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Friedenzohn, D. (2013). Delayed Flights and Delayed Action: The U.S. Department of Transportation's Tarmac Delay Regulations and Their Impact on Air Travel. *Issues in Aviation Law and Policy*, 13(1). Retrieved from <https://commons.erau.edu/db-aeronautical-science/5>

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Delayed Flights and Delayed Action: The U.S. Department of Transportation's Tarmac Delay Regulations and Their Impact on Air Travel

by Daniel Frieden-zohn*

Introduction

The deregulation of the U.S. airline industry in 1978 was based on the idea that greater competition among airlines would benefit consumers with lower fares and improved service.¹ In general, airline passengers experienced a decline in air fares, largely attributable to the increase in competition.² The enactment of the policy resulted in a 55 percent increase in passenger traffic during the first decade.³

Increased competition and rising operating costs put tremendous pressure on carriers.⁴ Between 2000 and 2009, U.S. passenger airlines lost more than \$45 billion.⁵ As a result, airlines are continually looking for ways to reduce their costs and increase

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¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-630, AIRLINE DEREGULATION: REREGULATING THE AIRLINE INDUSTRY WOULD LIKELY REVERSE CONSUMER BENEFITS AND NOT SAVE AIRLINE PENSIONS (2006).

² Steven A. Morrison & Clifford Winston, *The Dynamics of Airline Pricing and Competition*, 80 AM. ECON. REV. 389, 389 (1990).

³ KENNETH J. BUTTON, CATO INST., OPENING U.S. SKIES TO GLOBAL AIRLINE COMPETITION 3 (1998).

⁴ MIT GLOBAL AIRLINE INDUSTRY PROGRAM: AIRLINE INDUSTRY OVERVIEW, http://web.mit.edu/airlines/analysis/analysis_airline_industry.html (last visited June 10, 2013).

⁵ Rick Newman, *How Airline Mergers Save an Industry – and May Even Benefit Fliers*, U.S. NEWS & WORLD REP. (Feb. 14, 2013), <http://www.usnews.com/news/blogs/rick-newman/2013/02/14/how-airline-mergers-saved-an-industryand-may-even-benefit-fliers>. See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-733, AIRLINE PASSENGER PROTECTIONS:

revenue in order to survive in an extremely competitive environment. Some of the cost reductions have at times impacted customers in a negative way.

The airline industry's customer service problems are often underscored during flight delays, cancellations, and on-board delays. In 2007, 29 percent of all flights were cancelled or delayed, affecting about 163 million passengers.⁶ The causes of these flights' disruptions were often due to factors over which the airlines had little or no control, such as weather, airspace congestion, and airport capacity. Airlines, however, often receive the most criticism from the flying public in terms of how they fail to respond to the needs of passengers during these situations.

Over the past 13 years, there have been several instances where passengers have been stranded on airplanes on the ground at an airport without being allowed to disembark. In January 1999, hundreds of passengers were grounded on aircraft operated by Northwest Airlines for up to eight hours at the Detroit Metropolitan Airport without the possibility of disembarking.⁷ Eight years later, a similar incident involving JetBlue Airways occurred at New York's John F. Kennedy International Airport.⁸ Both of these situations highlighted the airline industry's perceived inability to address customers' needs during long delays.

The manner in which the industry, government regulators, and passengers have dealt with customer service issues related to delays and cancellations in the U.S. is varied. From a legal perspective, the traveling public has limited options in seeking judicial relief under a theory of contract or tort law for many airline customer service related issues. Similarly, passengers are generally prohibited from relying on state consumer protection laws to help them obtain relief from airlines because the Airline Deregulation Act of 1978 (ADA) prohibits states from enacting or enforcing

MORE DATA AND ANALYSIS NEEDED TO UNDERSTAND EFFECTS OF FLIGHT DELAYS (2011).

⁶ OFF. OF INSPECTOR GEN., U.S. DEP'T OF TRANSP., STATUS REPORT ON ACTIONS UNDERWAY TO ADDRESS FLIGHT DELAYS AND IMPROVE AIRLINE CUSTOMER SERVICE (2008) [hereinafter OIG STATUS REPORT 2008], available at http://www.oig.dot.gov/sites/dot/files/pdfdocs/WEB_FILE_OIG_Statement_for_April_9_Hearing_correct.pdf.

⁷ David Josar, Joel Smith, & John Bacon, *Storm Aftermath: Northwest Blames Metro for Blizzard Breakdown: Thousands Stranded as Snow Closed Runways*, DET. NEWS, Jan. 5, 1999, at 1D.

⁸ See Jennifer 8. Lee, *JetBlue Flight Snarls Continue*, N.Y. TIMES, Feb. 16, 2007, at B7.

laws that are related to the “price, route or service” of an air carrier.⁹ Finally, the airline industry’s attempt to create customer service standards, while effective in some areas, has been mixed and somewhat ineffective in dealing with cancellations as well as flight delays.

The federal government, however, is in a unique and perhaps the best position to address airline customer service issues. First, the U.S. Department of Transportation (DOT) has the responsibility to act in the public interest in supporting the development of a safe and efficient air transport system in this country. Pursuant to this mandate, the U.S. Congress and the DOT (including the Federal Aviation Administration) have the authority to enact statutes and regulations that address deficiencies in the aviation system. The DOT, itself, also has the authority to enforce those laws.

Moreover, the federal government has oversight authority over other aspects of commercial transportation that contribute to cancellations and delays, such as the National Airspace System and aviation security. Finally, because the Congress, in enacting the ADA, limited passengers’ ability to take legal action against airlines, the federal government may have a greater obligation to address these issues on behalf of the traveling public.¹⁰

Beginning in 2009, the DOT began the process of enacting a series of new regulations designed to better address the needs of airline passengers who are affected by service disruptions and/or poor customer service. The focus of this paper is on the DOT’s so-called “tarmac rule.” Part I provides an analysis of the limitations that the ADA imposes on airline passengers who seek private legal relief against a carrier for a delay or flight cancellation. Part II provides an overview of the airline industry’s attempt to address customer service issues during the late 1990s and early 2000s. Part III discusses the few, yet widely publicized, instances where individual airlines failed to handle tarmac delays in a customer-friendly way, which resulted in attempts by various states as well as the U.S. Congress to address tarmac delays beginning in 2007. Part IV addresses the DOT regulations that went into effect beginning in 2010 and analyzes how effective they have been in curbing long tarmac delays. Part V provides an analysis

⁹ Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1978).

¹⁰ See *Statland v. American Airlines*, 998 F.2d 539, 540–41 (7th Cir. 1993), *cert. denied*, 510 U.S. 1012 (1993).

of a number of consent orders that the DOT has entered into with both domestic and international carriers to address tarmac rule violations.

I. *The Legal Protections Afforded to Airline Passengers Do Not Provide Effective Relief to Address All Customer Service Related Issues*

Passengers flying on regularly scheduled airline service in the United States are generally given rights and protections set forth under statutes, regulations, and in certain instances, international treaties. Some of these rights, as well as further conditions, are also provided in the airline's contract of carriage.

A contract of carriage (also referred to as conditions of carriage or tariff) is an agreement between an airline and its customer(s) that identifies the duties and rights between the two parties.¹¹ Contracts of carriage generally address rights and responsibilities pertaining to many customer service related issues, including an airline's boarding policy (or situations that may warrant denial of a passenger's right to board), checked and carry-on baggage rules, denied boarding compensation, and conditions of the carrier's liability for flight delays and cancellations. The terms set forth in the contract of carriage are binding and enforceable by both the passenger and an airline in a court of law.¹²

The existence of a contract between an airline and its passengers does not necessarily mean that an appropriate legal framework exists to ensure that passengers' rights are being protected. Contracts of carriage are "lengthy and complex documents that anybody but a lawyer may find difficult to read."¹³ Delta Airlines' Domestic General Rules of Tariff (last modified May 25, 2012) for domestic U.S. service has over 22,000 words and is 51 pages long.¹⁴ It is highly unlikely that more than a few passen-

¹¹ Fontan-de-Maldonado v. Lineas Aereas Costarricenses, S.A., 936 F.2d 630 (1st Cir. 1991); Clemente v. Philippine Airlines, 614 F. Supp. 1196 (S.D.N.Y. 1985); U.S. GOV'T ACCOUNTABILITY OFFICE, RCED-99-281R, COMPARISON OF AIRLINE 'CUSTOMER SERVICE COMMITMENT' WITH CONTRACTS OF CARRIAGE AND FEDERAL LAW (1999).

