



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

Issued by the Department of Transportation  
on the 6<sup>th</sup> day of July, 2017

**TAP Portugal**

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

**Docket OST-2017-0001**

**Served July 6, 2017**

**CONSENT ORDER**

This consent order concerns violations by TAP Portugal (TAP) of 14 CFR Part 259 and 49 U.S.C. § 41712. Specifically, TAP failed to adhere to the assurances in its contingency plan for lengthy tarmac delays regarding deplaning of passengers, provision of adequate food, and access to operable lavatories. This order directs TAP 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 of the Department's rules (14 CFR 259.4), covered carriers, which include any foreign air carrier conducting scheduled passenger service or public charter service with at least one aircraft having a designed seating 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. Section 259.4(b)(2) requires that for international flights operated by a covered carrier that depart from or arrive at a U.S. airport, the carrier will not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours before allowing passengers to deplane, unless the pilot-in-command determines there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac to deplane passengers, or unless 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

Pursuant to section 259.4(b)(3), covered carriers are required to provide adequate food and 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) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such service. Section 259.4(b)(4) requires carriers to provide operable lavatory facilities while the aircraft remains on the tarmac. Further, section 259.4(b)(7) of the rule requires each covered carrier to have sufficient resources to implement its contingency plan. A covered carrier's failure to comply with the assurances required by section 259.4 and as 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**

TAP Portugal (TAP) is a foreign air carrier as defined by 49 U.S.C. § 40102(a)(21)<sup>1</sup> that operates scheduled service at Newark Liberty International Airport (EWR), a large hub airport, and that uses at least one aircraft having a design capacity of more than 30 passenger seats. TAP has adopted a contingency plan for lengthy tarmac delays covering its operations at all U.S. airports, including diversion airports.

An investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office) revealed that on July 25, 2016, TAP Flight 213, scheduled from Porto, Portugal to EWR, experienced a tarmac delay of four hours and 26 minutes after landing at Logan International Airport (BOS) due to a weather-related diversion. Flight 213 was one of 19 diverted flights to land at BOS. Only one other flight experienced an extended tarmac delay. Upon arrival, Flight 213 was directed to park at a remote area and to await further instructions from Air Traffic Control (ATC).

Massachusetts Port Authority (Massport) informed TAP that Flight 213 would receive priority in gate assignment if TAP informed Massport of its decision to cancel the flight. However, TAP intended for Flight 213 to continue onto Newark after refueling and obtaining ATC clearance. TAP was aware of likely delays in receiving aircraft services and ATC clearance due to the large number of diverted flights, most of which were parked in remote areas. TAP was also aware of takeoff delays at BOS due to multiple ground stops at John F. Kennedy International Airport.

TAP delayed cancelling Flight 213 despite its awareness of both the congestion at BOS and significant passenger discomfort onboard the aircraft due to the failure of the aircraft's auxiliary power unit (APU), which resulted in a lack of air conditioning for nearly two hours during the delay. During that period, law enforcement boarded the aircraft at TAP's request due to multiple agitated passengers.

Due to crew work time restrictions, TAP chose to cancel the flight after approximately three hours and 31 minutes on the tarmac. This decision caused it to wait behind other

---

<sup>1</sup> 49 U.S.C. § 40102(a)(2) 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."

aircraft awaiting a gate assignment, further prolonging the delay. Ultimately, Flight 213 did not arrive at the gate and deplane passengers until remaining on the tarmac for approximately four hours and 26 minutes. Thus, TAP allowed the aircraft to remain on the tarmac for more than four hours without any safety-related or security-related reason to do so and without advisement from ATC that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.

Furthermore, the aircraft's APU failure resulted in inoperable lavatories, which could not be flushed without power, for a period of 35 minutes during the delay. TAP also stated that it did not provide food to passengers within two hours after touching down. TAP's conduct violated 14 CFR §§ 259.4(b)(2), 259.4(b)(3), 259.4(b)(4), and 259.4(b)(7), and 49 U.S.C. § 41712.

