

Air Passenger Rights and Protections

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New York Law Journal
Mar 27, 2015



This aviation law column typically addresses the important legal issues that arise from aviation accidents, which thankfully have become rarer over the past decade. But while the rate of aviation accidents has decreased, passenger service complaints remain a recurring problem. These complaints range from serious claims of discrimination after an airline refuses to board certain passengers because of alleged security concerns to mundane claims involving missing bags.

Long delays at airports are a familiar problem to any traveler, and passengers rarely know their rights when faced with unexpected delays, cancellations or overbooked flights. After the much-publicized tarmac delays during a blizzard in 2007 that left hundreds of passengers stranded in airplanes for up to 10 hours without adequate food, water or functioning lavatories, Congress took action by passing the Federal Aviation Administration Modernization and Reform Act of 2012,¹ and the Department of Transportation (DOT) issued rules guaranteeing specific rights to passengers. Nevertheless passengers' rights in the United States still lag behind those in the European Union, and a federal court struck down New York's effort at legislating passengers' rights as preempted by federal law.



The size of the passengers' claims means that passengers will often have difficulty affording lawyer fees and will, therefore, find themselves at a disadvantage in dealing with airlines over a dispute. This article provides a concise summary of the law that is designed to protect

passengers, which we hope will help our readers provide sound advice to passengers on their rights.

Rights Against Discrimination

As a consequence of the growing security concerns following the terrorist attacks of Sept. 11, 2001, airlines have been sued for failing to allow passengers to board flights or taking passengers off flights for allegedly posing security threats. For example, in *Shqeirat v. U.S. Airways Group*, 645 F.Supp.2d 765 (D. Minn. 2009), six imams traveling on board a U.S. Airways flight from Minneapolis to Phoenix were taken off the flight and interrogated for several hours after they publicly prayed before the flight, asked for seat-belt extensions, and sat in a seating configuration that was deemed suspicious. Similarly, in *Dasrath v. Continental Airlines*, 2006 WL 372980 (D. N.J. Feb. 16, 2006), a passenger who was a U.S. citizen but born in Guyana was removed from a Continental flight at Newark airport because he was sitting next to two other passengers whose behavior appeared suspect, and because a fellow passenger told the aircraft's captain that "those Brown skin men are acting suspicious."

While it is generally recognized that airlines must not discriminate in providing transportation, airlines do have a right as common carriers to exclude or refuse to accept a passenger who the carrier "decides is or might be inimical to safety." 49 U.S.C. 44902. Most courts, including those in the Second Circuit, deem an airline's decision proper unless it was arbitrary or capricious, giving airlines "broad, but not absolute" discretion to remove passengers for safety reasons.² Courts look at the circumstances surrounding the carrier's decision including the limited facts known by the carrier at the time, the time constraints in making the decision and the general security climate surrounding the events. But despite the broad language of 49 U.S.C. 44902, it is not a license to discriminate against passengers based on race or nationality and not all decisions by an airline to remove passengers for allegedly suspicious behavior will hold up in court.³

Federal Laws and Regulations

While Congress has failed to pass a comprehensive passengers' rights bill, the 2012 FAA Modernization and Reform Act and the DOT's regulatory actions have resulted in some improvements for passengers. In 2009 the DOT issued the "3-hour tarmac rule," mandating that passengers on domestic flights be allowed to disembark after three hours on the tarmac (four hours for international flights), provided that this does not create safety or security issues or significantly disrupt airport operations.⁴ Failure to comply can lead to fines of up to \$27,000 per passenger. In addition, airlines must provide food and water after two hours on the tarmac, ensure operable bathrooms and medical attention, and notify passengers every 30 minutes of the status of the delay.

Notably, the law does not provide a private cause of action to the passengers and airlines are not obligated to pay any compensation to passengers no matter how long they are stuck in an airplane on the tarmac.

While U.S. law provides no compensation for delayed and cancelled flights, individual airlines may offer food vouchers, hotel accommodations and free phone calls. Passengers should consult the airline's contract of carriage on the airline's website, as well as ask the airline what it can offer while the passengers wait for their flight or to be rerouted. The airlines will often provide at least some services even though they are not required to by law.

On the other hand, passengers who are involuntarily "bumped" because of overbooking are entitled to compensation.⁵ Under a 2011 DOT rule, bumped passengers on domestic flights who are delayed one to two hours from their original scheduled arrival time (one to four hours on international flights) are entitled to 200 percent of their one-way fare, up to \$650. For delays of more than two hours (more than four hours for international flights) bumped passengers are entitled to 400 percent of their one-way fare, up to \$1,300. Passengers who purchased their tickets using frequent flyer miles must be compensated like other passengers and the compensation must be paid right at the airport.

State Legislation Preempted

States' efforts to legislate rights for passengers have failed. For example, in 2008 the Second Circuit struck down the New York Passenger Bill of Rights as preempted by the Airline Deregulation Act of 1978 in *Air Transport Association of America v. Cuomo*, 520 F. 3d 218 (2d Cir. 2008). The New York law was a response to the 2007 tarmac delays at JFK airport and required airlines to furnish fresh air, food, water and working bathrooms to passengers stuck on the tarmac for more than three hours. The court held that provision of food, water and restrooms was well within the meaning of "service" of an air carrier and was thus preempted by the ADA under 49 U.S.C. 41713(b)(1).⁶ While most of the provisions of the New York law were later adopted by the DOT, the Second Circuit decision effectively undercut state efforts at legislation on passengers' rights, leaving federal action as the only viable option.

