



**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

ExpressJet 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 (RST) involving Continental Airlines, Inc. (Continental) and its Continental Express flight 2816, operated by ExpressJet Airlines, Inc. (ExpressJet). The ExpressJet operated flight was diverted to Rochester because weather precluded landing at the destination airport—Minneapolis/St. Paul International Airport. The investigation revealed the failure of ExpressJet to follow its and Continental's procedures pertaining to lengthy ground delays in violation of 49 U.S.C. § 41712 which prohibits air carriers from engaging in unfair and deceptive practices in air transportation. ExpressJet 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 ExpressJet to cease and desist from future similar violations of section 41712 and assesses the carrier \$50,000 in civil penalties.²

ExpressJet operates 214 regional jet aircraft on behalf of Continental in the U.S., Mexico and Canada. In its capacity as a Continental Express carrier, ExpressJet has agreed under the terms of its capacity purchase agreement with Continental to adhere to the policies set out in Continental's Customer First commitments. These commitments contain twelve specific, voluntary promises to improve customer comfort and convenience. These commitments are published by Continental Airlines and are accessible to consumers on its website at

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 In a separate consent order related to the same incident, Continental Airlines, which purchased the entire capacity of the flight, published Customer First commitments covering the flight and marketed the service, is also assessed a civil penalty of \$50,000. Continental Airlines, Violation of 49 U.S.C. § 41712, Consent Order 2009-11-17, issued November 24, 2009. The total of the civil penalty amounts assessed for the ExpressJet and Continental 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.

www.continental.com. 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, such as Rochester. With respect to extended onboard delays, the commitment states, among other things, that if a ground delay approaches 3 hours, Continental's System Operations Coordination Center (SOCC), in coordination with senior Continental management, 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. With respect to diversions of flights to offline cities the commitment states that in the case of an extended onboard delay the Continental Operations Director will advise the local authority and may contact local ground handlers to provide appropriate assistance. ExpressJet also has in place internal procedures providing that, if an extended delay occurs, those on duty in the ExpressJet SOCC will contact senior ExpressJet management and that, if the delay cannot be resolved ExpressJet will contact the Continental SOCC. Internal ExpressJet procedures also provide for action to be taken in the event of lengthy delays at the 1 hour, 2 hour, 2.5 hour and 3 hour milestones with the objective being to deplane those passengers wishing to do so assuming facilities are available.³

The Enforcement Office's investigation of the tarmac delay incident involving Continental Express flight 2816 operated by ExpressJet revealed, among other things, that ExpressJet did not comply with Continental's Customer First commitment pertaining to long ground delays. Continental Express flight 2816, operated by ExpressJet, 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. on August 8, flight 2816 diverted to Rochester International Airport (RST) in Rochester, Minnesota, due to bad weather at MSP. Because neither Continental nor ExpressJet serves Rochester, prior to diverting to RST, ExpressJet contacted Mesaba Airlines (Mesaba) operations at RST to request assistance at the airport. ExpressJet had previously requested Mesaba services when ExpressJet flights diverted to Rochester. A Mesaba representative at RST assured ExpressJet that Mesaba would handle the ExpressJet flight while at RST.⁴ However, between 12:28 am and 3:30 am, several inquiries/requests by the flight crew of Continental Express flight 2816 to deplane its passengers into the airport terminal resulted in a Mesaba employee informing them that the passengers could not be deplaned into and remain in the closed airport.⁵ This Mesaba agent also provided the same erroneous information to ExpressJet's dispatcher as late as 4:23 a.m. ExpressJet repeatedly

³ These procedures are described in the ExpressJet Dispatch Information Letter ("DIL") entitled "Long Tarmac Delays".

⁴ Among the services that local carriers typically provide for operating carriers in these types of diversion situations is assistance with passenger deplaning, arranging local hotel accommodations, ground transportation, other passenger servicing-type functions and refueling.

