



**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

Mesaba Airlines

Violations of 49 U.S.C. § 41712

Docket OST 2009-0001

Served November 24, 2009

CONSENT ORDER

This consent order constitutes a compromise settlement of alleged violations by Mesaba Airlines (Mesaba) of the statutory prohibition against unfair and deceptive practices, 49 U.S.C. § 41712. The order directs Mesaba to cease and desist from future similar violations of section 41712 and assesses the carrier \$75,000 in civil penalties.

Mesaba is an air carrier as defined by 49 U.S.C. § 40102(a)(2),¹ which subjects the carrier to the prohibitions against unfair and deceptive practices in air transportation contained in 49 U.S.C. § 41712, when the carrier is engaged in air transportation. An investigation by the Department's Office of Aviation Enforcement and Proceedings (Enforcement Office) revealed that Continental flight 2816, operated by ExpressJet Airlines d/b/a Continental Express, was scheduled to operate between Houston Intercontinental Airport (IAH) and Minneapolis-St. Paul International Airport (MSP) on August 7, 2009. At approximately 12:28 a.m., Continental Express flight 2816 diverted to Rochester International Airport (RST) in Rochester, MN due to bad weather at MSP. Because neither Continental nor ExpressJet serves Rochester, prior to diverting to RST, ExpressJet contacted Mesaba airport station personnel at RST to ask if Mesaba would assist ExpressJet in connection with this unexpected diversion of the ExpressJet flight.²

Shortly after flight 2816's arrival at RST (between 12:30 a.m. and 1:30 a.m.), the captain of flight 2816 contacted a Mesaba station agent at RST to ask whether the passengers could be deplaned into the airport terminal if the delay became extensive. At that time, the airport was closed and there were no Transportation Security Administration (TSA) personnel at the airport.

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 Among the services that carriers typically provide for other carriers in these types of diversion situations is assistance with deplaning, arranging local hotel accommodations, ground transportation, and refueling.

However, under certain circumstances³, TSA allows passengers to be deplaned into a sterile area and re-boarded without additional screening as long as a secure area is maintained at the airport and the passengers do not exit the secure area.⁴ Although Mesaba's station manager at RST, who was present at the airport when flight 2816 first arrived at RST and again after approximately 2:30 a.m., was familiar with the TSA policy, the Mesaba station agent was not aware that deplaning into a closed terminal was permitted and informed the captain of ExpressJet flight 2816 that the passengers would not be able to deplane because the airport was closed and no TSA representatives were present at the airport. At approximately 2:00 a.m., the first officer of flight 2816 contacted the Mesaba station agent at RST and asked whether they could deplane the passengers into the airport terminal. The same Mesaba station agent stated that passengers would not be allowed to remain in the terminal, incorrectly asserting that the terminal was closed to passengers because TSA representatives were not present in the terminal at the time. Later (at approximately 3:15 a.m.), the captain of flight 2816 again asked the same Mesaba station agent whether they could deplane the passengers into the terminal. Then, at 4:23 a.m., ExpressJet's dispatcher contacted the same Mesaba station agent again to inquire whether the passengers could be deplaned into the terminal. The Mesaba station agent again stated that the airport was closed and passengers could not be deplaned into a closed airport.

The Enforcement Office believes that the Mesaba station agent's repeated conveyance of incorrect information was a significant cause of the 47 passengers remaining onboard flight 2816 and not deplaning into the secure holding area in the terminal, where passengers could move around and access vending machines and restrooms. The Enforcement Office regards the misinformation provided by the Mesaba station agent as demonstrating an indifference to the passengers and amounting to an unfair and deceptive practice in violation of 49 U.S.C. § 41712.⁵

