

DOT REGULATIONS AS TO PASSENGER DELAYS AND RIGHTS, AND THEIR RAMIFICATIONS

Katherine A. Staton, Esq.
Partner, Jackson Walker L.L.P.

I. THE HISTORY BEHIND THE TARMAC DELAY REGULATIONS

On April 29, 2010, new federal aviation regulations were enacted which govern the protection of passengers when delays occur in airline travel. These regulations, which are commonly referred to as The Passenger Bill of Rights, the Tarmac Delay Rules, or The Passenger Protection Act, were aimed at increasing air passenger protection to improve management of flights, to disseminate flight delay information, and to enhance customer service. *See The United States Department of Transportation Final Regulatory Impact Analysis of Rulemaking on Enhanced Airline Passenger Protections, Final Regulatory Evaluation* (Dec. 17, 2009) (hereinafter “*Final Regulatory Evaluation*”); Department of Transportation’s Final Rule and Summary, Fed. Reg., Vol. 74, No. 249 (Dec. 30, 2009) (<http://airconsumer.ost.dot.gov/rules/Final%20Rule%20on%20Enhancing%20Airline%20Passenger%20Protections.pdf>); 14 C.F.R. Part 259 *et seq.* The stated purpose of the Regulations is to “mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers’ accountability to consumers.” 14 C.F.R. 259.1. The Tarmac Rules require many things of airports and air carriers, which include air carriers’ development and implementation of contingency plans for tarmac delays, air carriers’ postings to their contracts of carriage regarding these contingency plans, air carrier development of customer service plans and responding to passenger complaints, air carrier publication of delayed flight information, cooperation between airports and air carriers in regards to tarmac delays, and prohibitions on air carriers’ retroactive changes

to their contracts of carriage which would negatively impact passengers. United States of America Department of Transportation Office of Aviation Enforcement and Proceedings, *Answers to Frequently Asked Questions Concerning the Enforcement of the Final Rule on Enhancing Airline Passenger Protections*, <http://airconsumer.ost.dot.gov/rules/FAQ%20on%20Consumer%20Rule%20April%2028%202010.pdf> (April 28, 2010) (hereinafter *DOT Answers to Frequently Asked Questions*).

What led up to these new regulations were well publicized incidents of passengers being held on aircraft for hours. Delays in 1999 (notably the Northwest Airlines aircraft that were held on the ground in Detroit during a blizzard trapping passengers for seven hours on aircraft) led some air carriers to take voluntary action to reduce customer complaints. *See supra, Final Regulatory Evaluation*, at Executive Summary; *see also Feds Come to Aid of Stranded Passengers*, Associated Press, at MSNBC.msn.com/id34510274/NS/travel news. But in 2006 through 2007, more publicized delays occurred in which passengers were stranded for hours on aircraft at airport tarmacs. These publicized delays were due to aircraft diversion and weather problems (lightening storms, tornadoes, snow and ice), and caused passengers to sit on aircraft for up to eleven hours. *Feds Come to Aid of Stranded Passengers, supra; Department of Transportation Office of the Secretary Final Rule, Docket DOT-OST-207-00* (hereinafter “*Final Rule Commentary*”), RAN No. 2105-AD at 2.

State legislatures, which included Arizona, California, Florida, Indiana, Michigan, New Jersey, Pennsylvania, Rhode Island, Washington and most notably New York, also attempted to address these tarmac passenger delay issues by proposing or implementing passenger bills of rights. New York was the first state to attempt to implement such a bill; however, the Air

Transportation Association of America (ATA) challenged the ability of New York to regulate airlines in the case of *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 528 F. Supp.2d 62 (N.D.N.Y. 2007). The ATA argued this area was preempted by federal law under the Airline Deregulation Act of 1978. The district court of New York held that this area was not preempted because it did not relate to pricing, route or service; however, the Second Circuit in *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008), overturned the district court holding that New York's attempt to regulate tarmac delay issues was preempted under the Airline Deregulation Act.

Federal lawmakers also pursued the passage of federal legislation pertaining to passenger rights, which became effective in April of this year, and is codified at 14 C.F.R. 259 *et seq.* See *Senators Boxer and Snowe Praised DOT Action to Protect Passengers' Rights*. *U.S. Fed. News* 2009 WLNR 25806000 (Dec. 23, 2009); *Our View: The U.S. Department of Transportation's New Rules Governing Airline Delays are a Good First Step Toward a Comprehensive Passenger Bill of Rights*, 2009 WLNR 25872116 (Dec. 24, 2009).

II. **THE SPECIFICS OF THE TARMAC DELAY RULES**

The Tarmac Delay Rules apply to domestic air carriers (and their domestic and international operations) for scheduled air passenger service or public charter service involving aircraft with 30 seats or more. 14 C.F.R. § 259.2. Additionally, these regulations apply to medium hub and large hub airports. Some examples of such airports are: DFW, La Guardia, JFK, Will Rogers World Airport (Oklahoma City), Albuquerque International Sunport Airport, Huntsfield–Jackson Atlanta International Airport, and Logan International Airport. *DOT Answers to Frequently Asked Questions*, *supra* @ 3.

