of the delay. When Flight 1854 eventually pushed back from the gate, the passengers had been on board the aircraft without an opportunity to deplane for four hours and one minute. When the aircraft took off from LAS following an additional fifteen-minute delay, passengers had been on board the aircraft without an opportunity to deplane for four hours and sixteen minutes.

As Rouge did not provide passengers an opportunity to deplane after the flight returned to the gate, the carrier did not adhere to the terms of its contingency plan and violated 14 CFR 259.4 and 49 U.S.C. § 41712.

### **Response**

In response, Rouge states that it takes very seriously its responsibility to comply with all of the Department's requirements, including the tarmac delay rules. Rouge states that on the night in question, the carrier made what it believed to be the best decisions it could for the safety and comfort of passengers, using all of the information available to it at the time the delay was occurring.

Rouge states that Flight 1854 was delayed by damage to one of the aircraft's forward landing gear tires during aircraft pushback. The carrier states that, after determining that its ramp employees were safe, the Captain of Flight 1854 elected to move the aircraft back into the gate area to have the forward landing gear inspected by maintenance for the safety of the passengers and crew. Rouge states that this inspection determined that a forward landing gear tire needed to be replaced, which was estimated to take 60-90 minutes, whereupon Flight 1854 would depart.

Rouge states that its local maintenance provider quickly positioned the necessary replacement wheel and jack at the aircraft, but it did not possess the correct size tool to complete the repair. The carrier states that this made it necessary to locate and borrow the required tool from another aircraft maintenance provider at LAS, a task made significantly more difficult given the fact that the incident occurred during the middle of the night.

Rouge states that passengers were comfortable throughout the delay, and that all passenger requirements were met, including refreshments, announcements, and continual lavatory access. The carrier adds that, given the time of day, most passengers slept throughout the delay, and it distributed iPads free of charge to passengers who remained awake but lacked electronic devices, in order that they could access the aircraft's in-flight entertainment system, which was available throughout the delay.

Rouge states that Flight 1854 pushed back from the gate for a second time 4 hours and 1 minute after its initial gate departure, expecting to be airborne within a few minutes. The carrier states that, upon the second pushback, ATC informed the carrier that Flight 1854's flight plan was no longer on file, and Rouge had to refile the flight plan for approval before departing.<sup>5</sup>

Finally, Rouge states that its pilots and flight attendants went beyond their contractual duty requirements for Flight 1854, with all of them voluntarily working in order that passengers could still travel to YYZ aboard Flight 1854. Rouge states that it was more beneficial for consumers to continue to travel to YYZ aboard Flight 1854 instead of the flight cancelling and passengers being woken up to disembark in the very early morning hours and suffering from greater delays in getting to their final destination. Given these facts, Rouge strongly disputes the propriety of enforcement action in this instance.

### **Decision**

OACP views seriously Rouge'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, Rouge 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 \$100,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. The compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It establishes a strong deterrent against future similar unlawful practices by Rouge and other carriers.

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

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<sup>5</sup> DOT notes that flight plans normally expire two hours after the proposed departure time, which can be extended by ATC if there are delays. In this case, Air Canada crew were notified that ATC did not have their flight plan 4:10 into the delay, and they re-filed their plan 4:12 into the delay.

**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 Canada rouge violated 14 CFR 259.4(a) by failing to adhere to the assurance in its contingency plan for lengthy tarmac delays that the carrier would not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours without providing passengers an opportunity to deplane. By its actions, the carrier forced passengers on Flight 1854 to remain on the tarmac for a period exceeding four hours on July 7, 2017;
3. We find that by engaging in the conduct described in paragraph 2, above, Air Canada rouge engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
4. We order Air Canada rouge 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 Canada rouge \$100,000 in compromise of civil penalties that might otherwise be assessed for the violations described above. Of that amount:
  - a. \$45,000 shall be due and payable within 60 days of the issuance of this order,
  - b. \$25,000 shall be credited to Air Canada rouge for cash compensation and travel vouchers<sup>6</sup> provided to passengers onboard Flight 1854 on July 6, 2017, and
  - c. The remaining amount, \$30,000, will become due and payable if, within one year of the date of the issuance of this order, Air Canada rouge violates the order's cease and desist provisions or fails to comply with the order's payment provision, in which case Air Canada rouge may be subject to additional enforcement action for violation of this order;
6. We order Air Canada rouge to pay within 60 days of the issuance of this order the penalty assessed in paragraph 5(a), 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 Canada rouge 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.

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<sup>6</sup> The credits are based on the actual amounts of cash compensation, two cents per frequent flyer mile, and 80% or less of voucher value provided to passengers onboard Flight 1854.

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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