New Tarmac Delay Rule and the Volcanic Ash Cloud over European Airspace: One Year Later

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THE NEW TARMAC DELAY RULE AND THE VOLCANIC
ASH CLOUD OVER EUROPEAN AIRSPACE:
ONE YEAR LATER

JENNIFER HENRY*
MARY GARDNER**

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I. INTRODUCTION

IN THE SPRING of 2010, two major events occurred that impacted the airline industry. The first was the U.S. Department of Transportation’s (DOT) adoption of rules to protect passengers in the event of tarmac delays, specifically titled “Enhancing Airline Passenger Protections,” which became effective on April 29, 2010.1 The second event was the volcanic ash cloud, created by the eruption of Iceland’s Eyjafjallajökull volcano, which shut down the majority of European airspace in April of 2010.2 This article examines each of these events and the effect—both immediately and over a longer term—they had on the industry.

II. NEW TARMAC DELAY RULE (TDR)

In April 2010, the DOT’s new rules on tarmac delay times and other passenger protections took effect.3 Although the regulations faced adversity and criticism, data from the last seven

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months indicates that the rule has served its intended purpose. The following discussion addresses the substance of the regulations, the events that led to their promulgation, the predicted outcome, and the realized outcome.

A. THE EVENTS THAT TRIGGERED THE RULE

A series of highly publicized incidents where travelers were left on the tarmac for long periods of time triggered the DOT’s new rule. The first highly publicized incident occurred in January 1999, when Detroit, Michigan, was hit by a massive snowstorm and “Detroit Metro Airport was blanketed with snow and ice.” Passengers on Northwest Airlines’s airplanes were physically stranded on the tarmac for approximately six hours. At 6:00 p.m. on January 3, the airline instructed passengers to board the aircraft; but, after the doors closed, the plane never took off, and passengers were repeatedly instructed to remain seated with their seat belts fastened. The flight remained parked on the tarmac for approximately six hours before the airline cancelled the flight and the passengers finally deplaned.

The second incident occurred in December 2006; severe thunderstorms in Dallas, Texas, resulted in multiple flights being diverted to surrounding airports and left on the runway for several hours. One plane, on its way from Oakland, California, to Dallas, Texas, was diverted to Austin, Texas. The plane landed in Austin around noon, refueled, began to taxi to the runway, but then stopped short. The pilot informed the passengers that the Dallas airport closed due to bad weather. Approximately an hour later, passengers were informed that a bus was available to take those who wished to deplane to the Austin airport terminal. One passenger alleged that the pilot recom-

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7 Id. at *1–2.
8 Id.
10 Ray, 609 F.3d at 920.
11 Id.
12 Id.
13 Id.
mended they stay onboard and told them that the plane would likely be leaving in an hour or so.\textsuperscript{14} Another two to three hours passed with the plane on the tarmac, and passengers were again offered the opportunity to deplane and head back to the airport terminal.\textsuperscript{15} The airline provided no further opportunities to deplane for the next six to seven hours.\textsuperscript{16} One passenger reported that the conditions in the plane “deteriorated” from that point and claimed that “the air became ‘stuffy’ and ‘smelly.’”\textsuperscript{17} The only food and drinks supplied to passengers were “two or three granola bars” and two soft drinks.\textsuperscript{18} At least one of the plane’s bathrooms eventually filled with waste and stopped flushing.\textsuperscript{19} Around 6:00 p.m., the pilot informed the passengers that “he was no longer able to fly the plane because he had reached his maximum duty hours,” but due to lightning in the Austin area causing ground crews to shut down, the plane was not taken to the gate until 9:00 p.m.\textsuperscript{20} “Many of the passengers . . . spent the night in the [airport] terminal.”\textsuperscript{21}

Another highly publicized event happened in February 2007. “More than 1,000 passengers on nine different flights” were kept on the tarmac for hours at John F. Kennedy International Airport in New York during a snowstorm.\textsuperscript{22} One flight sat on the tarmac for nearly eleven hours.\textsuperscript{23} As with the December 2006 incidents in Texas, “[t]he air and toilets on the plane [became] foul, and the passengers . . . were given little or no information about why they” could not deplane.\textsuperscript{24}

Several lawsuits were filed in the wake of the three events described above. A passenger on a Northwest Airlines flight during the January 1999 snowstorm in Detroit, Michigan, sued the airline for breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, false imprisonment, negligence, and violations of Califor-

\begin{footnotes}
\item[14] Id.
\item[15] Id. at 921.
\item[16] Id.
\item[17] Id.
\item[18] Id.
\item[19] Id.
\item[20] Id.
\item[21] Id.
\item[23] Id.
\item[24] Id.
\end{footnotes}
nia state statutes and asserted claims for declaratory and injunctive relief.\textsuperscript{25} The claims were dismissed at summary judgment.\textsuperscript{26} Two lawsuits, related to different flights, were filed in connection with Dallas’s 2006 thunderstorms.\textsuperscript{27} One suit was dismissed on summary judgment, and the dismissal was affirmed by the Eighth Circuit.\textsuperscript{28} In the other suit, the plaintiffs’ claims were dismissed through rulings on summary judgment and 12(b)(6) motions, but the court permitted the plaintiffs to amend their complaint and cure some of the defects.\textsuperscript{29} The plaintiffs, however, chose not to amend and sought entry of final judgment from the court so as to allow them to appeal without delay.\textsuperscript{30}

