



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

Issued by the Department of Transportation
on the 10th day of July, 2020

**Concesionaria Vuela Compañía de Aviación,
S.A.P.I. de C.V.**

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

Docket DOT-OST-2020-0001

Served July 10, 2020

CONSENT ORDER

This consent order concerns violations by Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. d/b/a Volaris (Volaris) of 14 CFR Part 259 and 49 U.S.C. § 41712. Specifically, Volaris failed to adhere to the assurances in its contingency plan for lengthy tarmac delays regarding the deplaning of passengers and provision of adequate food. This order directs Volaris to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and assesses the carrier \$70,000 in civil penalties.

Applicable Law

Pursuant to section 259.4(a) 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. For international flights, the rule requires covered carriers to provide assurance that they will not permit an aircraft to remain on the tarmac for more than four hours without providing passengers an opportunity to deplane, with the following exceptions: (1) where 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 (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. Additionally, section 259.4(b)(3) requires covered carriers 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. Further, section 259.4(b)(7) requires covered carrier to have sufficient resources to implement its contingency plan. A carrier's failure to adhere to the assurances in its contingency plan constitutes violations of 14 CFR 259.4(a) and a prohibition against unfair and deceptive practices in 49 U.S.C. § 41712.

The FAA Extension, Safety, and Security Act of 2016 (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 Consumer Protection (OACP)¹ issued an interim Enforcement Policy to implement the statutory changes to the tarmac delay rule pending rulemaking. The enforcement policy states that the OACP 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 OACP 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.²

Nevertheless, Volaris' contingency plan for lengthy tarmac delays stated: "We will not permit our 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 Air traffic control advises our pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations." In addition, Volaris' plan stated: "Where there are delays at U.S. airports, we will provide adequate food and potable 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 considerations preclude such service."

Because the purpose of section 259.4 is to protect individual passengers on international flights from being forced to remain on the aircraft for more than four hours without being provided the opportunity to deplane, the OACP takes the position that a separate violation occurs for each

¹ The Office of Aviation Consumer Protection was formerly known as the Office of Aviation Enforcement and Proceedings.

² See Enforcement Policy on Extended Tarmac Delays (Nov. 22, 2016), available at, www.transportation.gov/airconsumer/enforcement-policy-extended-tarmac-delays.

passenger who is forced to remain on board an aircraft for longer than the set amount of time without the opportunity to deplane.

Facts and Conclusions

Volaris is a foreign air carrier as defined by 49 U.S.C. § 40102(a)(21)³ that operates scheduled passenger service at John F. Kennedy International Airport (JFK), a large hub airport, and uses at least one aircraft having a design capacity of more than 30 passenger seats. Volaris has adopted a contingency plan for lengthy tarmac delays covering its operations at all U.S. airports, including diversion airports.

An investigation by the OACP revealed that on September 13, 2017, Volaris Flight 881, carrying 92 passengers from JFK to Mexico City International Airport (MEX), experienced a tarmac delay of over four hours prior to departure from JFK. After leaving the gate, the Captain of Flight 881 requested and received permission to taxi to a remote hardstand in order to refuel prior to departure. Pursuant to its internal safety rules, Volaris opened the aircraft door and attached mobile stairs to the aircraft while it was parked and being refueled. Passengers on Flight 881 were not provided an opportunity to deplane during the entirety of the delay because Volaris believed the flight would depart within four hours. When Flight 881 eventually departed from JFK, passengers had been on board the aircraft without an opportunity to deplane for four hours and 21 minutes. In addition, Volaris did not provide food to passengers on Flight 881 during the entirety of the tarmac delay.

Volaris did not adhere to the terms of its contingency plan and therefore violated 14 CFR 259.4 and 49 U.S.C. § 41712 when it failed to provide passengers on board Flight 881 an opportunity to deplane before the tarmac delay exceeded four hours and when it failed to provide adequate food to passengers on board Flight 881 during the tarmac delay.

