



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

**Issued by the Department of Transportation
on the 15th day of September, 2017**

Frontier Airlines, Inc.

**Violations of 14 CFR Part 259 and
49 U.S.C. §§ 41712 and 42301**

Docket OST 2017-0001

Served September 15, 2017

CONSENT ORDER

This consent order concerns violations by Frontier Airlines, Inc. (Frontier) of 14 CFR 259.4 (the Department's tarmac delay rule), 49 U.S.C. § 41712 (prohibition against unfair and deceptive practices), and 49 U.S.C. § 42301 (requirement to adhere to a carrier's tarmac delay contingency plan). Frontier Airlines failed to adhere to the assurances in its contingency plan for lengthy tarmac delays for twelve domestic flights at Denver International Airport (DEN) on December 16, 17, and 18, 2016. Specifically, the carrier violated the Department's tarmac delay rule by failing 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 three hours for domestic flights before providing passengers an opportunity to deplane, and (2) would have sufficient resources to implement its plan.¹ This order directs Frontier Airlines to cease and desist from future similar violations of Part 259 and sections 41712 and 42301 and assesses Frontier Airlines \$1.5 million in civil penalties.²

I. Applicable Law

Pursuant to 49 U.S.C. § 42301(b) and (e), each covered U.S. carrier is required to develop a tarmac delay contingency plan for each U.S. airport it serves and to adhere to its respective plans. In addition, under 14 CFR 259.4, certificated and commuter air carriers that operate scheduled

¹ An "excessive tarmac delay" is defined as a tarmac delay of more than three hours for a domestic flight and more than four hours for an international flight. *See* 49 U.S.C. § 42301(i)(4).

² In addition to the flights listed in this order, there were two additional domestic departure flights that experienced tarmac delays in excess of three hours on December 16 and 17 at Denver International Airport. The Department has determined that these flights did not violate the tarmac delay rule because they began the process to return to the gate within three hours after the main aircraft door had closed in preparation for departure.

passenger service or public charter service 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 hub, medium hub, small hub, and non-hub U.S. airport at which they operate or market scheduled or public charter air service.

For domestic flights, which are at issue here, the rule requires covered U.S. carriers to provide assurances in their contingency plans that they will not permit an aircraft to remain on the tarmac for more than three 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.); or (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. For all covered flights delayed on the tarmac, carriers must provide adequate food and 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. Carriers must also ensure that lavatory facilities are operable and medical attention is provided, if needed, while the aircraft remains on the tarmac. In addition, carriers must ensure that they have sufficient resources to carry out their contingency plans.

On July 15, 2016, President Obama signed the FAA Extension, Safety, and Security Act of 2016 (2016 FAA Extension). Section 2308 of the 2016 FAA Extension amended 49 U.S.C. § 42301 by changing the way that excessive tarmac delays are measured in the case of departure delays for U.S. carriers. Under section 2308 of the 2016 FAA Extension, a tarmac delay begins “after the main aircraft door is closed in preparation for departure” and ends when a U.S. carrier “begin[s] to return the aircraft to a suitable disembarkation point.” Section 2308 of the 2016 FAA Extension also amended 49 U.S.C. § 42301(i)(4) by defining an “excessive tarmac delay” as a tarmac delay of more than three hours for a domestic flight and more than four hours for an international flight.

On November 22, 2016, the Department’s Office of Aviation Enforcement and Proceedings (Enforcement Office) issued an interim Enforcement Policy to implement the statutory changes to the tarmac delay rule pending formal rulemaking. The enforcement policy states that the Enforcement Office considers a departing flight to have begun the process of returning to a suitable disembarkation point when permission to do so is granted by the Federal Aviation Administration (FAA) control tower, airport authority, or other relevant authority directing the aircraft’s operations while it is on the tarmac. If the aircraft is in an area of the airport property that is under the carrier’s control, the Enforcement Office considers an aircraft to have begun the process of returning to a suitable disembarkation point when the pilot begins maneuvering the aircraft to the disembarkation point.³

An air carrier’s failure to comply with assurances required by section 42301 or 259.4 and as contained in its contingency plan for lengthy tarmac delays constitutes an unfair and deceptive practice within the meaning of 49 U.S.C. § 41712.