\subsection*{B. Rules to Enhance the Protections for Airline Passengers}

The events in Detroit, Dallas, and New York drove the demand for a federal “passenger bill of rights” and put pressure on the DOT to take action.\textsuperscript{31} As Congress debated legislation to address the issue, the DOT published a Notice of Proposed Rulemaking (NPRM) on enhancing airline passenger protections on December 8, 2008.\textsuperscript{32} After reviewing and considering the comments on the NPRM, on December 30, 2009, the DOT published a final rule, “Enhancing Protections for Airline Passengers,” the stated purpose of which is “to mitigate hardships for airline passengers during lengthy tarmac delays and . . . bolster air carriers’ accountability to consumers.”\textsuperscript{33} The rule became effective on April 29, 2010, and is found in 14 C.F.R. Part 259.\textsuperscript{34}

\begin{thebibliography}{99}
\bibitem{26} Id. at *9.
\bibitem{28} Ray v. Am. Airlines, Inc., 609 F.3d 917, 922, 927 (8th Cir. 2010).
\bibitem{29} Hanni, 2010 WL 289297, at *2.
\bibitem{30} Letter from Paul S. Hudson, Attorney for Plaintiffs, to Hon. Claudia Wilken, Judge for the N. Dist. of Cal. (May 5, 2010) (available on PACER).
\bibitem{31} Berg, \textit{supra} note 4, at 18.
\bibitem{34} See 14 C.F.R. § 259 (2011); Enhancing Airline Passenger Protections, 74 Fed. Reg. at 68,983.
\end{thebibliography}
The "rule applies to all the flights of a certificated or commuter air carrier if the carrier operates scheduled passenger service or public charter service using any aircraft originally designed to have a passenger capacity of 30 or more seats," with certain exceptions, and it requires the carriers to adopt contingency plans for lengthy tarmac delays, respond to consumer problems, post flight delay contingency plans on their websites, and adopt, follow, and audit customer service plans.\footnote{14 C.F.R. §§ 259.2, 259.4–7 (2011).}

1. Contingency Plans for Lengthy Tarmac Delays

Under the TDR, every certificated and commuter U.S. air carrier is required to adopt contingency plans in cases of long tarmac delays "at each large and medium hub U.S. airport at which it operates."\footnote{Id. §§ 259.3–4.} Among other things, each plan is required to limit the number of hours an aircraft may sit on the tarmac before passengers are permitted to deplane.\footnote{See id. § 259.4(b)(1).} When the rule was published, Secretary of Transportation Ray LaHood explained that airlines which "do not provide food and water after two hours or a chance to disembark after three hours," as required by the TDR, will face penalties of up to $27,500 per passenger.\footnote{Matthew L. Wald, Stiff Fines Are Set for Long Wait on the Tarmac, N.Y. TIMES, Dec. 22, 2009, at A1; see also 14 C.F.R. § 259.4(b) (1), (3).} The rule provides some exceptions to the three hour maximum tarmac delay: (i) if the pilot-in-command ascertains that the plane must remain on the tarmac because of safety or security reasons, or (ii) if air traffic control informs the pilot-in-command that leaving the tarmac "to deplane passengers would significantly disturb airport operations."\footnote{14 C.F.R. § 259.4(b)(1)(i)-(ii).} Foreign carriers with international flights arriving at or departing from U.S. airports must also have contingency plans with a self-imposed time limit for remaining on the tarmac.\footnote{Id. § 259.4(b)(2).} The same exceptions that permit domestic flights to remain on the tarmac for longer than authorized periods apply to international flights.\footnote{Id. § 259.4(b)(2)(i)-(ii).}

The TDR requires the contingency plan to state that the air carrier will provide the passengers with adequate food and potable water within two hours of the plane leaving the gate for de-
parture or two hours of the plane touching down for arrival.\textsuperscript{42} An exception to this requirement exists in circumstances where the pilot-in-command determines that security or safety reasons prevent the provision.\textsuperscript{43} Additionally, all air carriers must assure operating bathrooms and medical attention, if needed.\textsuperscript{44} Failure to comply with the contingency plan is considered to be an unfair and deceptive practice and is subject to enforcement by the DOT.\textsuperscript{45}

2. \textit{Customer Service Plans}

In addition to contingency plans for lengthy tarmac delays, the TDR requires certificated and commuter air carriers to adopt customer service plans applicable to their scheduled flights.\textsuperscript{46} Such plans are required to contain provisions:

(1) Offering the lowest fare available;
(2) Notifying customers of known delays, cancellations, and diversions;
(3) Delivering baggage on time;
(4) Allowing reservations to be held without payment or cancelled without penalty for a defined amount of time;
(5) Providing prompt ticket refunds;
(6) Properly accommodating passengers with disabilities and other special-needs . . . ;
(7) Meeting customers' essential needs during lengthy tarmac delays;
(8) Handling "bumped" passengers with fairness and consistency in the case of over-sales;
(9) Disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration;
(10) Ensuring good customer service from code-share partners;
(11) Ensuring responsiveness to customer complaints; and
(12) Identifying the services it provides to mitigate passenger inconveniences resulting from cancellations and misconnects.\textsuperscript{47}