¹² American Airlines v. Wolens, 513 U.S. 219, 228 (1995).

¹³ James T. Yenckel, *Just What Do the Airlines Owe You?*, WASH. POST, Dec. 1, 1991, at E1.

¹⁴ DELTA AIR LINES INC. CONTRACT OF CARRIAGE: UNITED STATES, http://www.delta.com/content/www/en_US/legal/contract-of-carriage-dgr.html (last visited May 28, 2013).

gers ever take the time to read the contract of carriage and/or any of the associated rules pertaining to the ticket they purchased.¹⁵

Of equal concern is the fact that some passengers may not even be given the opportunity to review a carrier's conditions of carriage. Some passengers, for example, may purchase a ticket via a travel agency. There is no law that requires these agencies to "provide any notice of conditions of carriage in those confirmations."¹⁶

In addition to the complex language contained in most contracts of carriage, carriers draft the documents to limit their exposure in the event that something goes wrong. In others, the contract is specifically intended to ensure that passenger rights under the agreement are restricted to the extent possible.¹⁷ Airline passengers often find that the contract of carriage "[r]ules often work against them, not [the] airlines."¹⁸ The private contractual relationship that exists between an airline and its passengers may not provide an effective means to address customer service issues in the airline industry, including those related to delays and cancellations.

II. *A Few Well-Publicized Instances during the Late 1990s Highlighted the Airline Industry's Inability to Effectively Address Flight Delays and Cancellations*

In early January 1999, a snowstorm severely disrupted air travel over much of the Midwestern section of the United States. At that time, Northwest Airlines (which subsequently merged with Delta Air Lines) maintained its largest hub at the Detroit Metropolitan Airport. As a result of the storm, Northwest cancelled many departures from the airport.¹⁹ The carrier, however, did not cancel all flights that were scheduled to arrive at the airport. Consequently, many Northwest aircraft did not have a gate

¹⁵ Several courts, however, have ruled that conditions set forth in the contract of carriage are binding on a passenger even if he or she is not aware of them. *Fontan-de-Maldonado*, 936 F.2d 630; *Valderama v. Delta Air Lines*, 931 F. Supp. 119 (D.P.R. 1996); *Locks v. British Airways*, 759 F. Supp. 1137 (E.D. Pa. 1991).

¹⁶ Mark Pestronk, *Legal Briefs*, TRAVEL WKLY. (Apr. 2, 2012), <http://www.travelweekly.com/print.aspx?id=238084>.

¹⁷ Yenckel, *supra* note 13, at E1.

¹⁸ Scott McCartney, *When the Airlines Make the Rules*, WALL ST. J., Feb. 3, 2009, at 28.

¹⁹ Josar et al., *supra* note 7, at 1D.

at which to park at when they landed. Over 7,000 passengers were forced to remain aboard their aircraft, some for more than eight hours.²⁰

Following hearings in late January 1999, both the U.S. Congress and the DOT agreed to give an airline trade group, the Air Transport Association (ATA, now known as Airlines for America, or A4A), the opportunity to design a plan that would address the policymakers' concerns. The industry enacted a voluntary "Airline Customer Service Commitment" in June 1999.²¹ Each ATA member carrier was reported to have incorporated the Commitment into its customer service operations by March 2000.²² The plan included provisions that pledged to meet "passengers' essential needs, including those during long, on-board delays."²³

AIRLINE CUSTOMER SERVICE COMMITMENT
(JUNE 1999)²⁴

- Offer the lowest fare available [from the airline's telephone reservation system]
- Notify customers of known delays, cancellations and diversions
- Provide on-time baggage delivery [return misdirected bags within 24 hours]
- Support an increase in the lost baggage liability limit
- Allow reservations to be held or canceled [for 24 hours]
- Provide prompt refunds [7 days for credit card; 20 days for cash]
- Properly accommodate disabled and special needs passengers
- Meet customers' essential needs during long on-aircraft delays
- Handle "bumped" passengers with fairness and consistency

²⁰ OIG STATUS REPORT 2008, *supra* note 6.

²¹ *Id.*

²² OFF. OF INSPECTOR GEN., U.S. DEP'T OF TRANSP., INTERIM REPORT ON AIRLINE CUSTOMER SERVICE COMMITMENT (2000) [hereinafter OIG INTERIM REPORT 2000], *available at* <http://www.oig.dot.gov/sites/dot/files/pdfdocs/av2000102.pdf>.

²³ OIG STATUS REPORT 2008, *supra* note 6.

²⁴ OIG INTERIM REPORT 2000, *supra* note 22.

- Disclose travel itinerary, cancellation policies, frequent flyer rules and aircraft configuration
- Ensure good customer service from code-share partners
- Be more responsive to customer complaints.

The industry succeeded in meeting some of its obligations set forth under its improvement plan. Those areas included ensuring that customers were always offered the lowest fare available at the time of purchase and responding to customer complaints in a timely manner.²⁵ The Commitment did not effectively address areas that were the “underlying causes of deep-seated customer dissatisfaction – flights delays and cancellations.”²⁶ In 2000, the year that the airline industry’s initiative went into effect, “over 1 in 4 flights (27.5 percent) were delayed, canceled or diverted, affecting approximately 163 million passengers.”²⁷

The Commitment only pledged to “[m]eet customers’ essential needs during long on-aircraft delays” without providing specific details of how they would go about achieving that in certain situations.²⁸ Although the industry experienced a reduction in arrival delays in 2001, the DOT continued to express concerns about how information regarding cancellations and delays was being communicated to passengers.²⁹

Despite some improvements in the system, airlines and their customers continued to experience relatively high delay rates in the U.S. aviation system throughout much of the last decade. Data from the U.S. Bureau of Transportation Statistics (BTS) in Figure 1, *infra*, highlights by year the percentage of flights in the U.S. that were cancelled, delayed, or diverted.³⁰ While carriers

²⁵ OIG STATUS REPORT 2008, *supra* note 6.

²⁶ OFF. OF INSPECTOR GEN., U.S. DEP’T OF TRANSP., FINAL REPORT ON AIRLINE CUSTOMER SERVICE COMMITMENT (2001) [hereinafter OIG FINAL REPORT 2001], *available at* <http://www.oig.dot.gov/sites/dot/files/pdfdocs/av2001020.pdf>.

²⁷ *Id.*

²⁸ OIG STATUS REPORT 2008, *supra* note 6.

²⁹ Stephen Power & Jesse Drucker, *Airline Group Cites Delays as Biggest Headache*, WALL ST. J., Jan. 31, 2001, at A6; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-733, AIRLINE PASSENGER PROTECTIONS: MORE DATA AND ANALYSIS NEEDED TO UNDERSTAND EFFECTS OF FLIGHT DELAYS (2011).

³⁰ *On-Time Performance – Flight Delays at a Glance*, BUREAU OF TRANS. STATISTICS, <http://www.transtats.bts.gov/homedrillchart.asp> (last visited June 10, 2013).

were not always responsible for the delays or cancellations, especially those attributed to weather or air traffic control issues, the airline industry was increasingly on the defensive as Congress' displeasure with the industry continued to mount.