Response

In response, Volaris states that it takes very seriously its responsibility to comply with all of the Department's requirements, including the tarmac delay rule. Volaris explains that a series of events outside of its control combined to cause the tarmac delay of Flight 881. Volaris asserts that JFK was highly congested and Flight 881 had been taxiing for approximately 15 minutes when it was informed by ATC that (i) the flight was being re-routed due to a thunderstorm along its original flight path; (ii) the flight had to taxi to the opposite end of the airfield because JFK was changing runways due to a wind shift; and (iii) the flight needed to take a circuitous taxi route around the airport in order to avoid an active runway. Volaris states that these changes required Flight 881 to refuel in order to safely complete its flight. Volaris states that ATC cleared Flight 881 to return to the terminal; however, the terminal at which Volaris operates did not have a gate available, and Flight 881 was assigned to a hardstand. Volaris explains that refueling Flight 881 took longer than expected due to: (i) a lack of contracted ground personnel to take the necessary safety measures in

³ 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."

preparation for refueling⁴; (ii) thunderstorms over JFK that suspended ground operations and hindered airfield movement; (iii) the refueling contractor dispatched the incorrect truck necessitating the dispatch of a second truck; and (iv) airfield congestion. Although Flight 881 began taxiing for departure immediately after refueling, thunderstorms over and around JFK caused continued airfield delays. Volaris asserts that this series of events and conditions combined to prevent Flight 881 from reaching its assigned runway and departing within four hours of originally closing its doors.

With respect to the service of food and water during a lengthy tarmac delay, Volaris states that it has reviewed its training and tarmac delay procedures to ensure that, in a tarmac delay situation, its staff provides passengers with beverage and a snack within the first two hours of a tarmac delay event.

Volaris believes that in light of the particular facts, circumstances, and continued airfield delays caused by thunderstorms over and around JFK noted above, enforcement action by the Department is not warranted. Nevertheless, to resolve this matter without litigation, Volaris has agreed to this compromise settlement.

Decision

The OACP views seriously Volaris' 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 OACP believes that enforcement action is warranted. In order to avoid litigation, and without admitting or denying the violations described above, Volaris consents to the issuance of this order to cease and desist from future similar violations of 14 CFR Part 259 and 49 U.S.C. § 41712, and to the assessment of \$70,000 in compromise of potential civil penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. 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 Volaris 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 Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. violated 14 CFR 259.4(a) by failing adhere to the assurance in its contingency plan for lengthy tarmac delays that it will not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours before allowing passengers an opportunity to deplane;
3. We find that Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. violated 14 CFR 259.4(a), 14 CFR 259.4(b)(3), and 14 CFR 259.4(b)(7) by failing to adhere to the

⁴ These safety precautions include securing the aircraft's movement, connecting an electrical supply, and attaching mobile stairs.

assurance in its contingency plan for lengthy tarmac delays that it will provide passengers adequate food no later than two hours after the aircraft leaves the gate, in the case of a departure;

4. We find that by engaging in the conduct described in ordering paragraphs 2 and 3 above, Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;
5. We order Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. and its successors and assigns to cease and desist from further violations of 14 CFR 259.4 and 49 U.S.C. § 41712;
6. We assess Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. \$70,000 in civil penalties in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2, 3, and 4 above;
 - a. Of this total amount, \$35,000 shall be due and payable as follows;
 - i. \$10,000 shall be due and payable within 120 days of the service date of this order;
 - ii. \$10,000 shall be due and payable within 180 days of the service date of this order; and
 - iii. \$15,000 shall be due and payable within 270 days of the service date of this order.
 - b. The remaining \$35,000 shall become due and payable if, within one year of the service date of this order, Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. violates this order's cease and desist or payment provisions, in which case the entire unpaid amount shall become due and payable immediately and Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. may be subject to additional enforcement action for failure to comply with this order; and
7. We order Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. to pay the penalty assessed in ordering paragraph 6 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 Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V. 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
the Office of Aviation Consumer Protection

An electronic version of this document is available at www.regulations.gov