Each airline is also required to self-audit its adherence to the customer service plan annually and maintain those audit records for up to two years for review by the DOT.\textsuperscript{48}

\begin{itemize}
\item \textsuperscript{42} Id. \textsection 259.4(b)(3).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id. \textsection 259.4(b)(4).
\item \textsuperscript{45} Id. \textsection 259.4(e).
\item \textsuperscript{46} Id. \textsection 259.5(a).
\item \textsuperscript{47} Id. \textsection 259.5(b).
\item \textsuperscript{48} Id. \textsection 259.5(c).
\end{itemize}
3. Notice and Contract of Carriage

The DOT wanted to require carriers to include their contingency plans and customer service plans in their contracts of carriage, but this proposal was met with resistance by industry groups.\textsuperscript{49} A compromise was reached, and the rule instead requires each airline with a website to post its contract of carriage, including all updates to the contract, online in an accessible form.\textsuperscript{50} If the carrier’s contract of carriage does not include the carrier’s contingency plan for lengthy tarmac delays or the carrier’s customer service plan, the carrier must then post the contingency plan and/or customer service plan, including all updates, on its website in easily accessible forms.\textsuperscript{51} In June 2010, the DOT proposed yet another rule that would require the contingency plan for lengthy tarmac delay and customer service plan to be included in the contract of carriage.\textsuperscript{52} After receiving comments from the industry and interested groups about this proposal, the DOT ultimately decided not to require U.S. and foreign carriers to include their contingency plans and their customer service plans in their contract of carriage.\textsuperscript{53} The DOT did mandate that foreign air carriers post their tarmac delay contingency plans, customer service plans, and contracts of carriage on their websites.\textsuperscript{54}

4. Response to Consumer Problems

The DOT’s new regulations also address how air carriers are to respond to consumer problems.\textsuperscript{55} Carriers are to designate an employee to monitor the effects on passengers of flight delays, flight cancellations, and lengthy tarmac delays.\textsuperscript{56} “This employee shall have input into decisions on which flights to cancel and which will be delayed the longest.”\textsuperscript{57} Each carrier is also required to provide the mailing address and e-mail or web address of the department that handles passenger complaints on

\textsuperscript{50} 14 C.F.R. § 259.6(b).
\textsuperscript{51} 14 C.F.R. § 259.6(c)–(d).
\textsuperscript{52} Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,318 (proposed June 8, 2010) (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, 399).
\textsuperscript{54} Id.
\textsuperscript{55} See 14 C.F.R. § 259.7.
\textsuperscript{56} Id. § 259.7(a).
\textsuperscript{57} Id.
its website, on e-ticket confirmations, and, if requested by a passenger, at each ticket counter and boarding gate staffed by the air carrier. And when a carrier receives a complaint—defined as "a specific written expression of dissatisfaction concerning a difficulty or problem . . . experienced when using or attempting to use an airline's services"—the carrier is to acknowledge receipt of the complaint within thirty days and provide a substantive response within sixty days.

The DOT also focused on the regulation of certain flight schedules and chronically delayed flights in its efforts to provide passenger protection. "The holding out of a chronically delayed flight for more than four consecutive one-month periods represents one form of unrealistic scheduling and is an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712" and is subject to enforcement by the DOT. "Chronically delayed flight" is defined as any domestic flight, operating at least ten times a month, that arrives more than thirty minutes late more than fifty percent of the time during that month. Chronically delayed flights include cancelled flights.

C. The Anticipated Results of the Regulation

When the TDR was proposed, it was met with skepticism and predictions that, rather than helping passengers, it would increase the likelihood that passengers would face flight delays, cancellations, and general inconvenience. However, many of the concerns voiced by the airline industry to the DOT's proposed rule were alleviated in the final rule. For example, airlines were concerned with the initial deadline of only thirty days to respond to customer complaints. The Air Transport Association of America (ATA) proposed a thirty-day acknowledgement and a sixty-day deadline to respond. This suggestion was incorporated into the final rule under section 259.7(c). In addi-

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58 Id. § 259.7(b).
59 Id. § 259.7(c).
60 Id. § 399.81(c)(4).
61 Id. § 399.81(c)(2).
62 See id.
64 See Berg, supra note 4, at 18.
65 Id.
66 14 C.F.R. § 259.7(c).
tion, while airlines accepted the idea of developing contingency plans and customer service plans, they opposed incorporating those plans into their contracts for carriage.\textsuperscript{67} The DOT argued that the requirement would provide passengers a breach of contract cause of action if the carrier failed to follow the plans.\textsuperscript{68} The final rule contains a compromise, providing that “[e]ach air carrier that is required to adopt a Contingency Plan for Lengthy Tarmac Delays or a Customer Service Plan may include such plans in their Contract of Carriage.”\textsuperscript{69}

The ATA also opposed the fixed deadline of three hours to deplane passengers, arguing that it limited airline flexibility and would lead to more cancellations and be a greater nuisance to passengers.\textsuperscript{70} Passenger advocacy groups, on the other hand, argued for a two-hour deadline.\textsuperscript{71} Despite airline proclamations that carriers would be forced to cancel flights to avoid civil penalties even though passengers might be willing to risk extended delays, the new rule was instated with the three-hour deadline.\textsuperscript{72}