Montreal Convention

The Montreal Convention⁷ provides rights to passengers traveling on international flights. Under Article 19 of the Convention passengers who are delayed, or whose baggage is delayed, can recover from the airlines unless the airlines prove that they took "all measures that could reasonably be required" to avoid such delay, or it was impossible to take such measures.⁸ Although the language suggests that the airlines must take "all measures," it has been interpreted to mean only reasonable measures, so that delay due to bad weather or mechanical problems is often not compensable.⁹ In addition, airline liability for delay under Article 19 is limited to 4,150 Special Drawing Rights (approximately \$5,754) for the delay of persons and 1,000 Special Drawing Rights (approximately \$1,386) for the delay of baggage unless a passenger fills out a special declaration and pays additional fees.¹⁰ There are no claims for emotional or punitive damages under the Montreal Convention.

While the Montreal Convention provides the exclusive remedy for international air travel, passengers on international flights who have been bumped from flights and not provided with alternative transportation do not have to rely solely on Article 19 but can instead claim for breach of contract based on the airlines' nonperformance of their contractual obligations, rather than a simple delay.¹¹

Rights in the European Union

Unlike U.S. law, European Union law provides for compensation to passengers whose flights are merely delayed or cancelled. EU law is applicable if a passenger's flight departs from any airport located in the EU with any airline or arrives in the EU with an EU airline. One does not need to be an EU citizen to file a claim.

Flight delays of more than three hours at the destination are compensated unless the airline can prove that the delay was caused by extraordinary circumstances such as strikes or bad weather. The compensation is 250 for flights of 1,500 kilometers or less, 400 for flights of 3,500 kilometers or less, and 600 for flights of over 3,500 kilometers.¹² If the delay is longer than five hours, passengers are also entitled to a refund. In addition, delayed passengers are entitled to reasonable meals, refreshments, two free phone calls or email messages and hotel accommodation if the delay is overnight. These provisions also apply to extended tarmac delays.¹³

If a flight is cancelled, passengers are entitled to the same compensation as for delayed flights, food and board where applicable, and either a refund or alternative transportation to their destination. However, no compensation is due if passengers are notified of the cancellation more than two weeks before departure, or if the passenger is informed of the cancellation more than seven days before departure and is rerouted to arrive within two hours of the original arrival time, or when cancellations are caused by "extraordinary circumstances." Even in extraordinary circumstances airlines have to offer a ticket refund, and rerouting or alternative transportation, as well as food and lodging while passengers wait for alternative transport.

Passengers who are involuntarily bumped are treated like passengers whose flights were cancelled, and are entitled to the same compensation, food and board, and a ticket refund or rerouting.¹⁴ For passengers with multiple connecting flights, eligibility for compensation is measured by the total delay at the final destination. Connecting flights must be under the same booking reference; flights booked separately are deemed individual flights with their own final destination times.

Conclusion

The federal legal protections discussed in this article are important because without them passengers would be at the mercy of the airlines. Even with them, an aggrieved passenger is at a distinct disadvantage in dealing with an airline over a problem because it may not be worth hauling the airline into court if the airline refuses to live up to its legal responsibility. However, well-informed passengers have a much better chance of making sure their rights are protected.

Starting at the airport, a passenger whose flight had been cancelled or delayed should make sure to check the contract of carriage available on the airline's website or at the airline's ticket counter, and demand of the airline the maximum that the airline promises in such situations, whether it be food or overnight accommodation. Passengers who are bumped involuntarily should know their right to compensation on the spot. Those who volunteer to be bumped and are offered vouchers should make sure to ask for every restriction on the voucher if the airline fails to disclose this information. Even though passenger protections under U.S. law are limited, and further congressional action is in order to ensure similarly robust passenger protections as those under EU law, a persistent passenger who knows his or her rights will be able to force the airline to meet its limited obligations.

Endnotes:

1. P.L. 112-95, Title IV Air Service Improvements, Subtitle A Passenger Air Service Improvements.
 2. *Dasrath v. Continental Airlines*, No. Civ. 02-2683 (DRD), 2006 WL 372980 (Feb. 16, 2006).
 3. *Id.* at *5 (denying Continental Airline's motion for summary judgment where removed passenger did not engage in any suspicious behavior and no facts reasonably connected him with the two passengers who did exhibit such behavior, rendering the captain's decision to remove him arbitrary and capricious); *Bayaa v. United Airlines*, 249 F.Supp.2d 1198 (C.D. Cal. 2002) (denying defendants' motion to dismiss where removed passenger engaged in "entirely innocent conduct").
 4. http://www.dot.gov/sites/dot.gov/files/docs/Final_Rule_on_Enhancing_Airline_Passenger_Protections.pdf.
 5. 14 C.F.R. Part 250.
 6. 49 U.S.C. 41713(b)(1) mandates that "a State may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."
 7. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 (1999), 2242 U.N.T.S. 309 (entered into force Nov. 4, 2003).
 8. Montreal Convention, Article 19.
 9. *Cohen v. Delta Air Lines*, 751 F.Supp.2d 677 (S.D.N.Y. 2010) (airline not liable for delay due to bad weather); *Helge Mgmt. v. Delta Air Lines*, 2012 WL 2990728, at *4 (D. Mass. July 19, 2012) (airline not liable for delay due to mechanical problems).
 10. Montreal Convention, Article 22(1) and (2).
 11. *Mullaney v. Delta Air Lines*, 2009 WL 1584899 (S.D.N.Y. June 3, 2009) (passenger's state law claim alleging inability to fly home on Delta because of a strike and having to book a ticket on another airline was a claim of non-performance and therefore not preempted by the Montreal Convention); see also *In re Nigeria Charter Flights Contract Litigation*, 520 F.Supp.2d 447 (E.D.N.Y. 2007).
 12. Regulation 261/2004/EC, Article 5.
 13. *Id.* Article 9.
 14. *Id.* Article 4.
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