³ See *Enforcement Policy on Extended Tarmac Delays* (Nov. 22, 2016), available at <https://www.transportation.gov/sites/dot.gov/files/docs/Enforcement%20Policy%20on%20Extended%20Tarmac%20Delays.pdf>.

Pursuant to 49 U.S.C. § 46301, violations of 14 CFR Part 259 or 49 U.S.C. §§ 41712 and 42301 subject a carrier to civil penalties of up to \$32,140 per violation. Because the purpose of section 259.4 is to protect individual passengers, in the case of domestic flights, from being forced to remain on an aircraft for more than three hours without the opportunity to deplane, the Enforcement Office takes the position that a separate violation occurs 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.

II. December 16-18, 2016, Denver Lengthy Tarmac Delays

Frontier Airlines is an air carrier as defined by 49 U.S.C. § 40102(a)(2) that operates scheduled service into and out of DEN, a large hub airport, using at least one aircraft having a design seating capacity of more than 30 passenger seats. Frontier adopted a contingency plan for lengthy tarmac delays covering its scheduled operations at DEN, which stipulated that for the carrier's domestic flights, customers would have the opportunity to deplane before the tarmac delay exceeds three hours. The plan addressed the pilot in command's responsibility to begin conferring with controlling dispatcher for a status update at 90 minutes into the delay. At two hours and thirty minutes into the delay, the pilot in command must devise a plan to return to the gate to permit passengers to deplane prior to the three-hour mark. Frontier's plan states that, during an extended tarmac delay, the dispatcher will be the primary point of contact for the flight crew.

Although Frontier had a plan in place at the time of the event to address lengthy tarmac delays, the carrier's management of its Denver operations on December 16-18, 2016, was such that it did not adequately adhere to that plan. The Enforcement Office conducted an extensive investigation and determined that eleven arriving Frontier flights and one departing flight violated the Department's tarmac delay rule and warrant enforcement action.

A. DEN Operations at the Time of the Incident

At the time of the incident, DEN was Frontier's largest hub and the airport's third largest operating carrier. Denver International Airport, which is owned and operated by the City and County of Denver, has a total of six runways, one passenger terminal, and three concourses. All gates at DEN are operated under preferential use contracts by tenant carriers with the exception of eight common use gates which are owned and controlled by the airport. All gates in Concourse B and C are under a preferential use agreement by three other carriers. All other carriers operate from the A concourse. Frontier operates from 8 preferential-use gates in Concourse A, five of which can accommodate Frontier's largest aircraft. Frontier also maintains a crew and aircraft maintenance base at DEN. The eight common use gates in Concourse A are the primary gates used for international flights. However, when not being used for international flights, these gates are available to tenant carriers, free of charge, on a first-come basis, as needed, to accommodate irregular operations. Additionally, two gates in Concourse A under preferential use to another airline are frequently used by other carriers during irregular operations or when additional gate space is needed by tenant carriers.

Denver Airport Airside Operations (Airside Ops), through the ramp tower, controls all non-FAA related ground movements to and from the runways in the non-movement area of the airfield.

Additionally, with exception for one carrier, the ramp tower controls the ramp areas and gives pushback clearance for all carriers, including Frontier. The ramp tower coordinates with the carriers for any request for additional gates, remote deplaning, or other assistance if the carrier is experiencing irregular operations. Frontier is ultimately responsible for managing its operations, assigning aircraft to its preferential use gates, and ensuring it has adequate resources to operate its preferential use gates and deplane passengers within applicable timeframes.

B. Weather Impact

The Denver metro area was affected by Winter Storm Decima, a large west-to-east moving storm during the overnight hours of Friday, December 16, 2016 into the early morning hours of Saturday, December 17, causing heavy snow, ice, and extremely cold temperatures. Multiple weather forecasts initially predicted the storm's impact to be minor for Denver, with only 1-3 inches of snow predicted for the overnight hours of December 16. However, the storm unexpectedly developed into a larger and stronger event.

At 8:02 P.M.⁴ on December 16, light snow was observed at the airport. At 9:04 P.M., the National Weather Service issued a Winter Weather Advisory for the Denver Metropolitan Area until 8:00 A.M. December 17. The advisory indicated that snow would continue through the overnight hours and snow accumulation would be 3-5 inches. At 9:00 P.M., the airport initiated its full snow removal team. During the entire period of falling precipitation, Airside Ops continued to clear runways, taxiways, ramps areas, and deice pads to allow carriers to operate at their discretion.