Commentary on the new rule suggested that the “bright line” drawn by the DOT would lead to the unintended consequences of passenger disruption and lengthy onboard delay.\textsuperscript{73} Objectors argued that, while the rule allowed for the pilot-in-charge to prolong tarmac times for safety or security, it did not take into consideration a determination to stay on the tarmac because of imminent departure.\textsuperscript{74} It was also contended that, at certain large airports, taxi times between the gate and the runway can take more than thirty minutes and, therefore, departing planes will not be able to wait very long before the pilot must decide whether to taxi back and deplane passengers.\textsuperscript{75} Flights forced to return to the gate are more likely to be cancelled, and it was

\begin{flushright}
67 Berg, supra note 4, at 18.
68 Id.
69 14 C.F.R. § 259.6(a) (emphasis added). While the NPRM issued by the DOT on June 8, 2010, would require such plans to be included in the airline’s contract of carriage, see Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,324 (proposed June 8, 2010) (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, 399), the DOT ultimately decided not to require it, see Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110 (Apr. 25, 2011) (to be codified at 14 C.F.R. pts. 244, 250, 253, 259, 344).
70 Berg, supra note 4, at 18.
72 See Berg, supra note 4, at 19.
73 Id.
74 Id.
75 Id.
\end{flushright}
NEW TARMAC DELAY RULE

anticipated that airlines would begin to preemptively cancel flights when there is doubt as to the ability to depart within three hours. Overall, the arguments against the TDR alleged that it would create problems for passengers rather than alleviate them.

D. THE ACTUAL RESULTS OF THE REGULATION

While there are only seven months of data available on the subject, the TDR was being hailed a success. Data shows that at least one of the DOT’s goals—to prevent passengers from being held on the tarmac for over three hours—has been fulfilled by the new rule.

Table One

Tarmac Times of More Than 3 Hours

<table>
<thead>
<tr>
<th>Month</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct</td>
<td>46</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>Nov</td>
<td>183</td>
<td>183</td>
<td></td>
</tr>
<tr>
<td>Dec</td>
<td>85</td>
<td>50</td>
<td>40</td>
</tr>
<tr>
<td>Jan</td>
<td>85</td>
<td>74</td>
<td>6</td>
</tr>
<tr>
<td>Feb</td>
<td>34</td>
<td>161</td>
<td>6</td>
</tr>
<tr>
<td>Mar</td>
<td>65</td>
<td>268</td>
<td>11</td>
</tr>
<tr>
<td>Apr</td>
<td>34</td>
<td>90</td>
<td>34</td>
</tr>
<tr>
<td>May</td>
<td>60</td>
<td>74</td>
<td>17</td>
</tr>
<tr>
<td>Jun</td>
<td>66</td>
<td>60</td>
<td>1</td>
</tr>
<tr>
<td>Jul</td>
<td>40</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Aug</td>
<td>34</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Sep</td>
<td>4</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Oct</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Nov</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Between May 2009 and November 2009—before the TDR was effective—550 planes were reported to have sat on the tarmac for three hours or more. But since the TDR became effective, there were only twelve cases of tarmac times of three hours or more for the same May to November period of 2010.

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76 Id.
79 Id.
80 Id.
81 Id.
Table Two

<table>
<thead>
<tr>
<th>Month</th>
<th>2009</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>May</td>
<td>4701</td>
<td>6716</td>
</tr>
<tr>
<td>June</td>
<td>8282</td>
<td>8279</td>
</tr>
<tr>
<td>July</td>
<td>8813</td>
<td>8170</td>
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<tr>
<td>August</td>
<td>5618</td>
<td>5645</td>
</tr>
<tr>
<td>September</td>
<td>4754</td>
<td>5273</td>
</tr>
<tr>
<td>October</td>
<td>5275</td>
<td>5275</td>
</tr>
<tr>
<td>November</td>
<td>272</td>
<td>5755</td>
</tr>
</tbody>
</table>

It was predicted that, as a result of the TDR, flight cancellations would increase because carriers would cancel flights rather than risk incurring fines due to extended tarmac times.\(^{83}\) If one were to look solely at the number of flights cancelled, one would see an increase. For example, in May 2009, 4,792 flights were cancelled while in May 2010, 6,716 flights were cancelled; thus, 1,924 more flights were cancelled in May 2010 than in May 2009.\(^{84}\) Overall, 6,093 more flights were cancelled from May through November 2010 than from May through November 2009.\(^{85}\)

\(^{82}\) See sources cited infra note 85.

\(^{83}\) See Berg, supra note 4, at 19.


The number of flights cancelled alone, however, should not determine whether airlines have reacted to the TDR by cancelling more flights. The overall percentage of flights cancelled (i.e., the relationship between those cancelled to those scheduled) should be utilized. An increase in the number of flights scheduled will likely result in a parallel increase in the number of flights cancelled; thus, analysis of the numbers of flights cancelled alone is unlikely to be a true indicator of whether cancellations have risen overall. In May 2009, 0.88% of flights were

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See sources cited supra note 85.
cancelled. In May 2010, 1.24% of flights were cancelled. Thus, there was only a .36% increase in flight cancellations between May 2009 and May 2010. For the seven-month period from which there is data, there has been only a .14% increase in the percentage of flights cancelled from May through November 2010 than from May through November 2009.