⁵ The Transportation Security Administration (TSA) procedures would have allowed the passengers to deplane into the secure holding area in the terminal without TSA presence, where passengers could access vending machines and restrooms, and then reboard the aircraft without additional TSA screening, so long as the passengers remained in the sterile area. However, the Mesaba agent apparently was not aware of this TSA procedure or that it applied at RST.

questioned whether the Mesaba agent's statements that passengers could not deplane into a closed airport were accurate. However, no one elevated the matter to Mesaba management.⁶

Additionally, as the delay continued, the ExpressJet SOCC duty manager should have contacted ExpressJet management at the 3 hour mark, but this was not done. As a result, senior ExpressJet management did not contact the Continental SOCC as was called for under internal ExpressJet procedures. A conference call to discuss options which is supposed to occur if the tarmac delay reaches 2 hours and 30 minutes did not take place. Continental's senior managers did not receive an automated notice that flight 2816 diverted to RST, or automated notices of the tarmac delay that subsequently ensued even though the ExpressJet dispatcher reset the automated Aircraft Communications Addressing and Reporting System (ACARS)⁷ for the diversion because it did not work as expected. Consequently, because of the failure by ExpressJet to contact Continental, Continental's commitment for its SOCC to determine, in coordination with senior Continental management, if departure is expected within a reasonable time under the particular circumstances of the flight when a ground delay approaches 3 hours was not initiated.

Moreover, at 4:44 a.m. Mesaba's RST station manager advised the ExpressJet SOCC that the passengers on flight 2816 could be deplaned into the terminal. The DOT recognizes, however, that for a number of reasons, including the weather at RST, the need to find a gate and airstairs required to deplane the passengers, the need to taxi the aircraft to that gate, and the need of the Mesaba manager to consult with TSA, the deplaning process did not commence until approximately 6:05 a.m. The Enforcement Office believes that another reason the deplaning took as long as it did is because the ExpressJet SOCC felt the flight to MSP could be completed; however, the actual impact of this factor is undeterminable.

In summary, DOT finds that ExpressJet's failures to escalate the matter to senior ExpressJet management and notify Continental of the tarmac delay caused the passengers to be on the aircraft for a period longer than was reasonable and necessary. The Enforcement Office also believes that ExpressJet's failure to insist that Mesaba deplane the passengers as soon as possible after Mesaba's station manager told ExpressJet's SOCC that its passengers could be deplaned was one of the factors, in addition to those discussed above, that contributed to the delay. The actions of ExpressJet harmed passengers on Continental Express flight 2816 and amounted to an unfair and deceptive practice in violation of 49 U.S.C. § 41712.

In mitigation, ExpressJet states that it actively managed the delay event by simultaneously attempting 3 different alleviation measures. First, upon arrival at RST and throughout the event, ExpressJet states that its SOCC, in conjunction with the flight crew, planned for the resumption of the flight, weather permitting. ExpressJet explains that flight plans were developed and the aircraft was fueled twice for the onward flight, although the weather was never adequate to

⁶ Continental's Senior SOCC Director states that Continental's SOCC Directors "routinely confer with their counterparts on operational issues that affect the industry as a whole" and "all of us have developed pretty thick phone books over the years" and acknowledges that Continental's (or ExpressJet's) SOCC could have asked the ground handling carrier's SOCC to contact the Mesaba agent that refused to bring the aircraft to a gate. He further states that "perhaps there might have been a better outcome."

⁷ ACARS is a digital data link system for transmission of short, relatively simple messages between aircraft and ground stations via radio or satellite. One of the applications of ACARS is to automatically detect and report the time of changes in the major phases of flight; specifically, ot of the gate, off of the ground, on the ground and into the gate (referred to in the aviation industry as "OOOI").

permit safe operations. Second, ExpressJet asserts, consistent with the Department's preliminary statement of August 21, 2009 that the ExpressJet flight crew was not at fault as the crew of flight 2816 sought to gain permission from the ground handler to first taxi the aircraft from the remote parking area to the terminal and then to deplane the passengers. ExpressJet notes that the Mesaba agent refused these repeated requests. Third, ExpressJet states that the ExpressJet SOCC, along with the flight crew and Continental Operations at MSP, with whom ExpressJet had been in contact throughout the event, all attempted to arrange for bus transportation for the passengers from RST to MSP, but no bus could be procured due to the inclement weather.⁸

ExpressJet also states that it acted reasonably in attempting to address the passenger's needs throughout the night. According to ExpressJet, the Captain, First Officer and Flight Attendant ensured the passengers of flight 2816 were kept informed and the cabin of the aircraft remained comfortably climate controlled throughout the event. The carrier notes that beverages were served throughout the period of delay and the supply of food was not exhausted. ExpressJet states that it would have deplaned the passengers had it been permitted to do so, but its numerous requests were refused. ExpressJet makes clear that not being able to access the terminal, it made serial efforts to safely continue the flight to MSP, but before it could be resumed, the flight crew had reached the time at which it could no longer perform flight duties and the flight was necessarily cancelled. ExpressJet states that its many attempts to resume the flight in order to get the passengers to their destination was an appropriate objective under the circumstances where the terminal was not being made available to the passengers. ExpressJet also disputes the belief of the Enforcement Office that it delayed in deplaning the passengers after first being advised by Mesaba that the airport terminal was open. ExpressJet notes that the passengers were deplaned at the first opportunity after the aircraft was permitted to taxi to the gate and after stairs were brought up to the aircraft, as the jetway did not properly mate to the aircraft.

