



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

Issued by the Department of Transportation
on the 17th day of May, 2007

Comair, Inc., d/b/a Delta Connection

Violations of 49 U.S.C. § 41712

Docket OST-2006-23528

Served May 17, 2007

CONSENT ORDER

This order concerns apparent violations by Comair, Inc. d/b/a Delta Connection (“Comair”) of the statutory prohibition against unfair or deceptive practices, 49 U.S.C. § 41712, arising from its failure to provide consumers with certain amenities during flight disruptions in accordance with its contract of carriage. This consent order directs Comair to cease and desist from future violations and assesses a compromise civil penalty in the amount of \$75,000, subject to the offset and forgiveness provisions described below.

Background

At 10:00 p.m. on December 24, 2004, the computer system used by Comair to schedule and track its flight crews, referred to as TRACK,¹ suddenly ceased operation. During the preceding 72 hours, Comair’s Cincinnati hub had been inundated by a severe winter storm that caused widespread flight delays and cancellations throughout the Comair network. The resulting volume of crew schedule changes exceeded a design limitation embedded in the TRACK software by the third-party developer of the system, bringing the system to a halt. When TRACK ceased functioning, Comair by necessity reverted to a manual backup system to schedule and track its flight crews and immediately launched an investigation with the vendor from which Comair licensed the TRACK system to determine the cause of the outage and to bring the system back online as quickly as possible. Rescheduling a few crews by hand, Comair was able to operate seven flights on the night of December 24 after TRACK shut down. However, Comair soon concluded that it could not handle the amount of crew re-scheduling required using its manual backup system, given the thousands of crew scheduling changes necessitated by the winter storm. Therefore, early on December 25, Comair decided that a “clean slate” offered the best opportunity for the airline to safely and quickly resume

¹ TRACK had provided Comair with a centralized database to view, monitor and change schedules for its 1,800 pilots and 1,000 flight attendants. The system was also used to validate compliance with contractual work rules and FAA regulations, such as flight time and rest requirements.

full operations and minimize passenger inconvenience. Accordingly, Comair cancelled all 1,100 flights scheduled for December 25, 2004, and notified employees that it might also need to cancel all flights scheduled to operate on December 26. Working with its vendor, Comair was able to restore the TRACK system late on December 25 but because flight crews and aircraft were not properly positioned to resume full operations immediately, Comair cancelled or delayed another 3,900 of its 4,500 flights scheduled to operate between December 25 and December 28, 2004. By the end of December 28, 2004, Comair had resumed normal operations.

During the 2004 holiday season, Comair's contract of carriage² provided, *inter alia*, that "[w]hen as a result of factors within [Comair's] control, you miss a connection due to flight delays, your flight is cancelled, or a substitution of equipment results in a change in the class of service that you purchased or prevents us from transporting you, [Comair] will provide you with ... a voucher for one night's lodging [if available] when the delay is during the period of 10:00 pm to 6:00 am." Delta Domestic General Rules Tariff, Rule 240(C)(3)(b). The contract of carriage further stipulated that Comair would not be responsible for such amenities in the event of a *force majeure*, which the carrier defined to include, among other things, weather conditions, acts of God, or "[a]ny other condition beyond [Comair's] control or any fact not reasonably foreseen by [Comair]." *Id.* at Rule 240(B).

Comair employee internal guidance clearly indicates that in instances in which a cancellation is due to a cause that may be categorized as "Equipment Unavailable," "Mechanical," "Crew" or "Denied Boarding," customers are eligible for amenities, including hotel and meal accommodations, subject only to availability. The guidance states that customers are eligible for hotel amenities even if the cancellation or missed connection is only partially the result of factors within Comair's control.

Consistent with this guidance, initially, Comair appeared to treat the computer system failure as an event that would entitle customers to amenities, including hotel vouchers, with Comair and Delta employees being told that Comair was canceling their December 25 operations "due to crew tracking computer problems," described generally as a "computer outage." Employees were advised that enroute or diverted customers were eligible for "normal amenities" for a maximum of 24 hours.

However, a company-wide email sent to Comair employees at 5:27 p.m. on December 25, stated that "[t]he cancellations are the result of the severe weather, which stressed Comair's infrastructure and cause[d] the computer system that manages crew flight assignments (a.k.a SBS) to become inoperative." This statement was reiterated in a Comair press release issued at 4:43 p.m. on December 26, 2004.³ Comair's communication appeared to link the cancellations from the computer outage solely to the weather rather than to its crew-

² At all times relevant herein, Comair, as a "Delta Connection" carrier, used the contract of carriage dictated by and for Delta Air Lines, Inc.