With regard to flight cancellation numbers, it should also be noted that, unlike the clear and drastic drop in tarmac delay incidents, month-to-month flight cancellation comparisons have been variable. As shown in the table above, between 2009 and 2010, the month of May saw an increase of 1,924 flight cancellations. In June, however, there were actually three fewer cancellations in 2010 than in 2009. The cancellation numbers rose again in July, with 1,332 more flights being cancelled in 2010 than in 2009, but then dropped back down again in August, where there were five fewer cancellations in 2010 than in 2009. Thus, flight cancellations cannot, at this time, be used as a solid indicator of the success or failure of the TDR.

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89 See sources cited supra note 85.
Table Four

Percentage of Flights On-Time

From May through November 2010, 80.97% of flights were on time. For that same period of the previous year, 80.85% of flights were on-time. Thus, there was a .12% increase in the


94 See infra notes 95-96 and accompanying text.


percentage of on time flights. In sum, it appears that, to date, the TDR has had a negligible effect on the number of on-time flights as well as the percentage of flights cancelled. What has seen drastic reduction is the number of flights that sat on the tarmac for over three hours, which dropped from 550 to 12.\textsuperscript{97} It appears that the TDR, at least as of now, is deserving of its recent praise. Some hypothesize that airlines and airports have simply made operational adjustments in response to the TDR and, thus, have not had to unnecessarily cancel flights.\textsuperscript{98}

When contacted in November 2010, the DOT informed the authors that, of the eight tarmac delay incidents during May through August 2010, the DOT closed three with warning letters.\textsuperscript{99} Those cases apparently “involved tarmac delays of two, three, and five minutes over the three-hour threshold,” and extenuating circumstances existed in some of those instances.\textsuperscript{100} “The remaining five cases [were] still open and under investigation.”\textsuperscript{101} As of August 2011, no airline had been fined the threatened $27,500 per passenger for violations.\textsuperscript{102} And to date, there have been no chronically delayed flights for four consecutive months or more.\textsuperscript{103}

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\textsuperscript{97} Bureau of Transp. Stat., supra note 78; see also supra graphic accompanying note 79.
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\textsuperscript{98} See, e.g., Yu, supra note 77.
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\begin{flushleft}
\textsuperscript{99} Email from Reference Services, U.S. Dep't of Transp., to author Gardner (Nov. 1, 2010, 9:33 AM) (on file with author).
\end{flushleft}

\begin{flushleft}
\textsuperscript{100} Id.
\end{flushleft}

\begin{flushleft}
\textsuperscript{101} Id.
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E. ANOTHER PROPOSED RULE OFFERING ADDITIONAL PASSENGER PROTECTIONS

On June 8, 2010, the DOT continued its efforts to improve the air travel environment for passengers by issuing another NPRM that would expand the scope of the TDR; strengthen the rights of air travelers in the event of over-sales, flight cancellations, and long delays; and ensure that passengers have accurate and adequate information to make informed decisions when selecting flights.\textsuperscript{104} The DOT proposes to accomplish these objectives by:

- [(1)] increasing the number of carriers that are required to report tarmac delay information to the [DOT];
- [(2)] expanding the group of carriers that are required to adopt, follow, and audit customer service plans and establishing minimum standards for the subjects all carriers must cover in such plans;
- [(3)] requiring carriers to include their contingency plans and customer service plans in their contracts of carriage; . . .
- [(4)] enhancing protections afforded to passengers in oversales situations; . . .
- [(5)] requiring carriers to notify consumers of optional fees related to air transportation and of increases in baggage fees;
- [(6)] prohibiting post-purchase price increases;
- [(7)] requiring carriers to provide passengers timely notice of flight status changes such as delays and cancellations; and
- [(8)] prohibiting carriers from imposing unfair contract of carriage choice-of-forum provisions.\textsuperscript{105}

\textsuperscript{104} Enhancing Airline Passenger Protections, 75 Fed. Reg. 32,318, 32,318 (proposed June 8, 2010) (to be codified at 14 C.F.R. pts. 234, 244, 250, 253, 259, 399).

\textsuperscript{105} Id.
In addition, the DOT is considering several measures, including banning the serving of peanuts on commercial airlines to provide greater access to travel for those individuals with peanut allergies. The DOT issued a final rule in the spring of 2011 after considering the comments it received in response to its NPRM.

F. CONCLUSION

While the new TDR was met by the airline industry and others with opposition and skepticism, the results so far indicate that it has been successful to the extent that it sought to reduce the number of flights with tarmac times over three hours.

III. THE VOLCANIC ASH CLOUD OVER EUROPEAN AIRSPACE

On March 20, 2010, the Eyjafjallajökull volcano in Iceland began erupting. Volcanic ash spewed into the air and formed a large cloud that was carried by winds over Europe. As a result of this ash plume, the majority of European airspace became a no-fly zone from April 15 through April 22, 2010. The following is an overview of aviation's history with volcanic ash, a description of what occurred when the Eyjafjallajökull volcano erupted, and a discussion of the legal and financial ramifications of the closure of most of the European airspace for eight days.

