



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

Issued by the Department of Transportation
On the Fourteenth day of May, 2014

Air Europa Lineas Aereas, S.A.U.

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

Docket OST 2014-0001

Served May 14, 2014

CONSENT ORDER

This consent order concerns violations by Air Europa Lineas Aereas, S.A.U. (Air Europa) of 14 CFR Part 259 and 49 U.S.C. § 41712. Specifically, the carrier failed to adhere to the assurance in its contingency plan for lengthy tarmac delays that it 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 Europa to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712 and assesses the carrier \$140,000 in civil penalties.

Applicable Law

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 design 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.¹ For the international flight 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

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.

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 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 air carrier's noncompliance with assurances required by Part 259 and as contained in its contingency plan for lengthy tarmac delays is considered by the Office of Aviation Enforcement and Proceedings (Enforcement Office) to be an unfair and deceptive practice within the meaning of 49 U.S.C. § 41712. Because, in the Enforcement Office's view, the purpose of section 259.4 is to protect individual passengers from being forced to remain on an 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 by the Enforcement Office 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

Air Europa is a foreign air carrier as defined by 49 U.S.C. § 40102(a)(21)² that operates scheduled service into John F. Kennedy International Airport (JFK), a large hub airport, using at least one aircraft having a designed seating capacity of 30 or more passenger seats. An investigation by the Enforcement Office determined that during the night of November 7-8, 2012, 218 passengers were delayed on the tarmac for five hours on flight UX092.³

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."

³ Section 244.3 of the Department's regulations (as clarified in answer #2 in the "Reporting Tarmac Delay Data" section of the tarmac delay Frequently Asked Questions on our website) requires covered carriers to file a "Tarmac Delay Report," Bureau of Transportation Statistics (BTS) Form 244, with the Office of Airline Information for each month in which at least one tarmac delay of three hours or more occurred. A tarmac delay occurs when an aircraft is on the ground but there is no opportunity for its passengers to deplane, as defined in 14 CFR 244.1. On this basis, Air Europa, a covered carrier, was required to report the tarmac delay which began at 11:34 p.m., when passengers no longer had the opportunity to deplane, and ended five hours later when the aircraft took off at 4:34 a.m. Air Europa initially believed it was not required to file a Form 244 Tarmac Delay Report because the "gate departure time" for the flight did not reflect a lengthy tarmac delay. Gate departure time is defined in 14 CFR 244.1 as "the instant when the pilot releases the aircraft parking brake after passengers have boarded and aircraft doors have closed." Here, Air Europa released the aircraft parking brake at 3:31 a.m. and took off at 4:34 a.m. At that time, passengers had boarded and the aircraft doors had closed but the aircraft did not take off. In this situation, although it may have appeared based on the gate departure and takeoff times that the tarmac delay was one hour and three minutes, the tarmac delay was five hours since the aircraft was on the ground for that period with no opportunity for passengers to deplane. Therefore, the Enforcement Office considers this to have been a reportable tarmac delay under Part 244.

On November 7, 2012, Air Europa flight UX092 was scheduled to depart JFK at 10:05 p.m. destined for Madrid-Barajas Airport. Numerous flights scheduled to depart JFK that evening were delayed extensively due to a severe snowstorm.

Air Europa closed the aircraft door and concluded boarding activities at 11:34 p.m. At 11:54 p.m., the captain announced to passengers that the flight would be delayed due to the adverse weather conditions. According to Air Europa, despite the flight crew's repeated requests, Air Traffic Control (ATC) continued to provide no estimated pushback time during the delay. The aircraft continued to hold at the gate, although Air Europa did not open the door or inform passengers that they could deplane while the aircraft remained at the gate. ATC cleared the flight to push back from the gate at 3:31 a.m. The aircraft was then deiced and took off at 4:34 a.m.

Based on these facts, the Enforcement Office found that Air Europa did not adhere to the terms of its contingency plan because it did not provide passengers an opportunity to deplane before the tarmac delay exceeded four hours. The Enforcement Office concluded this deficiency violated 14 CFR 259.4(b)(2) and 49 U.S.C. § 41712.

Mitigation

Air Europa states that it is committed to compliance with its tarmac delay plan and the Department's regulations. Air Europa believes, however, that it is in the public interest for carriers to be afforded reasonable latitude in applying plan provisions so as to treat passengers respectfully and most beneficially in the circumstances. In Air Europa's view, that is what it did in this case.

The Enforcement Office asserts that Air Europa did not provide its passengers an opportunity to deplane before the tarmac delay exceeded four hours. In response, Air Europa states that during the three hours and 37 minutes the aircraft was at the gate awaiting pushback clearance from ATC, Air Europa would have allowed any passenger wishing to deplane to do so immediately. Air Europa advises that no passenger expressed a desire to deplane and that the passengers, recognizing the delay was beyond Air Europa's control, simply wanted Air Europa to get them to Madrid as quickly as possible. Air Europa states additionally that the aircraft door remained closed during the gate hold so that the flight would not miss an opportunity for pushback when ATC clearance was received. Air Europa states that under the circumstances, the objective of getting the passengers to their destination as quickly as possible required the aircraft to be kept in pushback-ready status.

In regard to the Enforcement Office's position that for civil penalty purposes, the tarmac delay rule is considered to apply on a passenger-by-passenger basis, Air Europa disagrees and believes such penalties may be assessed only on a per-flight basis as specifically stated in 49 U.S.C. § 46301(a)(2). However, in the interest of settling this matter, and without conceding or waiving its legal position on the scope of the Department's civil penalty authority, Air Europa has agreed to this consent order.

Decision

The Enforcement Office has carefully considered the information provided by Air Europa, but continues to believe enforcement action is warranted. The Enforcement Office and Air Europa have reached a settlement of this matter in order to avoid litigation. Without admitting or denying the violations found in this order, Air Europa consents to the issuance of this order to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and to the assessment of \$140,000 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 Air Europa 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 Air Europa violated 14 CFR 259.4(b)(2) by not adhering to the assurance in its contingency plan 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 Europa engaged in an unfair and deceptive practice and unfair method of competition in violation of 49 U.S.C. § 41712;
4. We order Air Europa and all other entities owned or controlled by, or under common ownership and control with Air Europa, its successors, affiliates, and assigns, to cease and desist from further similar violations of 14 CFR 259.4(b)(2) and 49 U.S.C. § 41712;
5. We assess Air Europa \$140,000 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 amount, \$70,000 shall be due and payable in three installments. The first installment of \$25,000 shall be due and payable within 30 days after the service date of this order. A second installment of \$25,000 shall be due and payable within 60 days after the service date of this order. The final installment of \$20,000 shall be due within 90 days after the service date of this order. The remaining \$70,000 shall be paid if Air Europa violates this order's cease and desist provisions during the one-year period following the service date of this order; and

6. We order Air Europa 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 Europa 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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