Beyond commenting on the underlying facts, ExpressJet notes that the Continental Customer First commitment calls for certain actions by ExpressJet, which, in fact, it accomplished. Commitment number 8 specifically addresses diversions to offline cities and states that the Captain will coordinate the parking of the aircraft and contact the SOCC to determine the appropriate actions to be taken for the comfort and safety of the passengers. ExpressJet states that the flight crew and the ExpressJet SOCC were fully in compliance with this procedure.⁹ The commitment goes on to state that contact will be made with the airport authority and local ground handler at the diversion airport to request assistance, equipment and personnel and ExpressJet notes that this was done, except ExpressJet reasonably expected the ground handler to make all necessary local contacts with the airport authority consistent with normal offline airport handling arrangements. Finally, as to the commitment, ExpressJet states that its obligation to adhere to the commitments only comes through its code share agreement with Continental and the DOT's attempt at enforcement of this private contract clause is beyond the Department's jurisdiction.

⁸ ExpressJet points out that even though ExpressJet did not orally contact the Continental SOCC as the delay progressed, it thought that contact was made automatically when it reset the ACARS system to show the aircraft had not arrived at MSP. However as a result of a software issue the ACARS system did not send the delay message to the Continental SOCC after it was "reset". ExpressJet notes, as has Continental, that this software issue now has been addressed such that automated delay-related communications between the ExpressJet SOCC and the Continental SOCC are assured.

⁹ ExpressJet points out that, pursuant to the ExpressJet Dispatch Information Letter (DIL), the coordination steps to be taken at the 1, 2, 2.5 and 3 hour marks by the SOCC and flight crew were taken except that, as the DOT is aware, the option of deplaning the passengers as called for in the DIL was not achieved due to the lack of facilities.

Finally, ExpressJet states that throughout the time the aircraft was on the ground at RST with the passengers on board all of the decisions made by it were done to ensure the passengers were safe and secure. ExpressJet contends that having been directed to park the aircraft on a remote ramp, away from the terminal, it could not take it upon itself to deplane the passengers because there was no terminal access. Further, ExpressJet comments that the thunderstorms that precluded onward flight also presented a safety risk to the passengers had they walked to the terminal.¹⁰ Finally, ExpressJet states that not being at an online airport, it had no direct knowledge of the airport security requirements and reasonably expected Mesaba to be knowledgeable of the local requirements. According to ExpressJet, it could not unilaterally make decisions regarding the disposition of the passengers without understanding the local TSA procedures for after-hour terminal access.

After carefully considering all the facts of this case including the information and mitigating factors provided by ExpressJet, the Enforcement Office believes that enforcement action is warranted against the carrier. In this regard and in order to avoid litigation, the Enforcement Office and ExpressJet have reached a settlement in this matter. While neither admitting nor denying the above allegations, ExpressJet accepts the findings and conclusions stated herein in order to avoid litigation. Under this order, the carrier will be 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 ExpressJet 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 ExpressJet 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 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 ExpressJet Airlines engaged in an unfair and deceptive practice in violation of 49 U.S.C. § 41712, as described above, by causing the passengers onboard flight 2816 to remain in the aircraft cabin beyond a reasonable period of time;
3. We order ExpressJet Airlines and its successors and assignees to cease and desist from further violations of 49 U.S.C. § 41712;
4. We assess ExpressJet Airlines 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 subparagraphs 4(a) and (b) below;

¹⁰ At one point during the evening all ground handling functions were suspended due to the proximity of lightning in the area of the airport.

- (a) \$25,000 shall be due and payable within 30 days after the service date of this Order;
 - (b) Up to \$25,000 shall be credited to ExpressJet 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 as may be adopted by carrier;
5. To the extent ExpressJet 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 \$25,000 offset, the Office of Aviation Enforcement and Proceedings shall notify ExpressJet of the inadequacies and ExpressJet 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 ExpressJet Airlines 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

(SEAL)

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