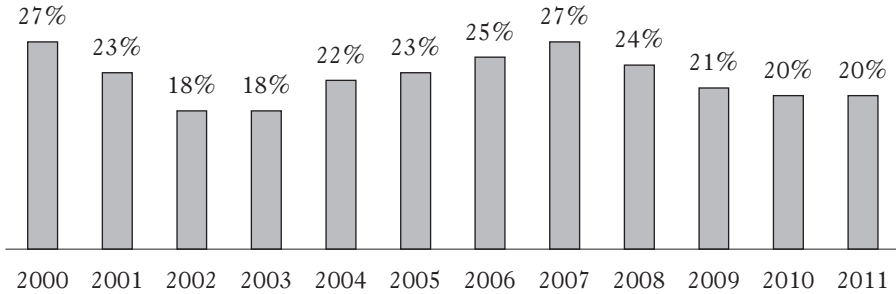


Figure 1

Numerous government reports and Congressional hearings highlighted concerns by policymakers on the need to address certain airline customer service issues.³¹ There were at least three bills introduced in the U.S. Senate during the 107th Congress (2001–02) which addressed airline passenger protection issues.³² Six bills were introduced in the House of Representatives dealing with airline passenger protection issues during that same session of Congress.³³

Senator Ron Wyden (D.-Ore.) introduced the Fair Treatment of Airline Passengers Act in 2001 which would have imposed a series of new obligations on carriers to inform passengers about delayed, canceled, or diverted flights.³⁴ The bill also required the DOT to “establish minimum standards, compliance which can be measured quantitatively, of air carrier performance with respect to customer service issues addressed by” regulations or the industry’s obligations as set forth in its Commitment.³⁵

³¹ *Report Is Expected to Outline Persistent Airline Problems*, N.Y. TIMES, Jan. 29, 2001, at A17; OIG FINAL REPORT 2001, *supra* note 26.

³² S. 200, 107th Cong., 1st Sess. (2001); S. 319, 107th Cong., 1st Sess. (2001); S. 483, 107th Cong., 1st Sess. (2001).

³³ H.R. 384, 107th Cong., 1st Sess. (2001); H.R. 571, 107th Cong., 1st Sess. (2001); H.R. 907, 107th Cong., 1st Sess. (2001); H.R. 1407, 107th Cong., 1st Sess. (2001); H.R. 1734, 107th Cong., 1st Sess. (2001); H.R. 1792, 107th Cong., 1st Sess. (2001).

³⁴ S. 483, 107th Cong., 1st Sess. § 3 (2001). *See Airlines Fail to Ease the Distress of Flight Delays, Report Says*, N.Y. TIMES, Feb. 13, 2001, at A18.

³⁵ S. 483, 107th Cong., 1st Sess. § 4(b)(2)(c) (2001).

Senator John McCain (R.-Ariz.) introduced a bill proposing the Airline Customer Service Improvement Act.³⁶ The proposal would direct the Secretary of Transportation to allocate additional resources towards “airline passenger consumer protection and related services.”³⁷ A similar bill was introduced by Rep. J.T. Watts (R.-Okla.) in the House of Representatives.³⁸

Despite the concern raised by an increasing number of members of Congress, no legislation to address passenger protection legislation was passed in 2001. With the tragic events of September 11, 2001 and the economic challenges facing the airline industry during that time, the Congress turned its attention to airline security and ensuring the financial viability of the U.S. airline industry.³⁹

III. *The Tipping Points That Called for the Government to Take Action*

The years 2006 and 2007 marked the tipping point for flight delays and cancellations. More than 25 percent of all flights were delayed during the summers of 2006 and 2007, with an average delay length of over 55 minutes.⁴⁰ Furthermore, the DOT’s Air Travel Consumer Reports noted a 65 percent increase in passenger complaints over the same time period in 2006.⁴¹

Two well-publicized incidents during peak travel periods in December 2006 and February 2007 heightened the level of concern about the airline industry’s ability to properly address long on-board delays, a subset of overall delays. On December 29,

³⁶ S. 319, 107th Cong., 1st Sess. (2001).

³⁷ *Id.* § 3(a)(1).

³⁸ H.R. 1792, 107th Cong., 1st Sess. (2001).

³⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-171T, COMMERCIAL AVIATION: FINANCIAL CONDITION AND INDUSTRY RESPONSES AFFECT COMPETITION (2002). Between 2000 and 2002, the industry experienced a revenue decline of 24 percent. The industry lost more than six billion dollars in 2001.

⁴⁰ OIG STATUS REPORT 2008, *supra* note 6. Under 14 C.F.R. § 234.2 (DOT regulations), a flight is considered delayed when it arrives 15 or more minutes after its scheduled arrival time. Summer months include June, July, and August.

⁴¹ OFF. OF INSPECTOR GEN., U.S. DEP’T OF TRANSP., ACTIONS NEEDED TO IMPROVE AIRLINE CUSTOMER SERVICE (2007) [hereinafter OIG AIRLINE CUSTOMER SERVICE STATEMENT], *available at* http://www.oig.dot.gov/sites/dot/files/pdfdocs/WEB_FILE_CC2007046_Airline_Customer_Service_Statement.pdf.

2006, American Airlines was forced to divert 130 aircraft to other airports due to a storm that necessitated the closing of the Dallas/Fort Worth International Airport.⁴² Over one-third of those aircraft sat on airport tarmacs for more than four hours.⁴³

Less than two months later, JetBlue Airways experienced a similar fate when 12 of its aircraft sat on John F. Kennedy International Airport's tarmac for more than four hours due to a winter snow storm in New York.⁴⁴ Nine additional aircraft were held on the tarmac for more than six hours.⁴⁵ In all, more than 1,000 passengers were affected.⁴⁶

To its credit, JetBlue and several other carriers took immediate action to enact a Customer Bill of Rights. JetBlue's policy set forth guidelines as to when it would provide monetary credits to its passengers for delays due to controllable irregularities.⁴⁷ This appeared to be a proactive approach by the industry to thwart government action once again.⁴⁸

At the time, both states and the federal government were interested in enacting legislation that would protect passengers affected by delays, especially those passengers on aircraft that are delayed on the tarmac. States use their police powers to enact laws that address health and safety issues.⁴⁹ Some states felt that a law requiring airlines to accommodate passengers who were experiencing long delays on flights fell within the scope of a state's police powers to address health issues.⁵⁰

⁴² J. Bailey, *Airlines Work on Systems to Reduce Delays*, N.Y. TIMES, Nov. 15, 2007, at C1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Editorial, *The Politics of JetBlue*, WALL. ST. J., Feb. 27, 2007, at 11.

⁴⁶ OIG AIRLINE CUSTOMER SERVICE STATEMENT, *supra* note 41.

⁴⁷ JETBLUE AIRWAYS' CUSTOMER BILL OF RIGHTS, http://www.jetblue.com/p/about/ourcompany/promise/Bill_Of_Rights.pdf (last visited June 4, 2013).

⁴⁸ Alexandra Marks, *JetBlue Woes Spur Call for Fliers' Bill of Rights; Long Waits for Passengers Caused by Last Week's Ice Storm in New York Have Prompted Talk of Customer-Service Regulation*, CHRISTIAN SCI. MONITOR, Feb. 20, 2007, at 2.

⁴⁹ *Air Transp. Ass'n of Am. v. Cuomo*, 528 F. Supp. 2d 62, 65 (N.D.N.Y. 2007), *rev'd*, 520 F.3d 218 (2d. Cir. 2008). See *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341, 347 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

⁵⁰ See generally Ani B. Satz, *The Limits of Health Care Reform*, 59 ALA. L. REV. 1451, 1460 (2008) (citing U.S. CONST. amend. X; *Lochner v. New York*, 198 U.S. 45 (1905) ("[Police] powers, broadly stated and without, at

When the U.S. Congress, however, enacted the ADA, it included a provision that specifically barred states from “enacting or enforcing any law . . . relating to [air carrier] rates, routes, or services.”⁵¹ Through a series of cases, the U.S. Supreme Court has explained the broad scope of this preemption clause. In *Morales v. Trans World Airlines, Inc.*, the Court stated that the reason Congress included a preemption provision was “[t]o ensure that the States would not undo federal deregulation with regulation of their own.”⁵² Two years later, the Congress “endorsed the holding in *Morales*” when it recodified the Airline Deregulation Act.⁵³

New York was the first state to enact a passenger bill of rights law.⁵⁴ New York’s law required airlines to provide their passengers who were on a flight that was delayed more than three hours with access to fresh cabin air and lights, bathrooms, food, and water.⁵⁵ Similar, but not identical, bills to New York’s law were introduced in ten other states.⁵⁶

The ATA, the U.S. airline industry trade group, brought suit in federal court, claiming that the law was preempted by the Airline Deregulation Act.⁵⁷ The U.S. District Court held that the Passenger Bill of Rights Act was not preempted because the New York law specifically addressed “consumer health and safety issues,” both of which were outside the scope of the federal Airline Deregulation Act.⁵⁸

The Second Circuit Court of Appeals reversed the District Court by ruling that New York State’s Passenger Bill of Rights was preempted by the Airline Deregulation Act. In its opinion,

present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.”)