A. THE HISTORY OF AVIATION AND VOLCANIC ASH

Volcanic ash particles "can be highly abrasive and can have melting temperatures below" the temperatures that typically exist in airplane engines. The particles remain in a solid form

106 Id. at 32,332.
108 Iceland Volcano Eruption of 2010 (Eyjafjallajokull Volcano), supra note 2.
109 Id.
111 See H. Flentje et al., The Eyjafjallajökull Eruption in April 2010-Detection of Volcanic Plume Using In-Situ Measurements, Ozone Sondes and Lidar-Ceilometer Profiles, ATMOSPHERIC CHEMISTRY & PHYSICS, June 18, 2010, at 10,085, 10,085, available at http://www.atmos-chem-phys.net/10/10085/2010/acp-10-10085-2010.html.
while suspended in the air; however, when the particles come in contact with the higher temperatures of an airplane's engines, the ash melts, potentially causing engines to seize and shut down. Thus, volcanic ash particles can be extremely destructive to aircraft. The dangers posed to aircraft by volcanic ash clouds were discovered and analyzed in the early 1980's.

On June 24, 1982, with 263 passengers onboard, British Airways Flight 009 took off from London's Heathrow Airport on its way to New Zealand with stops along the route in India, Malaysia, and Australia. The weather radar was clear as the Boeing 747 flew over the Indonesian city of Jarkarta at an altitude of over 36,000 feet. But, the cockpit and cabin soon began to fill with heavy sulphuric smoke. Passengers looking out the window saw that the jet was covered in a "brilliant, shimmering light" and all four engines of the plane were on fire.

As flames burst from the engines, they began to fail one by one until all four were gone. A Boeing 747 can move forward ten miles every 1,000 feet it falls, and, at this point, Flight 009 had become a glider. Oxygen masks fell from the overheads, but not all of them worked. In an effort to save those with faulty masks from oxygen starvation, the captain took a nosedive and dropped the jet to an altitude where there was enough oxygen in the atmosphere to sustain the passengers and crew. The surprising consequence of this action was that one engine unexpectedly came back to life. Soon after the plane dropped to 13,000 feet, the other three engines also began to

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113 Simon A. Carn et al., Tracking Volcanic Sulfur Dioxide Clouds for Aviation Hazard Mitigation, 57 NAT. HAZARDS 325, 328 (2008).

114 See id.

115 See id. at 326–27.


117 Id.

118 Id.

119 Id.

120 Id.

121 Id.

122 Id.

123 Id.

124 Id.
work, and, although one shut down again, the plane was able to safely land.\textsuperscript{125}

The forensic investigation that followed found that the engines had shut down after flying through a cloud of volcanic ash.\textsuperscript{126} That day, just southeast of Jakarta, Mount Galunggung erupted, sending “finely ground particles of rock” into the air.\textsuperscript{127} Volcanic ash plumes are composed of extremely dry material and are, therefore, unlike other weather systems that can be detected by radar through water particles.\textsuperscript{128} When the captain took the plane into clear, denser air, the volcanic material was blown free and the engines were able to restart.\textsuperscript{129} The incident changed aviation training around the world.\textsuperscript{130} Pilots are now taught to pay attention to signs of a sulphuric smell or smoke as well as frictional electrification—the brilliant shimmering light—on the leading edges of the aircraft.\textsuperscript{131}

A similar incident occurred on December 15, 1989, when KLM Flight 867, bound for Anchorage, Alaska, with 231 passengers onboard, inadvertently flew through a plume of volcanic ash.\textsuperscript{132} The Redoubt volcano, 115 miles southwest of Anchorage, began erupting ten hours before the Boeing 747 encountered the cloud.\textsuperscript{133} All four engines failed, but after the jet descended from 27,900 feet to 13,300 feet, the crew was able to restart all the engines and the plane landed safely.\textsuperscript{134} Between 1980 and 1997, at least fifteen aircraft utilizing North Pacific air routes and eighty planes worldwide were damaged after flying through volcanic ash clouds.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} See id.
\item \textsuperscript{131} Id.
\item \textsuperscript{134} NEAL ET AL., supra note 132.
\item \textsuperscript{135} Id.
\end{itemize}
B. THE EYJAFJALLAJÖKULL ERUPTION

The Eyjafjallajökull volcano is located in the south of Iceland.\(^\text{136}\) The volcano was relatively dormant for 190 years, but, in December 2009, enhanced seismic activity began and culminated in the eruption of the Eyjafjallajökull volcano on March 20, 2010.\(^\text{137}\) Fire fountains and lava jets were observed for days, and on April 14, 2010, a major eruption occurred in the central crater of the volcano.\(^\text{138}\) Large plumes of volcanic ash rose 10 kilometers—approximately 33,000 feet—into the sky and remained there for days.\(^\text{139}\) Northwesterly winds carried the ash cloud across the northeastern Atlantic to Scandinavia and the British Islands and then on to Central Europe.\(^\text{140}\) As a result, from April 15–22, 2010, the majority of European airspace closed.\(^\text{141}\)

C. GOVERNMENTAL RESPONSE TO EYJAFJALLAJÖKULL’S ERUPTION

The International Civil Aviation Organization (ICAO) has established widely published international safety protocols, one of which requires the closure of airspace when volcanic ash levels in the sky rise above zero.\(^\text{142}\) As the ash cloud created from Eyjafjallajökull’s eruption spread across Europe, European aviation authorities followed ICAO procedure and closed their airspace.\(^\text{143}\) On April 17–18, 2010, seventeen European Union member states and six non-EU states fully closed their airspace.\(^\text{144}\) Two EU member states were partially closed.\(^\text{145}\)

The flying bans were instituted by the European Organization for the Safety of Air Navigation (EuroControl) and were based on measurements of volcanic ash provided by the Volcanic Ash Advisory Centre (VAAC).\(^\text{146}\) But even before the bans were

\(^{136}\) Flentje et al., supra note 111.