In mitigation, Mesaba contends that it did not violate 49 U.S.C. § 41712 and states that the decision whether and when to deplane flight 2816 passengers, both as a matter of fact and under the applicable aviation statutes and regulations, was entirely the responsibility of and within the control of ExpressJet, the operator of the flight. Mesaba denies that it was engaging in air transportation⁶ or acting in any capacity as an air carrier in connection with this incident, since its only role was to provide voluntary ground handling assistance to ExpressJet during that air carrier's diversion of its flight to Rochester. Mesaba explains that, although its personnel were scheduled to end their working day at 11:00 p.m. on the night of the diversion, Mesaba

3 TSA permits passengers to deplane into the secure area of an airport without TSA presence as long as the secure area is maintained pursuant to the requirements of the airport's Airport Security Plan and the operating carrier's Aircraft Operator Standard Security Procedures.

4 This procedure was distributed nationally to all TSA Federal Security Directors on June 20, 2008. TSA personnel at RST were aware of these procedures and communicated them to operators at the airport.

5 Separate enforcement action is being taken against ExpressJet Airlines and Continental Airlines regarding their significant roles in this incident. ExpressJet Airlines, Violation of 49 U.S.C. § 41712, Consent Order 2009-11-18, issued November 24, 2009; Continental Airlines, Violation of 49 U.S.C. § 41712, Consent Order 2009-11-17, issued November 24, 2009. The total amount of civil penalty assessed Continental/ExpressJet for their roles in connection with flight 2816 is \$100,000.

6 " 'Air transportation' is the transportation of passengers or property by air as a common carrier between two places in the United States or between a place in the United States and a place outside of the United States or the transportation of mail by air. A 'common carrier' is a person or other entity that, for compensation or hire, holds out and/or provides to the public transportation by air between two points." See, DOT Order 2009-10-11, at 2.

voluntarily agreed to provide ground handling assistance to ExpressJet in connection with ExpressJet's diversion of flight 2816 to RST. Mesaba states that ExpressJet was the aircraft operator, and under the applicable Federal Aviation Regulations⁷, ExpressJet had the authority over its aircraft. Mesaba states that the decision whether or not to deplane was entirely ExpressJet's, not Mesaba's. Mesaba further states that it is standard practice in the industry, consistent with the Federal Aviation Regulations, that ground handlers do not take direction from the pilot in command alone (except in the event the pilot in command declares an emergency), but rather ground handlers follow the joint instruction of the airline dispatcher and the pilot in command⁸. According to Mesaba, the pilot and the dispatcher were not in agreement on whether the passengers should be deplaned, and Mesaba never received a clear and unambiguous instruction from ExpressJet to deplane the passengers, until 5:45 a.m..

Although a Mesaba station agent incorrectly told ExpressJet that the aircraft could not deplane without the passengers leaving the airport, Mesaba asserts that the station agent's statements were not the proximate cause of ExpressJet's failure to deplane its passengers. Mesaba argues that its RST station manager (the agent's supervisor) told ExpressJet's dispatcher⁹ that ExpressJet could deplane its passengers, hours before ExpressJet's dispatcher made a clear request to deplane. Furthermore, Mesaba points out that recorded evidence demonstrates that both the ExpressJet's dispatcher and the Captain stated that the station agent's information was incorrect and despite this ExpressJet never attempted to correct the station agent's misunderstanding, never asked to speak to the station agent's supervisor (who was at the airport), and never attempted to contact the airport or TSA, both of which have 24-hour contact numbers.

According to Mesaba, the evidence establishes that, throughout the night, ExpressJet dispatchers intended to continue the flight to Minneapolis and wanted the aircraft to be able to depart promptly if the weather-window cleared. For example, Mesaba points out that when the Mesaba station manager unambiguously asked the ExpressJet dispatcher in a recorded conversation at 4:44 a.m. whether ExpressJet wanted the passengers deplaned, the dispatcher rejected this offer and stated his intention to try to complete the flight. Similarly, Mesaba states that the evidence demonstrates there was an ongoing argument between ExpressJet dispatchers and the ExpressJet crew concerning whether the flight should be cancelled, until approximately 5:45 a.m., when ExpressJet dispatchers finally determined that the flight crew would exceed their duty time limitations. Mesaba contends that ExpressJet's acts and omissions demonstrate an indifference to its own passengers and that ExpressJet should not, as a matter of sound aviation policy, be