⁵¹ Airline Deregulation Act, 49 U.S.C. § 41713(b) (1978).

⁵² *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

⁵³ Robert S. Span, *Airline Passenger “Rights” Legislation*, 22-1 AIR & SPACE LAW. 5-8 (2008).

⁵⁴ N.Y. GEN. BUS. LAW §§ 251-f to 251-j (Consol. 2007), *invalidated by* Air Transp. Ass’n of Am. v. Cuomo, 520 F.3d 218 (2d Cir. 2008).

⁵⁵ *Id.*

⁵⁶ Timothy J. Lynes, *Second Circuit Court of Appeals Invalidates New York Airline Passenger Bill of Rights* (June 18, 2008), http://www.kattenlaw.com/files/21573_Lynes—ILO—Second_Circuit.pdf (citing Andrew Garber, *Passenger Rights Bill Gets a Push in State*, SEATTLE TIMES, Jan. 23, 2008, at A1).

⁵⁷ Air Transport Ass’n of Am. v. Cuomo, 528 F. Supp. 2d 62 (N.D.N.Y. 2007), *rev’d*, 520 F.3d 218 (2d. Cir. 2008).

⁵⁸ *Id.* at 67.

the Court held that “requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays does relate to the service of an air carrier and therefore falls within the express terms of the ADA’s preemption provision.”⁵⁹

Congress once again attempted to take action. Senators Barbara Boxer (D.-Cal.) and Olympia Snowe (R.-Me.) introduced the Airline Passenger Bill of Rights Act of 2007.⁶⁰ The bill required airlines to provide passengers who were on a flight that had left the gate and had still not departed, the right to “adequate food and potable water” as well as bathroom facilities.⁶¹ Reps. James Oberstar (D.-Minn.) and Jerry Costello (D.-Ill.) introduced a similar bill called the Air Service Improvement Act of 2008 in the House of Representatives.⁶² Neither house of Congress was able to get a bill passed.

The Executive Branch also tried to exert pressure on the industry as a whole to take action. In 2008, Secretary of Transportation Mary Peters created a Tarmac Delay Task Force to help formulate some protections for passengers. The group was composed of 36 members of the aviation industry.⁶³ But like the airline industry’s Commitment, the final report failed to impose any binding obligations on carriers.

These two events highlighted ongoing problems with the air transportation system. The DOT’s Office of Inspector General issued a report in 2008, stating that flight delays and cancellations were still problem areas for the air transport system and continued to contribute to a high level of discontent among the traveling public.⁶⁴ The report also recognized that delays and cancellations are caused by a number of factors, such as airline scheduling, air traffic congestion, airport infrastructure, security, and weather-related issues.⁶⁵

⁵⁹ Air Transport Ass’n of Am. v. Cuomo, 520 F.3d at 223.

⁶⁰ S. 678, 110th Cong., 1st Sess. (2007).

⁶¹ S. 678 §§ 41781(a)(1)(A)-(B), 110th Cong., 1st Sess. (2007).

⁶² H.R. 6355 § 42301(c)(2)(A)-(C), 110th Cong., 2d Sess. (2008).

⁶³ Carol J. Williams, *Trouble on Tarmac – Two Years After Post-Christmas Delays Fiasco, Bill for Air Travelers’ Rights Remains Grounded*, PITT. POST-GAZETTE, Dec. 25, 2008, at A10.

⁶⁴ OIG STATUS REPORT 2008, *supra* note 6.

⁶⁵ *Id.*

A review of federal government data provides some insight into the problem. The chart examines airline operations in the United States between June 2003 and June 2008.⁶⁶

On-Time Arrival Performance				
National (June, 2003 – June, 2008)				
	Number of Operations	% of Total Operations	Delayed Minutes	% of Total Delayed Minutes
Delayed	27,701,487	23.7%	N/A	N/A
Air Carrier Delay	2,151,153	5.9%	115,337,480	27.5%
Weather Delay	335,299	0.9%	24,867,003	5.9%
National Aviation System Delay	2,848,689	7.9%	128,868,633	30.8%
Security Delay	23,427	0.1%	866,102	0.2%
Aircraft Arriving Late	2,471,397	6.8%	149,105,974	35.6%
Cancelled	678,758	1.9%	N/A	N/A
Diverted	77,012	0.2%	N/A	N/A
Total Operations	36,287,218	—	419,045,192	100.0%

Figure 2

Air Carrier Delay is defined by the DOT as “[t]he causes of the cancellation or delay was due to circumstances within the airline’s control.”⁶⁷ The category *Aircraft Arriving Late* is defined as “[a] previous flight with the same aircraft arrived late, causing the present flight to depart late.”⁶⁸ Those delays and cancellations attributable to the *National Aviation System* “refer to a broad set of conditions, such as non-extreme weather conditions, airport operations, heavy traffic volume, and air traffic control.”⁶⁹

Close to 24 percent of all U.S. airlines’ scheduled flights, over 6.5 million total flights, were delayed between 2003 and 2008.⁷⁰ Only 5.9 percent of delayed flight operations were due to “circumstances within the airline’s control.”⁷¹ This percentage of flights, however, was responsible for over 27.5 percent of the total

⁶⁶ Bureau of Transp. Statistics, *Airline On-Time Statistics and Delay Causes*, http://www.transtats.bts.gov/ot_delay/ot_delaycause1.asp (last visited June 10, 2013).

⁶⁷ Bureau of Transp. Statistics, *Understanding the Reporting of Causes of Flight Delays and Cancellations*, <http://www.rita.dot.gov/bts/help/aviation/html/understanding.html> (last visited June 10, 2013).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Bureau of Transp. Statistics, *supra* notes 66 & 67.

delayed minutes.⁷² The industry was also partially responsible for delays under the *Aircraft Arriving Late* category, which represented over one-third of the total delayed minutes.⁷³

Nearly eight percent of all flights during this period were delayed due to a National Aviation System issue.⁷⁴ Yet the delayed flights in this category were responsible for 30.8 percent of the total delayed minutes during this period.⁷⁵ The airline industry or the federal government, or in some cases both institutions, were responsible for these types of delays. For example, the airline industry may have been responsible for scheduling too many flights into or out of certain heavily congested airports, such as New York's LaGuardia and Newark's Liberty International Airports. In many cases, the FAA was also partially responsible for these types of delays because the agency has primary responsibility for air traffic control and addressing problems such as heavy air traffic volume. The FAA has dedicated resources to dealing with these issues through the development of the next generation air traffic control system as well as redesigning certain highly congested airspace corridors.⁷⁶

The data reveal that the airline industry played a significant role in contributing to flight delays. The government, however, also played a role in contributing to the delay problems. Of course, it is appropriate to consider what kind of impact a deregulated and highly competitive industry has on airline behavior. One must also ask whether the highly competitive industry drives carriers to be concerned with market share and frequency of schedule over customer satisfaction as it pertains to flight cancellations and delays.

⁷² Bureau of Transp. Statistics, *supra* note 66 ("A flight is considered delayed when it arrived 15 or more minutes later than the schedule (see definitions in Frequently Asked Questions). Delayed minutes are calculated for delayed flights only. When multiple causes are assigned to one delayed flight, each cause is prorated based on delayed minutes it is responsible for. The displayed numbers are rounded and may not add up to the total."). *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ U.S. Fed. Aviation Admin., New York/New Jersey/Philadelphia Airspace design, http://www.faa.gov/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/ (last visited May 8, 2013).