At 9:27 P.M., heavy snow was reported at the airport and by 10:00 P.M., the observed snow fall rate was 1 to 1.5 inches an hour. At 10:11 P.M., the snow rate became too intense for carriers to keep up with deicing operations for departing flights and carriers began returning aircraft to gates. Between 10:30 P.M. and 1:00 am, heavy snow was reported at Denver with subfreezing temperatures. Between 1:00 A.M. and 8:00 A.M. December 17, light or moderate snow was reported at Denver with temperatures in single digits or below zero. The snow ceased falling at Denver around 10:00 A.M. December 17. In total, the airport received eight inches of recorded snow.

C. Arriving Flights

Frontier initially planned a normal operation for December 16, 17, 18, and did not anticipate any significant weather impact on its flights. However, once heavy snow began falling at DEN around 10:00 P.M., Frontier began to return departing aircraft to the gates because deicing operations could not keep up with the snow fall rate. The weather also caused several Frontier aircraft to experience mechanical issues while parked at the gate, rendering unusable the gates at which those aircraft were located. When this occurred, all of Frontier's priority gates became occupied. Nevertheless, Frontier continued to land its scheduled flights at Denver despite the lack of available gates and the increasing snow fall. This quickly led to gate saturation of Frontier's priority-use gates.

⁴ All times local (Mountain Standard Time)

During the overnight hours of December 16-17, Frontier initially had enough ground staff to accommodate its scheduled operations. However, as Frontier began returning departing aircraft to the gates, Frontier's ground staffing numbers inhibited the carrier's ability to clear aircraft from gates in a timely manner to accommodate arriving flights. In addition, Frontier could have mitigated or prevented lengthy tarmac delays if it had accepted services offered by the airport.

Moreover, in one instance, when a Frontier gate became available, the carrier made an operational decision to bring an empty aircraft to a gate in order to operate a delayed departure flight, whose passengers were in the terminal, instead of deplaning one of its long-delayed arrival flights which was experiencing a tarmac delay. Frontier's operational decision to continue to operate flights in and out of DEN in an attempt to mitigate the system-wide impact on its operations was also a contributing factor to the tarmac delays.

The Enforcement Office's investigation determined that eleven arriving flights experienced excessive tarmac delays in violation of the tarmac delay rule.

D. Departing Flights

Three departing flights from DEN experienced mechanical issues while on the deice pad in preparation for departure. With regard to two of those flights, the carrier quickly determined that the mechanical issue could not be resolved on the deice pad and initiated gate returns. Both flights received clearance from the FAA to return to a gate prior to the three-hour mark. Although the flights did not ultimately deplane within three hours, the flights began the process to return within three hours. Pursuant to the 2016 FAA Extension Act and the Department's November 2016 Enforcement Policy, we will not take action against Frontier for the delays on these flights.

However, one departing flight encountered a maintenance issue after pushing back from the gate and again while on the deice pad. The flight crew in conjunction with Frontier maintenance control attempted to resolve the maintenance issue and depart the flight. The flight crew, unable to remedy the issue, did not ultimately make the decision to return to the gate until after the three-hour mark. The carrier did not request clearance from the FAA to return to the gate until 4 hours and 14 minutes into the delay. Because this flight did not begin the process to return to the gate prior to three hours, it violated the tarmac delay rule.

E. Conclusion

In conclusion, Frontier failed to adequately adjust its operations in response to the snowstorm and resulting gate congestion at DEN. Frontier failed to properly assess the gate situation during the height of the snowstorm in order to take preventative measures to avoid excessive tarmac delays. Even after the snowstorm passed, Frontier continued to experience gate availability issues and ground staff shortage. Frontier failed to have adequate resources at DEN to accommodate the additional aircraft on the ground at the airport. Moreover, Frontier failed to delay, divert, or cancel a sufficient number of flights scheduled to arrive at DEN, even though it was aware of the conditions at DEN, to allow the carrier to recover and reduce the probability of flights experiencing long tarmac delays. Frontier could have mitigated or prevented lengthy tarmac delays if it had

accepted services offered by the airport. Finally, Frontier's management of its gates directly contributed to excessive tarmac delays.