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) EUROCONTROL, supra note 110.


\(^{143}\) Alemanno, supra note 142.

\(^{144}\) Id. at 1 n.2.

\(^{145}\) Id.

\(^{146}\) Id. at 1.
lifted, European airlines began criticizing the authorities as being overly cautious and argued that the model used by VAAC to measure the ash was “theoretical” and “based on ‘probability’ rather than fact.” In Britain, the Met Office—the United Kingdom’s National Weather Service—was criticized by major British airlines for relying on the VAAC model and making the U.K. a no-fly zone.

Aviation authority spokesmen and airline representatives stated that given the consequences of blanket airspace closures, as discussed below, future tests need to be conducted to determine if a non-zero safe-ash level exists. Several European airlines ran test flights to determine whether the models were matching reality. None allegedly suffered damage. Some of the test flights had sampling instruments that reported that there were no ash particles in locations predicated by the models. Some military jets, however, flew through ash and did sustain engine damage.

In Europe, air traffic control is closely associated with sovereignty, which has led to fragmented air traffic management over European states. In 2004, legislation known as Single European Sky brought air traffic management under the EU common transport policy. The efforts to unify the European sky, however, have been less than successful. It took five days before transport ministers from EuroControl member states conferenced and agreed to a uniform response to the crisis. New procedures defined zones of danger, with zone 1 being the central nucleus of the cloud where full restriction was maintained, through zone 3, where there was no ash and, therefore,

148 Gammell et al., supra note 147.
149 Id.; Marks, supra note 142.
150 Id.; Marks, supra note 142.
151 Id.
152 Id.
153 Id.
154 Alemanno, supra note 142, at 3.
155 Id.
156 See id.
157 Id. at 2.
no restrictions. The zoning led to the “‘progressive and coordinated opening of European Air Space.’”

D. CONSEQUENCES OF THE AIRSPACE CLOSURE

From April 15 through April 22, more than 100,000 flights and 10 million passengers were disrupted. Besides Iceland (where the volcano was located), Finland, Ireland, and the U.K. were hit the hardest, seeing a 90% reduction in air traffic. In Iceland, air traffic was affected for thirteen days—five days longer than most of Europe. Over the eight day period, 48% of flights into and out of Europe were cancelled. The worst day was April 18, when air traffic was down to 20% of normal. The ash plume moved in and out of European airspace and, consequently, between May 4–17, 2010, an additional 7,000 flights were cancelled.

The cancellation of flights not only disrupted passengers, it also upset global supply routes. The flying ban impacted international trade, particularly affecting fast-perishing items. Gross losses sustained by the aviation sector due to lost business are estimated to be $2.6 billion. It is likely, however, that some travel, originally cancelled because of airspace closures, was nevertheless taken, and, thus, the estimated net losses for the aviation sector are $2.2 billion. It is predicted that larger losses will be seen by the global hospitality industry, which lost expenditures on lodging, eateries, transportation, shopping, and entertainment. While the estimated potential loss of visitor spending is $4.2 billion, spending by stranded travelers likely offset the impact, and, therefore, the estimated net loss is $1.6

158 Id.
159 Id.
160 Id.
161 Id. at 2.
162 Id.
163 Id. at 7.
164 Id.
165 Id. at 3.
167 Id. at 9.
168 Id. at 4.
169 Id.
170 Id.
billion. The estimated total impact of the airspace closure on global GDP is approximately $4.7 billion.

E. PASSENGER CAUSES OF ACTION

As stated above, nearly 10 million passengers were disrupted by the volcanic ash plume that caused most of Europe to be a no-fly zone in mid-April 2010. This section discusses the European Union regulation controlling the treatment and compensation for those passengers.

EU Regulation No 261/2004 (Regulation) “establish[es] common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.” The rules are applicable to passengers flying out of member states as well as passengers flying into member states from non-member countries on community carriers. In cases of cancellation, addressed under Article 5, passengers may be entitled to reimbursement, rerouting, care (such as meals, refreshments, hotel accommodations, etc.), and compensation. In cases of delay, addressed under Article 6, passengers may be entitled to care, as described above, and in cases of delays over five hours, reimbursement.

The Regulation’s introduction appears to have a force majeure clause which states that the obligations imposed on carriers “should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.” Specifically detailed as an extraordinary circumstance are “meteorological conditions incompatible with the operation of the flight concerned.” The volcanic ash cloud would certainly fall under the category of extraordinary circumstances.

171 Id.
172 Id.
173 Id. at 4.
174 Id.
175 Id.
176 Id. at 1.
177 Id.
178 Id. at 2.
179 Id.
Article 5, dealing with flight cancellations, also contains a specific provision stating that "[a]n operating carrier shall not be obliged to pay compensation . . . if it can prove that the cancellation is caused by extraordinary circumstances." In contrast, Article 6, addressing delays, makes no specific mention of releasing air carriers from their obligations in extraordinary circumstances. The force majeure clause located in the introduction section could be interpreted to apply to the Regulation as a whole or interpreted as a reinforcement of only those articles that specifically contain such a provision. If the latter, it could be argued that carriers are, under certain delay circumstances, required to provide meals and refreshments, hotel accommodations, and transport between the airport and place of accommodation free of charge, regardless of any exigent circumstances. Several articles speaking to passenger rights in light of the volcanic ash situation interpret the Regulation to still impose delay obligations of care. As of now, it does not appear that any passengers have brought actions against airlines for violations of the Regulation. It is, however, possible that suits are pending but have not yet reached a disposition.