IV. *The DOT Enacts New Regulations to Address Customer Service Issues*

In 2009, the DOT promulgated its first Enhancing Airline Passenger Protections rule.⁷⁷ The rule went into effect in April 2010. With respect to addressing flight delays, the rule requires U.S. airlines to:

- Adopt contingency plans for lengthy tarmac delays that include provisions for adequate food and water within 2 hours and deplaning of passengers within 3 hours;⁷⁸
- Provide passengers with access to the aircraft's lavatory facilities;⁷⁹
- Provide passengers with medical attention if needed while the aircraft is on the tarmac;⁸⁰
- Post contracts of carriage, contingency plans, and customer service plans on their websites;⁸¹
- Publish information on flight delays on their websites;⁸² and
- Adopt customer service plans and audit their own compliance with their plans.⁸³

⁷⁷ Enhancing Airline Passenger Protections, 14 C.F.R. § 259.2 (2012). *See* U.S. Dept. of Transp., Office of Aviation Enforcement and Proceedings, Answers to Frequently Asked Questions Concerning the Enforcement of the Final Rule on Enhancing Airline Passenger Protections, Apr. 28, 2010, available at <http://airconsumer.dot.gov/rules/FAQ%20on%20Consumer%20Rule%20April%2028%202010.pdf> (last visited July 25, 2013).

⁷⁸ Enhancing Airline Passenger Protections, 14 C.F.R. § 259.4 (2013).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at § 259.6. Today, both domestic and foreign air carriers that operated scheduled passenger service or public charter service to or from the U.S. with an aircraft with a capacity of 30 or more seats are required to adopt a contingency plan which provides ten assurances that are specified at section 14 C.F.R. § 259.4(b)(1)-(10).

⁸² Enhancing Airline Passenger Protections, 14 C.F.R. § 259.6 (2013).

⁸³ The rule also prohibits U.S. carriers from retroactively applying any material amendment to their contracts of carriage that has significant negative implications for consumers. *See* U.S. Dept. of Transp., Office of Aviation Enforcement & Proceedings, Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2), issued August 19, 2011; revised September 6, 2011, October 19, 2011, January 11, 2012, and June 15, 2012.

In 2011, the DOT enacted its second Enhancing Airline Passenger Protections rule, which expanded the scope of the rule to cover international flights operated by both U.S. and foreign carriers operating into or out of the United States.⁸⁴ Key provisions of the rule include:

- Requiring foreign air carriers operating to or from the U.S. with at least one aircraft with 30 or more passenger seats to adopt and adhere to tarmac delay contingency plans;⁸⁵
- Requiring U.S. and foreign air carriers operating an international flight to not remain on the tarmac at a U.S. airport for more than four hours without allowing passengers to deplane subject to safety, security, and ATC exceptions;⁸⁶
- Expanding the airports at which airlines must adhere to the contingency plan terms to include small hub and non-hub airports, including diversion airports;⁸⁷
- Requiring U.S. and foreign carriers to coordinate plans with Customs and Border Protection (CBP) and the Transportation Security Administration (TSA);⁸⁸
- Requiring notification regarding the status of delays every 30 minutes while aircraft is delayed, including reasons for delay, if known;⁸⁹ and
- Requiring notification of opportunity to deplane from an aircraft that is at the gate or another disembarkation area with door open, if the opportunity to deplane actually exists.⁹⁰

Section 259.4 is the most important and sometimes the most controversial provision enacted by the DOT. It was important because it reflected a meaningful attempt by the DOT to finally use its rulemaking power to address long on-board delays. It

⁸⁴ Enhancing Airline Passenger Protections, 14 C.F.R. §§ 259.1–259.8. *See* U.S. Dept. of Transp., Office of Aviation Enforcement & Proceedings, *supra* note 83.

⁸⁵ Enhancing Airline Passenger Protections, 14 C.F.R. § 259.4.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at § 259.8.

⁹⁰ *Id.* at § 259.4.

was, however, controversial because the rule allows the DOT to impose fines up to \$27,500 per passenger whenever an aircraft sits on the tarmac for more than three hours.⁹¹ If an airline operating a Boeing 737 with 125 passengers on-board violates the rule, the airline is subject to a fine of over \$3.4 million.

A review of industry data reveals that the rule has been successful in reducing three-hour tarmac delays. In the 24 months prior to the rule going into effect, there were 1,880 flights that experienced tarmac delays of more than three hours.⁹² There were just 18 affected flights in the 12 months after the rule took effect.⁹³

The chart below (fig. 3) highlights the positive impact that the rule has made in reducing long on-board delays.⁹⁴ The chart, however, also highlights the fact that the enactment of the tarmac

⁹¹ 14 C.F.R. § 383.2(a) (2013). In its rule, the DOT created exceptions for the three- and four-hour tarmac limits:

(1) For domestic flights, assurance that the covered U.S. air carrier will not permit an aircraft to remain on the tarmac for more than three hours before allowing passengers to deplane unless:

(i) The pilot-in-command determines there is a safety-related or security-related reason (e.g. weather, a directive from an appropriate government agency) why the aircraft cannot leave its position on the tarmac to deplane passengers; or

(ii) Air traffic control 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.

(2) For international flights operated by covered carriers that depart from or arrive at a U.S. airport, assurance that the carrier will not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours before allowing passengers to deplane, unless:

(i) 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

(ii) Air traffic control 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.

14 C.F.R. § 259.4.

⁹² Amy Cohn, *A Year Later, Tarmac-Delay Rules Needs Some Maintenance*, BUS. TRAVEL NEWS, Aug. 22, 2011, at 54.

⁹³ *Id.*

⁹⁴ Bureau of Transp. Statistics, *Tarmac Times and Cancellation Rates*, http://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/subject_areas/airline_information/taxi_out_and_other_tarmac_times/index.html (last visited June 10, 2013).

rule has resulted in an increase in the cancellation rate for flights. In a 2011 report, the Government Accountability Office noted that “[t]otal cancellations as a percentage of all flights increased from 1 percent in 2009 to 1.2 percent in 2010.”⁹⁵

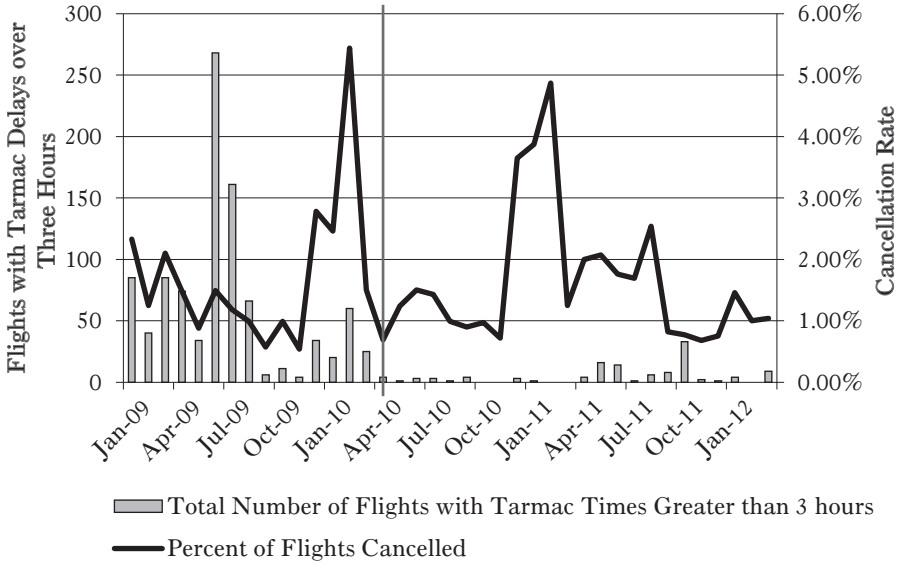


Figure 3

The tarmac rules also appear to have accentuated the effect of flight delays and cancellations on rural communities in the U.S. Flights to or from smaller and more rural airports tend to have higher rates of delays, cancellations, and diversions.⁹⁶ Flights from rural airports are 3.5 times more likely to be canceled or diverted when compared with flights from larger cities.⁹⁷ This means that trip times for passengers traveling to or from these smaller airports can be much longer than for passengers departing to, or arriving from, larger airports.⁹⁸

The effect of the tarmac rule also raises questions regarding passenger preferences when they are faced with the dilemma of a longer than expected trip time, versus the outright cancellation of their trip. For many passengers, their “highest priority is not be

⁹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-733, AIRLINE PASSENGER PROTECTIONS: MORE DATA AND ANALYSIS NEEDED TO UNDERSTAND EFFECTS OF FLIGHT DELAYS (2011).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

on the plane for an extended period of time.”⁹⁹ Indeed, the rule has been very good at addressing the needs of that segment of the traveling public.

