



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

Issued by the Department of Transportation
on the 24th day of November 2009

Continental Airlines, Inc.

Violation of 49 U.S.C. § 41712

Docket OST 2009-0001

Served November 24, 2009

CONSENT ORDER

This consent order is the result of an investigation by the Office of Aviation Enforcement and Proceedings (Enforcement Office) of the August 8, 2009, tarmac delay incident at Rochester International Airport involving Continental Express flight 2816, operated by ExpressJet Airlines, Inc. (ExpressJet) in air transportation provided to the public by Continental Airlines, Inc. (Continental). The ExpressJet operated flight was diverted to Rochester because weather precluded landing at the destination airport—Minneapolis/St. Paul International Airport. The investigation revealed Continental's procedures pertaining to lengthy ground delays were not followed on that flight in violation of 49 U.S.C. § 41712. Continental is an air carrier as defined by 49 U.S.C. § 40102(a)(2),¹ which subjects it to the prohibitions against unfair and deceptive practices in air transportation contained in 49 U.S.C. § 41712. The order directs Continental to cease and desist from future similar violations of section 41712 and assesses the carrier \$50,000 in civil penalties.

Continental has adopted and published Customer First commitments which contain twelve specific voluntary service commitments to improve passenger comfort and convenience. These Customer First commitments, which apply not only to flights operated by Continental but also to flights operated on behalf of Continental by ExpressJet,² are published by Continental and are accessible to consumers on its website at www.continental.com. Continental has also committed to ensuring ExpressJet, in its capacity as a Continental Express carrier, has comparable plans and policies to Continental's Customer First commitments, and ExpressJet has agreed under the terms of its agreement with Continental to adhere to the plans and policies set out in Continental's Customer First commitments.

¹ 49 U.S.C. § 40102(a)(2) defines an air carrier as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."

² Continental obtained an agreement when it entered into a code-share arrangement with ExpressJet that ExpressJet would adhere to the plans and policies set out in Continental's Customer First commitments.

Continental's eighth Customer First commitment addresses the essential needs of passengers onboard an aircraft that is on the ground for an extended period of time without access to airport terminal facilities and, separately, the actions to be taken when a flight diverts to an offline city not served by Continental, such as Rochester. It states, among other things, that if a ground delay approaches three hours, Continental will determine if departure is expected within a reasonable time under the particular circumstances of the flight. It explains that if departure is not expected within a reasonable time, Continental will take action as soon as practicable based upon local circumstances to deplane passengers who wish to deplane the aircraft, or return the aircraft to an available gate. Further, Continental's eleventh Customer First commitment states that its domestic code-share partners all have or are committed to providing comparable customer service plans and policies.

The Enforcement Office's investigation of the tarmac delay incident found that Continental made certain commitments regarding its handling of lengthy tarmac delays to its passengers which were not followed with respect to flight 2816, operated by ExpressJet. Flight 2816 was diverted to Rochester International Airport at approximately 12:28 a.m. on August 8, 2009. The passengers on that flight did not start the deplaning process until approximately 6:05 a.m. During this time period, there were steps that should have been taken by ExpressJet, such as escalating this matter to senior management that likely would have resulted in the passengers being deplaned earlier. We consider these failures, which are more fully described in the Department's consent order with ExpressJet issued today,³ to also have been failures by Continental, which purchased the entire capacity of the flight and marketed the service, in fulfilling its Customer First commitments described above. The Department has determined this was an unfair and deceptive practice in violation of 49 U.S.C. § 41712.

In mitigation, Continental asserts, consistent with the statements by the Department at the conclusion of the preliminary phase of its investigation, that the ExpressJet flight crew "was not at fault" and the "local representative of Mesaba Airlines improperly refused the requests of the captain to let her passengers off the plane" because "the representative incorrectly said that the airport was closed to passengers for security reasons." Continental believes based on the Department's preliminary findings and its own records, that these ExpressJet plans and policies were effective on August 8, 2009, the date of the flight operated by ExpressJet, and Continental believes they were followed by ExpressJet, except ExpressJet failed to notify Continental under those procedures three hours after the tarmac delay began so Continental could involve its senior management to try to help ExpressJet in ending the tarmac delay at the earliest possible opportunity consistent with the best interests of safety and security. Continental states that Customer First commitments are voluntary and Continental believes they are not subject to the Department's enforcement authority. Continental's contract of carriage with the customer are the rules that constitute the conditions of carriage under which Continental agrees to provide air transportation. In fulfillment of Continental's Customer First commitments, Continental states it had already ensured ExpressJet adopted plans and policies comparable to Continental's Customer First commitments for all Continental Express flights operated by ExpressJet.