³ On December 27, 2004, Comair's website stated that the problems during the "busy holiday season" were "exacerbated by problems with the airline's crew scheduling system." Company News page (emphasizing Comair's willingness to work with the Department to determine what had happened).

scheduling computer system failure,⁴ which may have affected how its employees responded to customer requests for amenities.

The Enforcement Office has learned of at least four instances where Comair customers who were affected by flight cancellations between December 25 and December 28 were informed that hotel vouchers would not be provided because their flight cancellation was the result of weather, even though Comair knew that all flights cancelled on or after December 25 were cancelled, at least in part, due to the TRACK outage. Each such instance appears to involve communications by employees or agents of Comair whereby customers were, at a minimum, not fully informed about the nature of the service disruption affecting them, and were told that they were not entitled to hotel accommodations. As a factual matter, such customers were at least entitled to the carrier's diligent efforts and honest representations with regard to the reasons for the flight cancellations and the carrier's obligations to temporarily stranded customers which, it appears to the Enforcement Office, included hotel accommodations where appropriate. The Enforcement Office believes that consumers clearly were entitled to such amenities, not only in view of Comair's initial notice to its employees about the cause of its flight irregularities, but also in light of the common sense interpretation of its contract of carriage, and the facts present here.⁵

By misleading consumers in this manner, Comair engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712.

Mitigation

In mitigation, Comair states that the disruptions to passenger travel during the holiday period of December 25-28, 2004, resulted from the confluence of two unprecedented, back-to-back events. First, a winter storm of historical proportions dumped 5 inches of ice and 4 inches of snow on Cincinnati between December 22 and 23, 2004. The fact that Cincinnati is Comair's major hub and the home area for many of its flight and cabin crews exacerbated the resulting complications substantially. According to Comair, the crew scheduling computer system used by Comair to schedule flight/cabin crews and monitor crew duty times shut down because Comair's efforts to get back on schedule and re-allocate aircraft crews exceeded a hidden defect, a monthly transaction limitation, of which Comair and its vendor were previously unaware. Comair states that it believes that the hidden limitation, the system default failure and the flight cancellations were beyond Comair's control and could not reasonably have been foreseen, and therefore the flight cancellations were subject to the *force majeure* provision of its contract of carriage. Comair states that the system was owned, controlled and maintained

⁴ According to Comair, a latent defect contained in the vendor's software code, previously unknown to Comair, caused the system to shut down during a period of unusually heavy use. We conclude that the fact that this shutdown was triggered by Comair's efforts to reschedule its crews in response to severe weather does not make the defect or its manifestation a *force majeure* weather event, nor does it make the event beyond the carrier's control or one which could not reasonably be foreseen.

⁵ In this regard, we note that consumer expectations and industry practice plainly contemplate that, in the ordinary course of business, a flight delay or cancellation caused by crew scheduling or maintenance requirements (such as the repair or replacement of malfunctioning equipment) would ordinarily not constitute a *force majeure* at law or under the contract of carriage.

by the vendor and licensed for use by Comair and that Comair had no control over its software content.

Comair asserts that, despite these two extraordinary events, it kept safety and passenger service as its top priorities. Comair states that as the winter storm approached Cincinnati, it proactively began contacting and re-routing passengers and, further, waived all re-ticketing fees and penalties for passengers choosing to rebook for alternative dates. Comair asserts that it also booked more than 2,000 hotel rooms in the Cincinnati area (all that were available at that time) at discount rates, and affected passengers took advantage of Comair's foresight, utilizing approximately 1,800 of those rooms. According to Comair, unaccompanied minors who had to stay overnight in Cincinnati during the winter storm were accommodated and chaperoned, with the last minor departing Cincinnati by mid-day of December 25. With respect to the computer failure, Comair worked diligently with its vendor throughout Christmas Day to restore the computer system, eventually implementing a temporary fix late on December 25.

Comair asserts that it further evaluated passenger reimbursement requests and, in many cases, did reimburse passengers on a case-by-case basis for out of pocket expenses. Comair states that it and Delta refunded tickets for thousands of passengers. According to Comair, one billion (1,000,000,000) frequent flyer miles and/or travel vouchers (valued well in excess of reasonable local overnight hotel accommodations) were also distributed to affected passengers in the aftermath of the service disruption.

In the end, Comair believes that it made extraordinary efforts to protect passengers and minimize the impact of the storm while nonetheless maintaining safety and security as its highest priority. Comair maintains that, although the Department reportedly received complaints from certain passengers notwithstanding Comair's extraordinary efforts over the holiday period, it has also received numerous expressions of thanks and understanding for its handling of this extraordinarily difficult situation.