The Tarmac Delay Rules are designed to mitigate hardships for airline passengers, and to essentially prevent passengers from being held on an aircraft either before taking off or after landing with no opportunity to deplane the aircraft. 14 C.F.R. 259.1, 259.3. The guts of the Tarmac Delay Rules are contained in 14 C.F.R. 259.4, and are summarized as follows:

A. Section 259.4(a):

1. Adoption of Plan:

Each covered carrier shall adopt a Contingency Plan for Lengthy Tarmac Delays and shall adhere to its plan's terms.

B. Section 259.4(b):

1. Contents of Plan (Minimums):

(a) 3 Hour Mark:

(1) For domestic flights, assurance that the air carrier will not permit an aircraft to remain on the tarmac for more than three hours unless:

(i) The pilot-in-command determines there is a safety-related or security-related reason (e.g. weather, a directive from an appropriate government agency) why the aircraft cannot leave its position on the tarmac to deplane passengers; or

(ii) 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.

(2) For international flights that depart from or arrive at a U.S. airport, assurance that the air carrier will not permit an aircraft to remain on the tarmac for more than a set number of hours, as determined by the carrier and set out in its contingency plan, before allowing passengers to deplane, unless:

(i) 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

(ii) 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

(b) **2 Hour Mark:**

For all flights, assurance that the air carrier will provide adequate food and potable water no later than two hours after the aircraft leaves the gate or touches down if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such service.

(c) **All Flights:**

(1) For all flights, assurance of operable lavatory facilities, as well as adequate medical attention if needed, while the aircraft remains on the tarmac;

- (2) Assurance of sufficient resources to implement the plan; and
- (3) Assurance that the plan has been coordinated with airport authorities at all medium and large hub airports that the carrier serves, including medium and large hub diversion airports.

C. **Section 259.4(c):**

1. **Amendment of Plan:**

At any time, an air carrier may amend its Contingency Plan for Lengthy Tarmac Delays to decrease the time for aircraft to remain on the tarmac for domestic flights, international flights and for the trigger point for food and water.

D. **Section 259.4(d) - Retention of Records:**

Each air carrier that is required to adopt a Contingency Plan for Lengthy Tarmac Delays shall retain for two years the following information about any tarmac delay that lasts at least three hours.

1. The length of the delay;
2. The precise cause of the delay;
3. The action taken to minimize hardships for passengers.
4. Whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and
5. An explanation for any tarmac delay that exceeded 3 hours.

E. **Section 259.4(e) - Unfair and Deceptive Practice:**

An air carrier's failure to comply with this will be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 that is subject to enforcement action by the Department.

F. **Section 259.5 - Customer Service Plan Requirements.**

G. **Section 259.6 - Notice and Contract of Carriage.**

H. **Section 259.7 - Response to Customer Problems.**

III.

ADDITIONAL PROPOSED REGULATIONS

The Department of Transportation has also proposed additional consumer protections to be added to 14 CFR part 259 *et seq.*, which include the following:

1. Expand the regulations to require contingency plans to foreign airlines operating at U.S. airports.
2. Increase compensation for passengers involuntarily bumped from flights.
3. Require carriers to adopt contingency plans for small and non-hub airports.
4. Allow passengers to make and cancel reservations within 24 hours without penalty.
5. Require full and prominently displayed disclosure of baggage fees as well as refunds and expense reimbursement when bags are not delivered on time.
6. Require fair price advertising.
7. Prohibit price increases after a ticket is purchased.
8. Mandate timely notice of flight status changes.
9. Increase potential compensation to passengers involuntarily bumped from flights.

Department of Transportation Press Release, DOT 110-10, June 2, 2010, <http://www.dot.gov/affairs/2010/dot11010.html>.

IV.

TARMAC DELAY RULES IMPLICATIONS

The Tarmac Delay Rules have been in effect for approximately eight months. There has been strong reaction on the part of customer advocacy groups, the Department of Transportation, and the aviation industry, and differing views as to the appropriateness of some of the

Regulations' provisions and consequences of the Regulations. Compare Marks, Jenkins, *Summer 2010 Cancellations and the Five-Month Impact of the Three-Hour Tarmac Rule* (Nov. 18, 2010), http://www.tarmaclimits.com/Tarmac/Tarmac_Limits_files/MA%20AZ%20Summer%202010%20Cancellations%20%26%20Tarmac%20Rule%2018%20NOV%202010.pdf, and C. Manno, *The Unintended Consequences of the Passenger Bill of Rights*, May 24, 2010, *Ft. Worth Star-Telegram*, with U.S. Department of Trans., DOT 207-10, *No Tarmac Delays Longer Than Three Hours in October [2010]*, <http://www.dot.gov/affairs/2010/dot207.10.html> (Dec. 7, 2010). There is also confusion as to key aspects of these Regulations, such as whether the \$27,500 fine pertains to each passenger on the aircraft (i.e. number of occupied seats x \$27,500), or the delay incident itself. No fines have been issued under these new Regulations, and thus no clarity has been given as to the application of the fines to a delay incident.

This presentation will focus on some of the real life implementation of these Regulations from the air carrier and airport perspectives, and will outline some of the implications these Regulations have had on the airline and airport industries. For a copy of the presentation made at the Embry Riddle Symposium on January 6, 2011, please contact Embry Riddle.