There are also passengers who, if given the choice, would prefer to avoid sitting on a plane waiting for more than three hours before taking off. Those passengers, however, may prefer that option over having their flight canceled because their airline does not want to violate the tarmac rule. This is a particularly sensitive issue for passengers who are flying during peak travel periods. If an airline cancels its flight, passengers may be faced with the prospect of waiting for an extended period of time because the airline is unable to accommodate them on other flights that are also full.¹⁰⁰

The DOT publishes a monthly report designed to assist consumers with information on the quality of services provided by U.S. and foreign carriers serving the United States. The DOT uses the submissions to “determine the extent to which carriers are in compliance with federal aviation consumer protection regulations.”¹⁰¹ This data can also serve as a basis for DOT to propose new regulations in order to address certain problems in the airline industry.¹⁰²

The DOT classifies the complaints registered with the Department in various ways including by type and airline.¹⁰³ One way of examining the possible impact of the new DOT regulations is to consider the changes in the rate of passenger complaints before and after the rules were enacted. The chart below (fig. 4) compares the rate of passenger complaints submitted on a monthly basis from April 2007 through March 2008, versus April 2011 through March 2012.¹⁰⁴ Except for the month of May, the passenger complaint rates decreased each month after the rules went into effect.

⁹⁹ Cohn, *supra* note 92, at 54.

¹⁰⁰ *Id.*

¹⁰¹ U.S. Dept. of Transp., Air Travel Consumer Reports, June 2011–May 2012 Reports, Table 6, *available at* <http://www.dot.gov/airconsumer/air-travel-consumer-reports>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

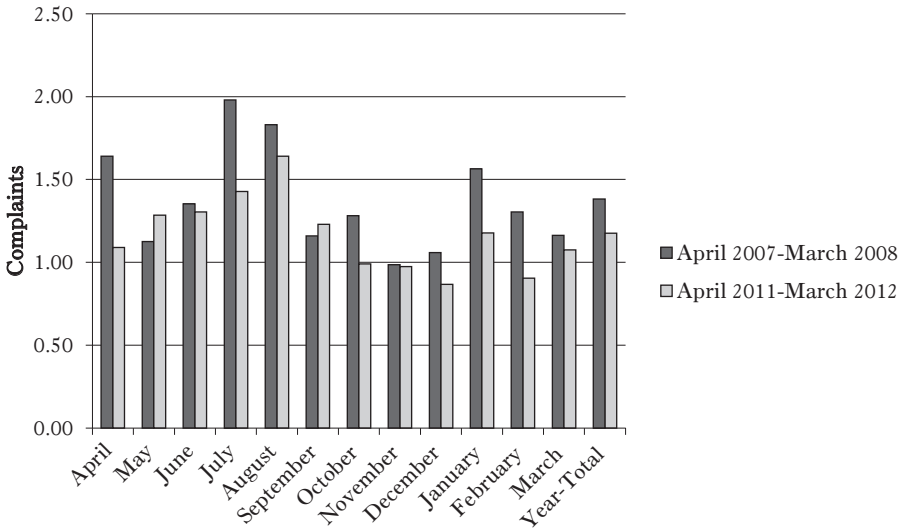


Figure 4

Of course, the tarmac rules represent a subset of all new DOT customer service rules now in effect. The changes, however, suggest that the rules may be having a positive impact. The traveling public, policymakers, and industry stakeholders have a vested interest in making sure that the rules improve customer service. Whether the rules achieve DOT’s objective remains to be seen. What is clear, however, is that the tarmac rule has reduced long on-board delays.

V. DOT’s Enforcement Case of the Tarmac Rule Highlights the Complexity of Airline Operations and the Department’s Commitment to Address Long On-Board Delays

One way of measuring the effectiveness of the tarmac rule is to look at the number of cases that the DOT has brought against carriers for violating the regulations. To date, the DOT has brought fewer than ten cases against carriers. Of course, the potential of a fine greater than \$1 million in some cases may incentivize carriers to follow the rules.

The cases below illustrate how the DOT enforces its rules. It appears that the DOT is holding all airlines accountable for adherence to the regulations, as well as to the commitments the airlines set forth in their contingency plans. The DOT also appears to be more concerned with making sure that airlines follow the rules than with imposing large fines. As the cases below reveal,

airlines have a chance to reduce their monetary penalties by taking corrective actions that avoid future violations of the DOT regulations.

A. *Tarmac Rule Violations*

The DOT brought an enforcement action against American Eagle Airlines in 2011 as a result of the carrier having 15 inbound flights at Chicago O'Hare International Airport that were parked on the tarmac for more than three hours on May 29, 2011.¹⁰⁵ In total, 608 passengers were on those affected flights.¹⁰⁶

Throughout much of the day in question, the weather conditions forced air traffic control to implement ground stops as well as arrival delays and gate holds at the airport.¹⁰⁷ The ramp reopened during the afternoon, but American Eagle did not have enough gates to accommodate its arriving flights. Consequently, the carrier's aircraft were forced to "hold at various waiting areas around the airfield."¹⁰⁸

The DOT's Consent Order stated that American Eagle had a "Drop and Go" procedure which allows aircraft to be brought into a gate so that passengers can disembark. The aircraft are immediately returned to a holding area until the congestion issues have been resolved.¹⁰⁹ The airline, however, did not execute its plan very well. According to the Consent Order:

American Eagle's overly optimistic estimation of its ability to handle the number of flights it chose to operate into ORD and its poor planning of its crew and gate resources caused 608 passengers to remain on aircraft in excess of three hours without the opportunity to deplane. Furthermore, the Enforcement Office also believes that American Eagle's failure to implement in a timely manner its "Drop and Go" procedure, and its failure early in the incident to request assistance deplaning passengers remotely by bus from the Chicago Department of

¹⁰⁵ American Eagle Airlines, Inc., OST-2011-0003, Consent Order No. 2011-11-13 (Dep't of Transp. Nov. 14, 2011).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Aviation, contributed significantly to the carrier's inability to deplane the 15 flights by the three-hour mark.¹¹⁰

The DOT settled its enforcement matter with American Eagle Airlines for \$900,000.¹¹¹ This represents the first and largest fine to date against any carrier for a tarmac rule violation. The settlement amount is much lower than the \$16.7 million fine the DOT could have levied against the carrier. It appears that the DOT felt that a reduced fine was appropriate because "the average passenger delay was [only] 18 minutes beyond the three-hour limit."¹¹²

This case underscores the complexity of airline operations and how poor decision-making can impact airline passengers. To its credit, American Eagle informed the DOT that as a result of this incident, it "conducted additional training of its employees, with a particular focus on flights destined to ORD on days involving inclement weather."¹¹³ This is particularly important because the carrier and its mainline partner both have hubs at this airport. Because of the high level of congestion at this airport and because inclement weather is common to the Chicago area, it is very likely that this situation could occur again.