### **Response**

In response, TAP states that the delay resulted from "perfect storm" events entirely outside TAP's control, stemming from the shutdown of all three major New York City area airports due to extreme weather conditions. At least 19 international flights were suddenly and unexpectedly diverted to Boston Logan Airport, with TP213 being one of the last, or the last, to land. TAP states that all resources at the airport were severely strained. TAP asserts that there was insufficient gate space and needed ground services and equipment were unavailable.

TAP explains that after diverting to Boston Logan, TAP was instructed to park on a remote runway that was near active runways. TAP states that because TP213 was parked behind another aircraft and also experienced an unexpected APU malfunction, the aircraft could not move on its own to take off or taxi to the gate; it needed services and equipment from Massport, which TAP requested.

TAP states that because TP213 was a large international flight, only eight international gates in Terminal E of Boston Logan Airport could be used to deplane passengers. During most of the delay, the international gates were completely full with scheduled international flights, and numerous diverted flights also needed gate space. TAP states that it reasonably did not cancel the flight immediately; it would have been best for passengers and crew to be able to continue to their desired destination (Newark) without having to overnight in Boston, as passengers on another TAP flight diverted to Boston earlier that day were able to do. TAP believes that had it timely received requested ground services and equipment, it should have been able to achieve this preferred result for TP213 passengers as well. TAP states that when continuing on to Newark was no longer a reasonable possibility, TAP did everything it could to secure an open gate and deplane passengers as soon as possible. TAP asserts that it canceled the flight with ample time (about one-half hour) to proceed to an open gate and deplane passengers before four hours elapsed, had there been a gate and a tow available.

TAP states that it provided drinks to passengers (including before the two-hour mark) but had only seven meals onboard because it had just completed a transatlantic flight. TAP states that if there had been enough meals onboard, TAP would have served them, as it

did when only a small group of passengers needing wheelchairs remained on the aircraft. TAP states that the APU malfunction that caused the bathrooms to be inoperable for 35 minutes was completely outside TAP's control. TAP explains that the Captain immediately requested a GPU, which resolved the issue, and tried repeatedly throughout the delay to restart the APU (and eventually was successful).

TAP states that it takes the Department's tarmac delay rules very seriously and took all reasonable measures to comply with them. TAP states that it believes that it acted in the best interests of its passengers with regard to safety, convenience and comfort throughout the delay.

### **Decision**

The Enforcement Office views seriously TAP'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, the Enforcement Office believes that enforcement action is warranted. By this order, the Department finds that TAP failed to adhere to the assurances in its contingency plan for lengthy tarmac delays regarding timely deplaning of passengers, provision of adequate food, and access to operable lavatories.

In order to avoid litigation, TAP has agreed to settle this matter with the Enforcement Office and enter into this consent order directing the carrier to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and assessing \$100,000 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 TAP 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 TAP Portugal violated 14 CFR 259.4(b)(2), 14 CFR 259.4(b)(3), 14 CFR 259.4(b)(4), and 14 CFR 259.4(b)(7) by failing to adhere to the assurances in its contingency plan for lengthy tarmac delays regarding timely deplaning of passengers, provision of adequate food, and access to operable lavatories;
3. We find that by engaging in the conduct described in paragraph 2, above, TAP Portugal engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
4. We order TAP Portugal and its successors and assigns to cease and desist from further violations of 14 CFR Part 259 and 49 U.S.C. § 41712;

5. We assess TAP Portugal \$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 amount, \$50,000 shall be due and payable on June XX, 2017. The remaining \$50,000 shall become due and payable if, within one year of the service date of this order, TAP Portugal violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and TAP Portugal may be subject to additional enforcement action for failure to comply with this order.
6. We order TAP Portugal to pay within 30 days of the issuance of this order the penalty assessed in ordering paragraph 5 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 TAP Portugal 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**  
**Assistant General Counsel for**  
**Aviation Enforcement and**  
**Proceedings**