³ ExpressJet Airlines, Violation of 49 U.S.C. § 41712, Consent Order 2009-11-18, issued November 24, 2009, which also assesses that carrier a civil penalty of \$50,000. The total of the civil penalty amounts assessed for the Continental and ExpressJet violations in connection with flight 2816 is \$100,000. *See also* Mesaba Airlines, Violation of 49 U.S.C. § 41712, Consent Order 2009-11-16, issued November 24, 2009.

Continental strongly disagrees with enforcement action against Continental under such circumstances, but has decided in the interest of compromise and settlement to avoid the substantial burdens of litigation by agreeing to the issuance of this consent order for this flight. In addition, Continental states that it has strongly reinforced its Customer First commitments under Continental's agreements with ExpressJet and other Continental Express carriers and implemented additional measures to ensure lengthy tarmac delays are handled in a manner that is consistent with safety, security and these commitments. Continental states that it has provided a full refund to each passenger on flight 2816 for the entire ticket (not limited to the diverted flight) and offered each passenger additional compensation to tangibly acknowledge their time and discomfort.

The Enforcement Office has carefully considered all of the information available to it, including the information provided by Continental, but continues to believe that enforcement action is warranted against the carrier. In this regard and in order to avoid litigation, the Enforcement Office and Continental have reached a settlement in this matter. While neither admitting nor denying the above allegations or the Department's findings, Continental consents to the issuance of this consent order in order to avoid litigation. Under this order, the carrier is assessed \$50,000 in compromise of potential penalties otherwise assessable under the provisions of 49 U.S.C. § 46301 subject to the offset of up to \$25,000 of that amount, provided Continental meets the requirements set forth in the ordering paragraphs below. The Enforcement Office believes that the assessment of a civil penalty of \$50,000 is appropriate in view of the nature and extent of the violations in question, serves the public interest, and establishes a deterrent to future similar unlawful practices by Continental and other air carriers. However, this action does not alter the inherent responsibility and lawful prerogatives of any air carrier to make operational decisions, either in the air or on the ground, based on the best interests of the safety and security of its passengers, crew and aircraft.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.15.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of the order as being in the public interest;
2. We find that Continental engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712, as described above, by failing to ensure that ExpressJet followed certain published procedures in Continental's Customer First commitments for Continental Express flight 2816 operated by ExpressJet on August 8, 2009, during which passengers remained in the aircraft cabin beyond a reasonable period of time under those procedures without being afforded the opportunity to deplane;
3. We order Continental, its successors and assignees to cease and desist from further similar violations of 49 U.S.C. § 41712 for any flight operated by Continental or a Continental Express carrier, including ExpressJet;
4. We assess Continental a compromise civil penalty of \$50,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraph 2,

above, which amount shall be due and payable subject to the payment provisions set forth in subparagraph 4(a) through (b) below:

- (a) \$25,000 shall be due and payable within 30 days after the service date of this order; and
 - (b) up to \$25,000 shall be credited to Continental for expenditures that will be made within 18 months after the service date of this Order to implement enhancements to lengthy tarmac delay procedures and/or develop training materials and/or train its personnel on lengthy tarmac delay procedures as may be adopted by the carrier;
5. To the extent Continental fails to provide adequate documentation, including a sworn declaration as to the accuracy of the documentation by a senior career official, verifying the appropriate expenditures of the potential \$25,000 offset set forth in subparagraph 4 (b), the Office of Aviation Enforcement and Proceedings shall notify Continental of the inadequacies and Continental shall have 60 days to cure the inadequacies or pay the remaining portion of the offset; and
6. Payment shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury in accordance with the instructions contained in the Attachment to this order. Failure to pay any portion of the penalty as ordered shall subject Continental to the assessment of interest, penalty, and collection charges under the Debt Collection Act and possible further enforcement action.

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 initiative.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

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