7 14 C.F.R. 121.533(c) states that "[T]he aircraft dispatcher is responsible for ... (3) Cancelling... a flight, if in his opinion or the opinion of the pilot in command, the flight cannot operate or continue to operate safely as planned or released." FAA Advisory Circular 8900.1, Volume 3, Chapter 25, Paragraph 3-1921 provides that "Part 121, §§ 121.533 through 121.537 require that Part 121 operators exercise operational control over all common carriage commercial and air transportation flights they conduct." The term "operational control" means "the exercise of authority over initiating, conducting or terminating a flight." 14 CFR Part 1.

8 See footnote 7. Mesaba asserts that under the Federal Aviation Regulations, 14 CFR 121.533, the airline's dispatcher and the Captain are jointly responsible for cancelling a flight and that Mesaba never received an instruction from ExpressJet's dispatcher and the Captain to deplane the aircraft.

9 Mesaba's station manager submitted to the Department a sworn declaration attesting that he told ExpressJet dispatch personnel at 3:15 a.m. that ExpressJet could deplane into the airport.

permitted to shift the responsibility for its operational decisions to a volunteer third party ground handler.¹⁰

Mesaba maintains that under no circumstances could the incident constitute a violation by Mesaba of section 41712. Section 41712 is limited to “an unfair or deceptive practice ... in air transportation.” The term “air transportation” is expressly defined in the statute to mean “interstate air transportation...by aircraft.” And “interstate air transportation” is defined, in turn, to mean “the transportation of passengers ...by aircraft as a common carrier for compensation...” Mesaba asserts that it never provided “air transportation” at any time during the incident. According to Mesaba, the only action it engaged in during the incident was routine ground handling assistance at Rochester. Mesaba states that at no point during the incident did Mesaba undertake any action to “transport[] ... passengers ... by aircraft as a common carrier for compensation.”

Further, Mesaba maintains that it was not acting as an “air carrier” during the Rochester incident. That is critical, according to Mesaba, because section 41712 prohibits unfair or deceptive practices only when engaged in by, among others, an “air carrier.” But, Mesaba points out the definition of “air carrier” under the statute is a citizen “undertaking by any means, directly or indirectly, to provide air transportation.” Mesaba asserts that although Mesaba happens to hold an air carrier certificate, it was not “undertaking ... to provide air transportation” during the incident in Rochester. Mesaba contends that the only role Mesaba played during this incident was that of a voluntary ground handler. The functions Mesaba performed, according to Mesaba, were identical to functions performed by any other ground handling company—which, by definition, does not provide “air transportation” and over which the Department has no jurisdiction under section 41712. Mesaba asserts that only ExpressJet was undertaking air transportation by aircraft with respect to the RST incident. Consequently, Mesaba’s position is that enforcement action is not warranted and that the Department has no jurisdiction under section 41712 to take action against Mesaba.

Mesaba also maintains that it did not engage in an unfair or deceptive practice because the evidence shows that ExpressJet’s crew and dispatchers were not misled or deceived by any statement made by a Mesaba representative, since they clearly knew that ExpressJet’s passengers could be deplaned and failed to act on that knowledge. Finally, Mesaba states that although the station agent’s statements were incorrect, there was no intent to deceive or act unfairly because the station agent believed, based on the station agent’s recent prior experience at another airport, that the airport could not be secure in the absence of TSA personnel.