The first case against a carrier for violating the tarmac rule, as it applies to international flights, was brought against Pakistan International Airlines Corporation (PIA). The DOT alleged that PIA violated 14 C.F.R. § 259.4 and 49 U.S.C. § 41712 by allowing one of its flights to "remain on the tarmac at Washington Dulles International Airport on October 29, 2011, for more than four hours without the opportunity to deplane."¹¹⁴ DOT also alleged that PIA failed to "adhere to the assurances in its contingency plan for lengthy tarmac delays that the carrier would not permit an international flight to remain on the tarmac for more

¹¹⁰ *Id.*

¹¹¹ *Id.* In the consent order, DOT stated that after it paid the first \$650,000, American Eagle would be credited up to \$250,000 for vouchers, frequent flyer mileage, and cash funds given to passengers.

¹¹² Doug Cameron, *U.S. Levies First Tarmac-Delay Fine*, WALL ST. J., Nov. 15, 2007, at B2.

¹¹³ American Eagle Airlines, Inc., OST-2011-0003 (consent order), *supra* note 105.

¹¹⁴ Pakistan Int'l Airlines Corp., OST-2012-0002, Consent Order No. 2011-11-13 (Dep't of Transp. Sep. 19, 2012).

than four hours without providing passengers an opportunity to deplane.”¹¹⁵

PIA flight 711 from Manchester, England to New York was scheduled to arrive at John F. Kennedy International Airport (JFK) at 3:27 pm on October 29, 2011.¹¹⁶ A “winter weather event” in the Northeastern portion of the U.S. was creating airport delays.¹¹⁷ The instrument landing system, which is often utilized, especially during inclement weather, was not working at JFK, thus making it impossible for PIA’s flight to land.¹¹⁸ The captain of flight 711 subsequently tried to land at Boston’s Logan International Airport (BOS), PIA’s principal diversion airport in the Northeast.¹¹⁹ His request was denied due to the large volume of additional flights arriving at the airport.¹²⁰

PIA’s flight had a limited amount of fuel and was diverted to Washington’s Dulles International Airport (IAD).¹²¹ The aircraft landed at 4:28 p.m. and parked at a remote stand.¹²² The aircraft’s captain and first officer disembarked the aircraft via air stairs in order to conduct external safety inspections.¹²³ PIA made no attempts to allow passengers to disembark, nor did it make contact with the U.S. Customs and Border Patrol about the possibility of allowing its passengers to go through customs.¹²⁴ The flight was delayed on the tarmac for four hours and forty-seven minutes.¹²⁵

In mitigation, PIA stated that its tarmac delay issue was “exacerbated by several regrettable events outside the airline’s direct control” such as the instrument landing system problems at JFK and having to land at IAD which was not its principal diversion airport.¹²⁶ PIA further claimed that allowing passengers to disembark via the air stairs may have been “unsuitable due to the

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

inclement weather, as well as the number of passengers requiring wheelchairs and the number of small children on board.”¹²⁷

DOT didn’t find PIA’s reasons to be compelling. DOT stated that, in fact, IAD served as a regular diversion airport for PIA.¹²⁸ The carrier also provided a copy of its tarmac delay plan to the Customs and Border Patrol, Transportation Security Administration, and “the Metropolitan Washington Airports Authority officials at IAD on August 23, 2011, in an effort to coordinate the carrier’s plan with those entities.”¹²⁹ This suggests that PIA was indeed prepared to use IAD as a diversion airport and therefore, it should have been able to allow its passengers to disembark within the four hour time limit.

PIA and DOT entered into a settlement whereby the carrier agreed to a civil penalty of \$150,000.¹³⁰ DOT agreed to forego collection of half the total penalty if PIA did not commit any further violations of 14 C.F.R. § 259.4 and 49 U.S.C. § 41712 before November 1, 2014.¹³¹

DOT’s case against Copa Airlines, Inc. illustrates another set of conditions which highlights the complexity of airline operations: limits on flight crew hours.¹³² Copa’s flight 831 was scheduled to depart New York’s John F. Kennedy International Airport (JFK) at 3:05 p.m. for Panama Tocumen International Airport (PTY) on June 22, 2012.¹³³ Poor weather conditions at JFK resulted in delayed departure at the airport that afternoon. Copa’s flight left the gate at 3:50 p.m.¹³⁴

While waiting for the weather to improve, Copa’s flight crew began serving beverages at 4:50 p.m.¹³⁵ Forty minutes later, the flight’s captain relocated the aircraft to a remote area on the tarmac in order to refuel the aircraft.¹³⁶ Refueling was completed at 6:45 p.m. and the aircraft once again waited on the taxiway for

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Copa Airlines, Inc., OST-2012-0002, Consent Order No. 2012-12-18 (Dep’t of Transp. Dec. 31, 2012).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

departure instructions.¹³⁷ Passengers were offered meals at 7:30 p.m. while the aircraft continued to wait for further instructions.¹³⁸

Copa's flight crew was nearing the limit on its work duty times. The captain decided to postpone the flight and passengers disembarked at 9:24 p.m., some five hours and thirty-four minutes after the aircraft left the gate.¹³⁹

The DOT charged Copa with violating 14 C.F.R. § 259.4(b)(2) for failing to "adhere to the assurances in its contingency plan for lengthy tarmac delays that the carrier would not permit an aircraft to remain on the tarmac at a U.S. airport for more than four hours without providing passengers an opportunity to deplane."¹⁴⁰ Copa was also charged with failing to adhere to its contingency plan to provide "food no later than two hours after the aircraft left the gate in the case of departure."¹⁴¹

In the consent order, DOT noted that Copa failed to comply with the regulatory requirements regarding the necessary contents for its contingency plan.¹⁴² The carrier noted that its crew "acted in a very courteous and professional manner" and that it provided its passengers with meal vouchers and ground transportation after it canceled the flight.¹⁴³ Copa conceded to the DOT that it "failed to strictly comply with the requirements."¹⁴⁴ The carrier also noted the steps it took in order to address the issues. This included updating its flight crew operations and procedure manuals as well as its website in order to comply with DOT regulations.¹⁴⁵

DOT assessed Copa \$150,000 in civil penalties.¹⁴⁶ Half of the fine, however, did not have to be paid by Copa if it adhered to the consent order's cease and desist provisions for a total of one year.¹⁴⁷

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* Copa also conceded that it had failed to timely file the tarmac delay report with the DOT's Bureau of Transportation Statistics.

¹⁴⁵ Copa Airlines, Inc., OST-2012-0002 (consent order), *supra* note 132.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

B. *Proceedings Against Carriers Who Fail to Inform Passengers That They Have a Right to Disembark When the Flight is at the Gate and the Aircraft Door is Open*

The DOT pursued a case against JetBlue Airways in 2012 for two violations, neither of which was a traditional tarmac delay.¹⁴⁸ The case is important because it illustrates the obligations imposed on carriers who operate a delayed flight that has neither left the gate nor closed the aircraft door. In this case, JetBlue was operating a flight from New York's John F. Kennedy International Airport (JFK) to San Francisco International Airport (SFO) on March 3, 2012.¹⁴⁹ The flight was scheduled to depart JFK at 7:30 p.m. and boarding began at 7:06 p.m.¹⁵⁰ A mechanical issue and the accommodation of military personnel required the flight to be delayed until 9:55 p.m.¹⁵¹

14 C.F.R. § 259.4(b)(6) states:

For all flights, assurance that the passengers on the delayed flight will be notified beginning 30 minutes after scheduled departure time (including any revised departure time that passengers were notified about before boarding) and every 30 minutes thereafter that they have the opportunity to deplane from an aircraft that is at the gate or another disembarkation area with the door open if the opportunity to deplane actually exists¹⁵²

The DOT stated that the carrier had violated 14 C.F.R. § 259.4(b)(6) because it failed to “properly notify passengers that they had the opportunity to deplane the aircraft that was at the gate for a lengthy period of time with the door open.”¹⁵³ DOT stated that “[a] tarmac delay begins when passengers no longer have the option to get off an aircraft, which usually occurs when the doors of the aircraft are closed.”¹⁵⁴

¹⁴⁸ JetBlue Airways Corp., OST-2012-0002, Consent Order No. 2012-8-25 (Dep't of Transp. Aug. 20, 2012).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Enhancing Airline Passenger Protections, 14 C.F.R. § 259.4.