Decision

We view seriously any carrier's failure to honor commitments made to consumers, particularly those contained in its contract of carriage. We understand that there may be disagreement over the application of provisions in that contract of carriage to particular situations. Here, however, we find unpersuasive Comair's position that, by hiring an outside vendor to develop and maintain its computerized crew scheduling system, a software problem with the system is outside of Comair's control. Thus we do not agree that Comair's decision to cancel all flight operations beginning on December 24, 2004, was properly subject to the *force majeure* provision of its contract of carriage.⁶ A carrier cannot escape responsibility for

⁶ The critical *force majeure* inquiry here, as in any such case, is not whether Comair knew or could have known the precise mechanism by which its computerized scheduling system ceased functioning, but whether it anticipated or should have anticipated that some failure of its computerized scheduling system could occur. We conclude that Comair understood that such a failure was possible, and even prepared for it by having in place an explicit backup procedure. Comair cannot assert that it could not have foreseen what it had, in fact, prepared to contend with.

the failure of mission critical components of its own infrastructure by the mere act of subcontracting development and maintenance responsibilities to one or more third parties.

We have carefully considered the facts of this case, including the explanation provided by Comair, and continue to believe enforcement action is necessary. Comair, in order to avoid litigation, and without admitting or denying the alleged violations, agrees to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41712 with respect to the provision of amenities to consumers, and to an assessment of \$75,000 in compromise of potential civil liabilities. Of that \$75,000 assessed amount, \$25,000 shall be paid, subject to offset as provided in ordering paragraph 4 below. The remaining \$50,000 shall be suspended, and forgiven after one year, if the carrier commits no further similar violation during that one-year period. This compromise assessment is appropriate in view of the nature and extent of the alleged violations at issue and serves the public interest.

We believe that this consent order and the penalty it assesses provide an adequate deterrence to future noncompliance with the above-cited statutory requirement by Comair, as well as by other carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

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 by engaging in the conduct described herein, Comair, Inc., engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712;
3. We order Comair, Inc., and all other entities owned and controlled by or under the common ownership and control with Comair, Inc., and their successors and assignees to cease and desist from further similar violations of 49 U.S.C. § 41712;
4. We assess Comair, Inc., a compromise civil penalty of \$75,000 in lieu of civil penalties that might otherwise be assessed for the violations described herein. Of this total amount,
 - a. up to \$25,000 shall be credited to Comair, Inc., on a dollar-for-dollar basis for its expenditures during the 12 months following the service date of this order to Comair passengers above and beyond what is required by its contract of carriage;
 - b. to the extent that Comair, Inc., fails to meet the offset credit provisions permitted under paragraph 4(a) above, or to adequately document the offset credit amount as required by paragraph 5, the unexpended portion of that amount shall become due and payable 14 months after the service date of this order;

- c. the remaining \$50,000 shall be suspended for 14 months after the service date of this order, and then forgiven unless Comair, Inc., violates the cease and desist provisions within 12 months of the service date of this order or fails to establish that it has met the credit offset/payment provisions of this order, in which case the entire unpaid amount shall become due and payable immediately and Comair, Inc., may be subject to additional enforcement action as well as the assessment of interest, penalty, and collection charges under the Debt Collection Act;
5. Within 13 months of the service date of this order, Comair, Inc., shall provide:
 - a. written certification to the Office of Aviation Enforcement and Proceedings that it has provided amenities to its passengers costing it up to \$25,000, above and beyond those required by its contract of carriage, in satisfaction of paragraph 4(a);
 - b. an explanation of the method used by Comair, Inc., to determine the total cost of such amenities, as well as an accounting of amenities provided and the manner in which their provision exceeds the requirements of its contract of carriage; and
 - c. a sworn statement from an appropriate company official certifying that the total expenditures were properly expended to the best of that official's knowledge after completion of a reasonable inquiry to establish the accuracy of the sworn statement;
6. The offset described in paragraph 4 may be amended with the approval of the Office of Aviation Enforcement and Proceedings. If Comair, Inc. intends to seek a change in the nature or extent of the offset, it must notify and obtain approval from the Office of Aviation Enforcement and Proceedings 30 days prior to the date documentation is due pursuant to paragraph 5; and

7. Subject to the credit offset provision described in paragraphs 4 and 5, above, or as amended pursuant to paragraph 6, above, payment of any outstanding civil penalty amount shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. The wire transfer shall be executed in accordance with the attached instructions. Failure to pay the penalty as ordered will subject Comair, Inc., their successors or assignees, to the assessment of interest, penalty, and collection charges under the Debt Collection Act.

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

BY:

ROSALIND A. KNAPP
Deputy General Counsel

(SEAL)

An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov/>