Although the Enforcement Office recognizes that weather conditions changed quickly from the initial forecast, the purpose of the tarmac delay rule is to require carriers to plan for various contingencies including weather-related events. The Enforcement Office does not see the situation at DEN on December 16-18 as so unique that it went beyond the planning capabilities of the carrier, particularly as Denver is Frontier's hub and Frontier is the third largest carrier operating out of the airport. The carrier failed to effectively manage arriving and departing flights and the assigning of aircraft to gates in order to deplane passengers in a timely manner. These actions caused a significant number of passengers on 12 aircraft at DEN to remain on the tarmac in excess of three hours without the opportunity to deplane.

III. Response of Frontier Airlines

In response, Frontier states that the magnitude of the snowstorm was much more severe and intense than predicted. Frontier further asserts that it was fully staffed at the time for the planned schedule of eight gates and indeed, during and in the aftermath of the storm, increased its staffing by assigning additional personnel from its headquarters to the airport to assist its airport personnel and passengers affected by the delayed and cancelled flights resulting from the snowstorm. Frontier asserts that, in addition, in order to mitigate the delays during this severe snowstorm event, Frontier requested from the airport at the outset of the snowstorm and secured access to three airport-controlled common use gates, which it utilized on an "ad hoc" basis during the event to assist in deplaning. Frontier asserts that its third-party ground service provider also extended the duty periods of its ramp workers by two hours so that ramp workers stayed on duty for a full twelve hours through the height of the snowstorm. Frontier states that it spent nearly \$1.2 million in vouchers and cash reimbursements to compensate passengers affected by delays caused by the snowstorm. Frontier believes that the proper metric for computing civil penalties should be per flight, not per passenger. Finally, Frontier believes that the Enforcement Office should apply the November 22, 2016, interim Enforcement Policy to both departing and arriving flights.

IV. Decision

The Enforcement Office views seriously Frontier Airlines' violations of 14 CFR 259.4 and 49 U.S.C. §§ 41712 and 42301. 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, and without admitting or denying the violations described above, Frontier Airlines consents to the issuance of this order to cease and desist from future violations of 14 CFR 259.4 and 49 U.S.C. §§ 41712 and 42301 and to the assessment of \$1.5 million in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301, subject to the credits described below. 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 against future similar unlawful practices by Frontier Airlines and other carriers.

This order is issued under the authority contained 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 Frontier Airlines, Inc. violated 14 CFR 259.4 and 49 U.S.C. § 42301 by failing to adhere to the assurance in its contingency plan for lengthy tarmac delays that the carrier will not permit a domestic flight to remain on the tarmac for more than three hours without providing passengers an opportunity to deplane and for failing to have adequate resources to implement its plan;
3. We find that by engaging in the conduct and violations described in ordering paragraph 2, Frontier Airlines, Inc. engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
4. We order Frontier Airlines, Inc. and its successors and assigns to cease and desist from further violations of 14 CFR 259.4 and 49 U.S.C. §§ 41712 and 42301;
5. We assess Frontier Airlines, Inc. \$1.5 million in compromise of civil penalties that might otherwise be assessed for the violations described above;
 - a. \$300,000 of the assessed penalty shall be due and payable within 60 days of the issuance of the order;
 - b. \$300,000 of the assessed penalty shall be due and payable on January 15, 2018; and
 - c. \$900,000 of the assessed penalty shall be credited to Frontier Airlines for compensation provided to passengers on the affected flights described in this order and also passengers on other delayed flights;
6. Within 15 days of the issuance of the order, Frontier Airlines, Inc. shall provide the Department with supporting documentation for the \$900,000 offsets listed in subparagraph 5(c) above, and the accompanying accounting verifying the offsets. The documentation must be accompanied by a sworn statement by a senior carrier official attesting that the description, documentation, and accounting are true and complete to the best of that official's knowledge.
7. If Frontier Airlines, Inc., fails to provide adequate documentation and accounting verifying the appropriate expenditures of the \$900,000 offsets listed in subparagraph 5(c) above, the difference between \$900,000 and the amount of compensation adequately documented shall become due and payable within sixty (60) days of the issuance of the order; and
8. We order Frontier Airlines, Inc. to pay the civil penalties as described in subparagraph 5(a) and (b), 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 Frontier Airlines 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 WORKIE
Assistant General Counsel for
Aviation Enforcement and Proceedings

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