



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

Issued by the Department of Transportation  
On the Twenty-First day of August, 2013

**Aerovías del Continente Americano S.A.  
(Avianca)**

**Violations of 14 CFR Parts 244 and 259 and  
49 U.S.C. §§ 41708 and 41712**

**Docket 2013-0004  
Served August 21, 2013**

**CONSENT ORDER**

This consent order concerns violations by Aerovías del Continente Americano S.A. (Avianca) of 14 CFR Parts 244 and 259 and 49 U.S.C. §§ 41708 and 41712. Specifically, the carrier 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. Moreover, Avianca failed to file accurately the required on-time performance information for a lengthy tarmac delay with the Department of Transportation (Department). This order directs Avianca to cease and desist from future similar violations of 14 CFR Parts 244 and 259 and 49 U.S.C. §§ 41708 and 41712 and assesses the carrier \$100,000 in civil penalties.

**Applicable Law**

**I. Contingency Plan for Tarmac Delays**

Pursuant to section 259.4 of the Department's rules (14 CFR 259.4), foreign air carriers that operate scheduled passenger service or public charter service to and from the U.S. using any aircraft with a designed capacity of 30 or more passenger seats are required to adopt, implement, and adhere to contingency plans for lengthy tarmac delays at each

large, medium, small, and non hub U.S. airport at which they operate scheduled or public charter air service.<sup>1</sup> For the international flight at issue here, 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 an aircraft cannot leave its position on the tarmac to deplane passengers due to a safety-related or security-related reason (e.g. weather, a directive from an appropriate government agency, etc.); and (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 comply with 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 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, 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. A failure to report a lengthy tarmac accurately is considered to be a separate unfair and deceptive practice and an additional violation of 49 U.S.C. § 41712.

## **II. Reporting Tarmac-Delay Data**

Section 244.3 of the Department's regulations requires certain air carriers to file Bureau of Transportation Statistics (BTS) Form 244 "Tarmac Delay Report" with the Office of Airline Information for each month in which at least one tarmac delay of three hours or more occurred. The data are then published and made available to the public in a useable format in the Department's monthly Air Travel Consumer Report (ATCR), which, among other things, lists all regularly scheduled international flights with tarmac delays of four hours or more.<sup>2</sup> The ATCR data in question are used for a number of purposes, including by the traveling public to choose among transportation options, by the Department as a basis for conducting enforcement investigations, and by carriers as a basis for making advertising claims regarding the quality of their service compared to other carriers. It is imperative, therefore, that ATCR data be accurate. Violations of section 244.3 also constitute violations of 49 U.S.C. § 41708.

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<sup>1</sup> According to 14 CFR 259.2, Part 259 does not apply to foreign carrier charters that operate to and from the United States if no new passengers are picked up in the United States.

<sup>2</sup> See *Air Travel Consumer Report*, available at <http://www.dot.gov/airconsumer/air-travel-consumer-reports>.

### **Facts and Conclusions**

Avianca is a foreign air carrier as defined by 49 U.S.C. § 40102(a)(21)<sup>3</sup> that operates scheduled service from both Miami International Airport (MIA) and Orlando International Airport (MCO), among other large hub airports, using at least one aircraft having a designed capacity of more than 30 passenger seats.

Miami serves as a regular diversion airport for Avianca, and Avianca has adopted a contingency plan for lengthy tarmac delays covering its diversion operations into MIA. In 2011, Avianca provided a copy of its tarmac delay plan to U.S. Customs and Border Protection (CBP), the Transportation Security Administration (TSA), and airport officials at MIA, in an effort to coordinate the carrier's plan with those entities. Avianca's contingency plan stipulates that for the carrier's international flights to and from the United States, Avianca will not permit an aircraft to remain on the tarmac for more than four hours before allowing passengers to deplane unless: (1) there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac to deplane passengers, or (2) 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.

An investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office) revealed that on March 24, 2013, 121 passengers were delayed on the tarmac for five hours and twenty minutes in violation of 14 CFR 259.4(b)(2), when Avianca flight 28, traveling from El Dorado International Airport (BOG) in Bogotá, Colombia, to MCO, diverted to MIA.

Avianca flight 28 was scheduled to arrive at MCO at 3:06 pm. However, due to weather and the limited amount of fuel remaining onboard the aircraft, it was unable to land at MCO as planned and diverted to MIA, landing at 3:29 pm. After landing at MIA, flight 28 was directed to a gate, where the aircraft was refueled and where it stayed for approximately one hour. According to Avianca, although the door of the aircraft was open during refueling, allowing passengers to deplane was not necessary due to Avianca's having no knowledge of additional delays at the time and due to the time, approximately thirty minutes, it would take to establish the sterile area required when deplaning an international flight. Avianca never contacted CBP at MIA to inquire about deplaning passengers.

