



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

Issued by the Department of Transportation
On the 28th day of October, 2014

Air Canada rouge

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

Served: October 28, 2014

Docket OST-2014-0001

CONSENT ORDER

This consent order concerns violations by Air Canada *rouge* (*Rouge*) of 14 CFR Part 259 and 49 U.S.C. § 41712. Specifically, the carrier failed to adhere to the assurances in its contingency plan for lengthy tarmac delays that the carrier (1) would not allow an aircraft to remain on the tarmac for more than four hours before allowing passengers an opportunity to deplane, (2) would provide customers with food and water within two hours after the aircraft left the gate in the case of a tarmac delay, and (3) would have sufficient resources to implement the carrier's tarmac delay contingency plan. 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 \$90,000 in civil penalties.

Applicable Law

Pursuant to section 259.4 of the Department's rules, covered carriers, which includes foreign air carriers conducting scheduled passenger service or public charter service to and from the U.S.¹ using any aircraft with a design capacity of 30 or more passenger seats, are required to adopt, implement, and adhere to contingency plans for lengthy

¹ 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.

tarmac delays at each large, medium, small, and non-hub U.S. airport. For an international flight, which is at issue here, section 259.4(b)(2) requires covered carriers to provide an 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 determines that 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.

Section 259.4(b)(3) requires covered carriers, for all flights delayed on the tarmac, to provide adequate food and potable water no later than two hours after the aircraft leaves the gate (in the case of a departure) or touches down (in the case of an arrival), unless the pilot-in-command determines that safety or security requirements preclude such service. Additionally, section 259.4(b)(7) requires covered carriers to ensure that they have sufficient resources to implement their plan. A carrier's failure to comply with the assurances required by Part 259 and contained in the carrier's contingency plan for lengthy tarmac delays constitutes an unfair and deceptive practice within the meaning of 49 U.S.C. § 41712.

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).² *Rouge*, Air Canada's leisure airline, began operating to and from the U.S. in November of 2013, and operates routes between Canada and four destinations in the U.S. For example, *Rouge* operates scheduled service from Orlando International Airport (MCO), a large hub airport, to Toronto Pearson International Airport (YYZ) using at least one aircraft having a design seating capacity of more than 30 passenger seats. Air Canada's 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 hours. With respect to the provision of food and water, the plan states that the carrier will provide passengers with adequate food and potable water no later than two hours after the aircraft leaves the gate (in the case of departure) or touches down (in the case of arrival and diversions) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such service. Finally, the plan states that the carrier has taken steps to ensure sufficient resources are available to implement its plan.

An investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office) found that *Rouge* flight AC 1861 diverted to Buffalo Niagara International

² 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."

Airport (BUF) at 10:09 p.m. on January 11, 2014, while in route to Toronto Pearson International Airport (YYZ). Flight AC 1861 diverted to BUF due to freezing rain and fog in the Toronto area. Because *Rouge* expected to quickly refuel and depart from BUF, the carrier did not seek a gate or another disembarkation point to deplane passengers until 1:25 a.m. At 2:36 a.m., flight AC 1861 was assigned a gate and passengers were afforded the opportunity to deplane at 2:50 a.m., 4 hours and thirty-one minutes into the delay. Although all passengers were provided with beverages throughout the delay, and some of its passengers were provided with snacks, *Rouge* did not have adequate snacks on board the aircraft to provide to all of its passengers during the delay.

Based on the facts described above, the Enforcement Office has concluded that *Rouge* failed to provide passengers with an opportunity to deplane before the tarmac delay exceeded four hours. Furthermore, The Enforcement Office has found that *Rouge* did not provide food to all of its passengers within two hours after the aircraft arrived at BUF and *Rouge* did not have sufficient resources available to implement its contingency plan as the carrier did not have adequate snacks on board to distribute to passengers during the delay. *Rouge's* failure to adhere to the terms of its contingency plan in this regard violated sections 259.4(b)(2), 259.4(b)(3), and 259.4(b)(7) and 49 U.S.C. § 41712.

Mitigation

In mitigation, *Rouge* states that there were numerous flights diverted to BUF on the evening of January 11, and that congestion at BUF and the large volume of delays and diversions contributed to *Rouge's* inability to deplane its passengers in less than four hours. Furthermore, *Rouge* notes that many (but not all) of its passengers did receive a snack during the course of the delay. The carrier states that it supplied food items from its supply of "buy on board" snacks, the supply of which varies based on consumer purchases on a particular flight leg (or preceding flight legs).

Rouge states that it takes its regulatory obligation seriously and it has examined in detail the steps required to help ensure that an incident like this does not occur again. The carrier explains that since this event, it has revised its procedures to ensure closer coordination between the pilot of a delayed aircraft and Systems Operation Control (SOC). The carrier also states that it has decided to stock each of its trans-border services with a dedicated supply of snacks to be opened in the event of a delay, to ensure availability for each passenger. The carrier further notes that it provided sandwiches and other food items as soon as its passengers were permitted to deplane.

Decision

We view seriously *Rouge's* violation 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, the Enforcement Office believes that enforcement action is warranted.

In order to avoid litigation, *Rouge* has agreed to settle this matter with the Enforcement Office and enter into this consent order, which directs *Rouge* to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and assesses \$90,000 in compromise of potential civil penalties otherwise due and payable. 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 *Rouge* 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 Canada *rouge*, violated 14 CFR 259.4(b)(2) by failing to adhere to the assurances 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;
3. We find that Air Canada *rouge*, violated 14 CFR 259.4(b)(3) by failing to adhere to the assurances in its contingency plan for lengthy tarmac delays that the carrier would provide food no later than two hours after the aircraft touched down in the case of arrival;
4. We find that Air Canada *rouge* violated section 259.4(b)(7) by failing to have sufficient resources available to implement its tarmac delay plan;
5. We find that by engaging in the conduct described in ordering paragraphs 2, 3 and 4, above, Air Canada *rouge* engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
6. We order Air Canada *rouge*, and all other entities owned or controlled by Air Canada *rouge*, its successors, affiliates, and assigns, to cease and desist from further violations of 14 CFR Part 259 and 49 U.S.C. § 41712;
7. We assess Air Canada *rouge* \$90,000 in civil penalties in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2 through 5 above. Of this total penalty amount, \$45,000 shall be due and payable within 30 days of the 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, Air Canada *rouge* violates this order's cease and desist or payment provision, in which case Air Canada *rouge* may become subject to additional enforcement action for any violation of the order; and

8. We order Air Canada *rouge* 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 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.

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
Acting Assistant General Counsel for
Aviation Enforcement and Proceedings

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