The Enforcement Office has carefully considered all of the information available to it, including the information and mitigation provided by Mesaba. We disagree with many of Mesaba’s contentions, particularly that its actions did not constitute a violation of 49 U.S.C. § 41712 and its claims that it was not acting as an “air carrier” during the Rochester incident. Mesaba is a certificated air carrier and we contend that the functions it took on at RST for ExpressJet when performed by an air carrier are air carrier functions. Moreover, we believe those functions are a part of providing air transportation. We also wish to make clear that it is not necessary for the actions of the air carrier to have been intentional for the air carrier to be found to have engaged

¹⁰ To support this Mesaba points to *In the Matter of: USAIR, Inc.*, FAA Order No. 92-70, December 17, 1992: “an air carrier’s responsibility for safety is not delegable to a contractor....The captain should not have relied on the pushback operator’s response...”

in an unfair and deceptive practice. Intentional violations may be subject to criminal penalties. Further, we contend that Mesaba's attempt to rationalize its failure to provide timely deplaning assistance under the circumstances by citing Federal Aviation Administration (FAA) regulations is misplaced. In this regard, it is clear to the Enforcement Office that the Mesaba station agent's understanding as to whether the passengers initially could deplane was not based on the FAR provisions cited by Mesaba and we contend that at least until 4:44 a.m. there is no evidence of any "ongoing argument" between the ExpressJet pilot and dispatcher that had any bearing on whether the passengers were deplaned. At any rate, based on the Enforcement Office's review of the applicable Federal Aviation Regulations and discussions with FAA staff, while the decision for an air carrier to take off or cancel a flight is a joint dispatcher/pilot decision, no FAA requirement prohibits a pilot from solely deciding to deplane his or her aircraft's passengers. In this instance, the Enforcement Office contends that the flight crew asked to have the passengers deplaned before there was any "ongoing argument."

The Enforcement Office believes that enforcement action is warranted against Mesaba. Mesaba states that, although it believes enforcement action is not warranted, it has agreed to settle this matter without admitting to a violation of section 41712 to avoid the burden and expense of litigation and because it believes that the interests of both Mesaba and the Department are better served through settlement of this matter. Thus, in order to avoid litigation, the Enforcement Office and Mesaba have reached a settlement in this matter in which Mesaba, while not admitting the above allegations, accepts the findings and conclusions stated herein. Under this order, Mesaba is assessed \$75,000 in compromise of potential penalties otherwise assessable under the provisions of 49 U.S.C. § 46301. Of this amount, one-half shall be due and payable within 30 days after the service date of this order, and the remaining one-half of the assessed penalty shall be credited for expenditures that will be made within 18 months after the service date of this order, to develop training materials and/or train its personnel on tarmac delay procedures. The Enforcement Office believes that this compromise assessment of a civil penalty is appropriate in view of the nature of the violations in question, serves the public interest, and establishes a deterrent to future similar unlawful practices by Mesaba and other air carriers.

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 Mesaba Airlines engaged in an unfair and deceptive practice in violation of 49 U.S.C. 41712, as described above, by being a significant cause of the passengers on board ExpressJet flight 2816 remaining in the cabin for a lengthy period of time;
3. We order Mesaba Airlines and its successors to cease and desist from further similar violations of 49 U.S.C. § 41712;
4. We assess Mesaba Airlines a compromise civil penalty of \$75,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraph 2, above, subject to the following payment schedule:
 - (a) \$37,500 shall be due and payable within 30 days after the service date of this order;

(b) up to \$37,500 shall be credited to Mesaba for expenditures that will be made within 18 months after the service date of this order to develop training materials and/or train its personnel on tarmac delay procedures;

5. To the extent Mesaba Airlines fails to provide adequate documentation, including a sworn declaration as to the accuracy of the documentation by a senior carrier official, verifying the appropriate expenditures of the potential \$37,500 offset, the Office of Aviation Enforcement and Proceedings shall notify Mesaba of the inadequacies and Mesaba 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 Mesaba Airlines, to the assessment of interest, penalty, and collection charges under the Debt Collection Act.

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

(SEAL)

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