After leaving the terminal, flight 28 spent approximately four more hours at MIA, including time in a waiting area and on a taxiway. Avianca made no attempts during this time to deplane passengers or to solicit assistance from the airport operator in deplaning. At 7:30 pm, the captain of flight 28 contacted Avianca operations at MIA to discuss deplaning, whereupon a decision was made not to deplane passengers. Avianca states that the flight would have been cancelled if it returned to the terminal for deplaning due to the

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<sup>3</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."

expiration of the crew's duty time. Flight 28 departed from MIA at 8:49 pm, landed at MCO at 9:34 pm, and arrived at its gate at 9:49 pm.

Additionally, Avianca misreported information regarding flight 28 in the BTS Form 244 "Tarmac Delay Report" it filed with the Office of Airline Information. Avianca's initial report to the Department incorrectly stated the arrival and departure times at MIA, indicating a tarmac delay of five hours and one minute, nineteen minutes shorter than the actual delay. According to Avianca, the error was caused by the data-recording system on flight 28 not properly transmitting data. Avianca self-disclosed this discrepancy to the Department.

In summary, the Enforcement Office found that Avianca made no attempt to adhere to the terms of its contingency plan or to provide passengers an opportunity to deplane before the tarmac delay exceeded four hours. Avianca also failed to report the tarmac delay accurately in its initial report to the Department. Avianca's failures violated 14 CFR 244.3 and 259.4 and 49 U.S.C. §§ 41708 and 41712. Although the Department finds that Avianca violated 14 CFR 244.3 and 49 U.S.C. § 41708, the Department has based the compromise civil penalty assessed in this order solely on violations of 14 CFR 259.4 and 49 U.S.C. § 41712 because the carrier's erroneous report was a result of equipment failure and because the carrier self-reported the violation.

### **Mitigation**

In mitigation, Avianca states that that it is fully committed to complying with all of the Department's consumer protection requirements, including the Department's tarmac delay rules. Avianca asserts that this tarmac delay was the result of an unusual set of circumstances, including severe weather interrupting operations at both the destination and diversion airports and heavy taxiway traffic, which combined to form an extraordinarily difficult operating environment. In addition, Avianca believed it would be able to refuel and promptly depart the diversion airport without a tarmac delay but was prevented from doing so due to deteriorating weather conditions delaying takeoff.

Avianca notes that it received no passenger complaints about the tarmac delay, and that at all times it acted in what it believed were the best interests of its passengers. In addition, Avianca emphasizes that it provided timely food and drinks, the crew made periodic flight status announcements, and the lavatories remained operable during the course of the delay.

### **Decision**

The Enforcement Office has carefully considered the information provided by Avianca but continues to believe enforcement action is warranted. The Enforcement Office and Avianca have reached a settlement of this matter in order to avoid litigation. Without admitting or denying the violations described above, Avianca consents to the issuance of this order to cease and desist from future violations of 14 CFR 244.3 and 259.4 and

49 U.S.C. §§ 41708 and 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 to future similar unlawful practices by Avianca and other carriers.

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

ACCORDINGLY,

1. Based on the above information, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that Aerovías del Continente Americano S.A. violated 14 CFR 259.4 by failing 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. By its actions, the carrier forced a total of 121 passengers on flight 28 to remain on the tarmac at Miami International Airport on March 24, 2013, for more than five hours without the opportunity to deplane;
3. We find that by engaging in the conduct and violations described in ordering paragraph 2, Aerovías del Continente Americano S.A. engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712;
4. We find that Aerovías del Continente Americano S.A. violated 14 CFR 244.3 by failing to file an accurate BTS Form 244 with the Department regarding the tarmac delay flight 28 experienced on March 24, 2013;
5. We find that by engaging in the conduct and violations described in ordering paragraph 4, above, Aerovías del Continente Americano S.A. violated 49 U.S.C. § 41708;
6. We order Aerovías del Continente Americano S.A., its successors, its affiliates, its assigns, and all other entities owned by, controlled by, or under common ownership and control with Aerovías del Continente Americano S.A., its successors, its affiliates, or its assigns to cease and desist from further violations of 14 CFR 259.4, 14 CFR 244.3, and 49 U.S.C. §§ 41708 and 41712;
7. We assess Aerovías del Continente Americano S.A. \$100,000 in civil penalties in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 and 3, above. Of this total penalty amount, \$50,000 shall be due and payable within 30 days of the date of issuance of this order. The remaining portion of any unpaid civil penalty shall become immediately due and

payable if, within one year of the date of this order, Aerovías del Continente Americano S.A. violates this order's cease and desist or payment provision, in which case Aerovías del Continente Americano S.A. may become subject to additional enforcement action for any violation of the order; and

8. We order Aerovías del Continente Americano S.A. to pay the penalty through Pay.gov to the account of the U.S. Treasury in accordance with the instructions contained in the Attachment to this order. Failure to pay the penalty as ordered shall subject Aerovías del Continente Americano S.A. 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:**

**SAMUEL PODBERESKY**  
**Assistant General Counsel for**  
**Aviation Enforcement and Proceedings**

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