¹⁵³ *Id.*

¹⁵⁴ JetBlue Airways Corp., OST-2012-0002 (consent order), *supra* note 148.

JetBlue conceded that its crew failed to inform passengers that they had the right to deplane the aircraft.¹⁵⁵ The airline argued, however, that the aircraft door was open throughout the entire delay and passengers could have deplaned at any time.¹⁵⁶ DOT rejected the carrier's argument by explaining that that Section 259.4(b)(6) "was promulgated to address the issue of when a tarmac delay has not yet begun, because the doors remain open at a gate or another disembarkation area, and yet passengers are unaware that the door to the aircraft is open and that they have the option to deplane, particularly during a departure delay at the gate or on an aircraft where passenger [sic] would not know that the door was open and deplaning."¹⁵⁷

JetBlue was also charged with violating 14 C.F.R. § 259.4(b) for not including all of the "required assurances in its contingency plan for lengthy tarmac delays."¹⁵⁸ The DOT noted that both violations also constituted engagement in "unfair and deceptive practice" under 49 U.S.C. § 41712.¹⁵⁹ Although DOT and JetBlue agreed that the carrier would pay a fine of \$90,000, the language in the order noted that the carrier would only be responsible for half of that amount provided that the carrier did not violate 14 C.F.R. § 259.4 and 49 U.S.C. § 41712 for one year from the date of the order.¹⁶⁰ The inclusion of this type of condition has also been found in other orders that the Department has entered into with other carriers. It also reflects the DOT's desire to penalize parties for violations but also to provide them with some financial incentive to rectify their noncompliance with the Department's regulations.

The DOT's case against Virgin America is similar to the JetBlue matter. Virgin America was scheduled to operate a flight between Chicago O'Hare International Airport (ORD) and San Francisco International Airport (SFO) on July 18, 2012 at 8:20 p.m.¹⁶¹ Boarding for the flight commenced 50 minutes late because the inbound aircraft arrived late into Chicago.¹⁶² With all

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Virgin America Inc., OST-2012-0002, Consent Order No. 2012-12-20 (Dep't of Transp. Dec. 31, 2012).

¹⁶² *Id.*

passengers aboard the aircraft, the flight was delayed once again due to weather.¹⁶³ During this gate delay of more than two hours, “passengers remained on board the aircraft with the door to the aircraft open and the jet bridge attached.”¹⁶⁴

The DOT charged Virgin America with violating 14 C.F.R. § 259.4(b)(6) by failing to properly notify passengers that they had the opportunity to deplane the aircraft that was at the gate for a lengthy period with the door open.¹⁶⁵ The Department also alleged that the carrier’s regulatory violation resulted in the carrier engaging in “unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.”¹⁶⁶ The DOT set forth its findings in the order:

In sum, section 259.4(b)(6) is in place to address the precise incident that occurred on flight 211. Beginning thirty minutes after the revised scheduled departure time and every thirty minutes thereafter until the doors closed, Virgin America was required to notify passengers that they could deplane the aircraft if they wished to do so. The failure by Virgin America to make the proper notifications is a violation of 14 CFR 259.4(b)(6) as well as 49 U.S.C. § 41712.¹⁶⁷

The DOT and Virgin America entered into a settlement whereby the carrier was fined \$55,000.¹⁶⁸ As in the JetBlue case, the agency agreed to allow Virgin America to avoid paying half of its fine if the carrier complied with the order’s cease and desist as well as the payment provisions.¹⁶⁹

The DOT pursued a similar matter against United Air Lines in 2013. United’s flight 881 from Chicago O’Hare International Airport (ORD) to Narita International Airport (NRT) in Tokyo left the gate at 12:38 p.m. on May 7, 2012.¹⁷⁰ The flight never left the airport. The aircraft returned to a gate at 2:25 p.m. in order

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ United Air Lines, Inc., OST-2013-0004, Consent Order No. 2013-2-9 (Dep’t of Transp. Feb. 11, 2013).

to address a maintenance issue.¹⁷¹ The aircraft's doors were opened at the gate, but United failed to make an announcement notifying passengers that they had the right to deplane.¹⁷² At 3:10 p.m., the aircraft's doors were closed.¹⁷³ Soon after, another mechanical issue arose and the flight was subsequently canceled and passengers deplaned the aircraft.¹⁷⁴

The DOT alleged that United had violated 14 C.F.R. § 259.4(b)(6) and 49 U.S.C. § 41712 by "failing to properly notify passengers that they had the opportunity to deplane the aircraft that was at the gate with the door open."¹⁷⁵ United was also charged with failing to accurately report tarmac delay information to the DOT in violation of 14 C.F.R. § 244.3 and 49 U.S.C. § 41708.¹⁷⁶

United told the DOT that a "miscommunication resulted in the failure to make a deplaning announcement after the flight returned to the gate and the opportunity to deplane existed."¹⁷⁷ The carrier stated, however, that it "failed to make the announcement mandated by section 259.4(b)(6) only once" and "it did not have any knowledge about any passenger requesting to leave the aircraft while it was at the gate with the door open."¹⁷⁸ The DOT stated in part:

Beginning thirty minutes after the flight returned to the gate in which the opportunity to deplane existed and every thirty minutes thereafter until the doors closed United was required to notify passengers that they could deplane the aircraft if they wished to do so. The failure by United to make the proper notification is a violation of 14 CFR 259.4(b)(6) as well as 49 U.S.C. § 41712.¹⁷⁹

In the order, DOT stated that carriers have an obligation to inform their passengers that they have the option to deplane when the aircraft is parked at the gate and its door(s) is open.¹⁸⁰

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

The DOT also stated that airline should “remind passengers that they are deplaning at their own risk and that the flight could depart at any time without them if that is in fact the case.”¹⁸¹ This is particularly important for a situation that involves an international flight. By failing to return on time to board an international flight, passengers may find it very difficult to reach their destination in a timely manner and incur additional expenses.

In its settlement with United, DOT assessed the carrier \$130,000 in civil penalties.¹⁸² After paying the first \$40,000, United was credited up to \$40,000 for refunds, travel vouchers, and frequent flyer mileage awards given to passengers on flight 881.¹⁸³ Consistent with its action in previous cases, the DOT agreed to forego the remaining \$50,000 that United owed the Department if the carrier complied with the order’s cease and desist provisions.¹⁸⁴

C. *The Need to Follow the Rules*

The DOT brought a case against Air India in 2012 for its failure to post its tarmac delay contingency and customer service plans, pursuant to 14 C.F.R. §§ 259.4 and 259.6(a), on its website by August 23, 2011, the date the second set of rules went into effect.¹⁸⁵ The DOT also charged Air India with failing to “disclose on the homepage of their website a clear and conspicuous hyperlink that takes the viewer directly to a page . . . where all fees for optional services” are disclosed.¹⁸⁶ The DOT noted that these actions constitute engagement in “unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712.”¹⁸⁷

In its settlement with the DOT, Air India agreed to a fine of \$80,000, with half of that amount not subject to payment if the carrier complied with the consent order’s cease and desist and payment provisions for at least one year.¹⁸⁸

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Air India, Ltd., OST-2012-0002, Consent Order No. 2012-5-4 (Dep’t of Transp. May 3, 2012).

¹⁸⁶ *Id.*; 14 C.F.R. § 399.85(d).

¹⁸⁷ Air India, Ltd., OST-2012-0002 (consent order), *supra* note 185.

¹⁸⁸ *Id.*

Conclusion

The federal government can play a meaningful role in addressing deficiencies in the airline industry. As the enforcement of the tarmac rule has demonstrated, solutions for a complex industry are not always perfect. Time will tell if these new regulations have improved the much-loved deregulated airline industry. Nonetheless, the cases discussed in this article suggest that the DOT has been aggressive in trying to ensure that air carriers adhere to the regulatory requirements for addressing long flight delays. Both the cases and the quantitative data suggests that the DOT's rulemaking and enforcement powers have been quite successful in ensuring that passengers' needs are addressed during long delays. Policymakers will be watching to see whether airlines and their passengers experience improvements in customer service.