Passengers flying from non-EU airports on non-EU carriers will not be covered by the Regulation. Those individuals could potentially be covered by the particular airline on which they are flying, depending on the terms and conditions of their ticketing contract. Additionally, passengers covered by travel insurance could submit claims for expenses to their insurer. Certain insurance companies, however, have already refused to compensate stranded passengers by invoking the "Act of God" clause and arguing that the erupting volcano was not an insurable event. Another option for passengers who paid for their travel by credit card would be to submit a claim under section 75

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180 Id. at 4.
181 Id.
184 See id.
185 Id.
186 Id.
of the Consumer Credit Act of 1974, which covers losses for goods and services not supplied within a given value range.\textsuperscript{187}

F. Business Causes of Action

Many European and British airlines denounced governmental authorities for closing European airspace and have publicly indicated that they believe the authorities were negligent in using a "probability" model to determine their decisions.\textsuperscript{188} In fact, British Airways already requested financial restitution from the British government and European Union for making Europe a no-fly zone when test flights showed no danger to normal flights.\textsuperscript{189} The logical next question is whether a state can be held liable for airlines' or other industries' loss of business due to the closure of airspace.

It appears that, while multiple articles were written about the ash cloud itself as well as passenger rights in light of the airspace closure,\textsuperscript{190} little has been written on the topic of states' liability. In the United Kingdom, "a public body acting \textit{ultra vires} is as liable for an act committed beyond its powers as is a private individual."\textsuperscript{191} There are three possible causes of action under which a plaintiff might bring a suit against a public entity: (1) "a breach of statutory duty without the necessity to prove carelessness;" (2) "a common law breach of duty of care resulting from a breach of a statutory duty or a performance of a duty;" and (3) "misfeasance in a public office."\textsuperscript{192} Claims asserted under a social interest statute, intended to benefit society in general, would not typically give rise to a cause of action for breach of duty unless the plaintiff could prove negligence.\textsuperscript{193} Additionally, courts are not permitted to impose their judgment on discretionary authority, and the discretion of the state can only be attacked if the plaintiff shows manifest unreasonableness on the part of the authority.\textsuperscript{194}

\textsuperscript{187} Id.
\textsuperscript{188} E.g., Gammell et al., \textit{supra} note 147.
\textsuperscript{190} See, e.g., \textit{id.}; Alemanno, \textit{supra} note 142; Barham, \textit{supra} note 182; Gammell et al., \textit{supra} note 147.
\textsuperscript{191} Abeyratne, \textit{supra} note 189, at 286.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 287.
\textsuperscript{194} Id.
Under the Convention on International Civil Aviation, it is the duty of the state to ensure the safety of the flights, passengers, and crews that utilize its airspace, and it is the right and responsibility of a state to close its airspace in emergency situations.\textsuperscript{195} Given aviation’s history with volcanic ash, it seems highly unlikely that the decision to close European airspace, even if based on a theoretical model, could be considered manifestly unreasonable.

G. MOUNT MERAPI

The Eyjafjallajökull volcano in Iceland was not the only volcanic eruption to disturb airspace and halt air traffic in 2010. In late October and early November of 2010, Mount Merapi, located in Indonesia, began erupting.\textsuperscript{196} As ash plumes rose into the sky, international airlines cancelled flights in and out of Jakarta.\textsuperscript{197} Eighty-six flights were cancelled from November 6–7, 2010.\textsuperscript{198} On November 8, 2010, normal flights resumed.\textsuperscript{199} While the impact of these closures has not yet been analyzed, Yogyakarta is considered by some to be “one of Indonesia’s most important touristic and cultural cities,” and, thus, the closure of Yogyakarta’s Adisucipto International Airport is likely to have had a huge impact on that region of Indonesia.\textsuperscript{200}

H. CONCLUSION

Given the drastic effects of airspace closures, it certainly appears to be true that improvements need to be made in Europe’s airspace closure decision-making process. History, however, has shown that airplanes and volcanic ash do not mix, and, thus, until a better method is developed, it is better to close airspace than to risk the possible loss of lives.

\textsuperscript{195} Id. at 283, 285.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{200} Id.
April 2010 brought changes and unique challenges to both the domestic and international aviation industry. "'If you learn one thing from having lived through decades of changing views, it is that all predictions are necessarily false.'\(^{201}\) The predictions that the TDR would cause more harm than good have yet to play out. In fact, early data indicates that those predictions might never come true. Additionally, even though they were based on a scientific model, the VAAC’s predictions as to the location of volcanic ash particles have been denounced as faulty and potentially causing unnecessary losses in the billions of dollars. In light of all this, predictions about the future of tarmac delay rules or the development of alternative procedures for the closure of European airspace will not be made. What will be said is that there is a lot to learn about each subject, and information obtained in the future will lead to a clearer perspective on both topics.