BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D.C.

)
In the Matter of)
)
ENHANCING AIRLINE PASSENGER) Docket DOT-OST-2010-0140
PROTECTIONS)
)

COMMENTS OF THE REGIONAL AIRLINE ASSOCIATION

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September 23, 2010

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Introduction and Summary of RAA Position

The Regional Airline Association ("RAA") submits these comments in response to the Department of Transportation's ("Department") June 8, 2010, Notice of Proposed Rulemaking ("NPRM") proposing the adoption of additional regulations intended to improve passenger protections in air travel. RAA supports the Department in its aim, as referenced by the rule's title, to "enhance airline passenger protections." Improving the travel experience of our valued customers is a shared goal among RAA, its member airlines, the Department, and other aviation stakeholders. In fact, RAA supports and, in some cases, is already undertaking many of the objectives identified by the Department. Regardless of further regulation, RAA member airlines remain committed to providing the highest level of customer service.

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¹ 75 Fed. Reg. 32318 (June 8, 2010).

Although we are supportive of the Department's objective of improving customer service, RAA is concerned that certain elements of the Department's proposed rule could, in fact, inconvenience consumers and disrupt air travel. Additionally, RAA is concerned that the rule is unsupported by the Department's own cost benefit analysis. Therefore, RAA and its members, urge the Department to reconsider its proposed rule and withdraw these elements of it until the Department: (1) thoroughly evaluates the effects of the tarmac delay rule (Docket DOT-OST-2007-0022) implemented on April 29, 2010, and (2) completes a cost benefit analysis that meets the requirements of Executive Order 12866. After such analysis, the Department will have a better basis to assess which further regulations are most appropriate and how the current proposals should be revised to provide the greatest benefit to airline passengers while imposing the least restrictive and least costly alternatives on airlines and airports.

To the extent that the benefits of certain measures proposed by the Department are shown to outweigh their costs, we ask DOT to revisit those proposed measures in order to avoid creating consumer confusion or conflicts between mainline and regional carriers and to recognize the very different role and relationship that regional carriers, that do not market or sell their own flights, have with consumers, as compared to the relationship and role of the mainline carriers. Importantly, the Department should resist imposing industry-wide rules in reaction to aberrational behavior or rare incidents caused by weather and other circumstances beyond the

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Aerolitoral, Air Wisconsin Airlines, AirNet Systems, American Eagle Airlines, Atlantic Southeast Airlines, Cape Air, Chautauqua Airlines, Colgan Air, Comair, Commutair, Compass Airlines, Empire Airlines, Era Aviation, ExpressJet, GoJet, Grand Canyon/Scenic Airlines, Great Lakes Airlines, Gulfstream International Airlines, Horizon Air, Island Air, Jazz Air, Mesaba Aviation, New England Airlines, Piedmont Airlines, Pinnacle Airlines, Inc., PSA Airlines, Republic Airlines, Shuttle America, SkyWest Airlines, Inc, and Trans States Airlines.

Regulatory Planning and Review, E.O. 12866 of September 30, 1993, 58 Fed. Reg. 51735 (Oct. 4, 1993), as amended.

control of carriers. The marketplace and media provide a more powerful antidote to those occurrences than does regulation.

As we said in our comments to the tarmac delay rule, RAA member airlines and their nearly 60,000 employees constantly strive to provide efficient and timely transportation for passengers; voluntary efforts by airlines to improve on-time performance eliminate the need for further regulation; and the Department and the Federal Aviation Administration ("FAA") should focus on initiatives that will increase the efficiency of the Air Traffic Control ("ATC") system.

(RAA Comments in Docket DOT-OST-2007-0022, dated March 9, 2009, at 1). In those comments, RAA also explained fully why many of the provisions of the tarmac delay rule simply do not apply to non-marketing regional carriers. RAA incorporates its January 22, 2008 and March 9, 2009 comments in DOT-OST-2007-0022 (respectively, "RAA January 22, 2008 Comments" and "RAA March 9, 2009 Comments") by reference herein and urges the Department to reconsider its proposals in light of the factors related to regional carrier operations set forth therein.⁴

In addition to the comments offered herein, RAA endorses the views of the Air Transport Association of America ("ATA") concerning deplaning announcements, contracts of carriage, denied boarding compensation, choice of forum, and peanut allergies.⁵

RAA states as follows in support of its position and in response to certain specific questions affecting RAA members that are raised in the NPRM:

Similar points were made by RAA member ExpressJet Airlines, Inc. in that previous rulemaking. *See* Comments of ExpressJet Airlines, Inc. in Docket DOT-OST-2007-0022, dated March 9, 2009.

⁵ Because RAA members do not typically market or sell airline tickets, RAA takes no position on the Department's proposals with respect to full fare advertising, baggage and other fees, or post purchase price increases.

I. Customer Service Plans: Section 259.5 Should Be Revised to Reflect The Department's Recognition of Regional Carrier Functions, As Stated in the Preamble to the Tarmac Delay Rule.

Of major importance to RAA members is seeing the text of 14 C.F.R. § 259.5 aligned with the Department's recognition in the tarmac delay rulemaking "that some of the subjects proposed to be addressed in the customer service plan would only apply in the context of the relationship between a seller of the air transportation and a buyer, and it would thus not be appropriate to mandate that carriers that do not offer their own reservation services or ticket passengers adopt a plan for addressing these elements." (74 Fed. Reg. at 68997)

Notwithstanding this recognition, the existing text of 14 C.F.R. § 259.5 fails to expressly exempt regional carriers from the requirement to include such provisions in their customer service plans.

Nor does the text of proposed Section 259.5 do so. (*See* 75 Fed. Reg. at 32340)

In the tarmac delay rulemaking, the Department acknowledged that the following elements have no applicability to an airline that does not hold out, market, sell or ticket its services:

- offering the lowest fare available;
- allowing reservations to be held or cancelled without penalty for a defined amount of time;
- providing prompt ticket refunds; or
- disclosing travel itinerary, cancellation policies, frequent flyer rules and aircraft configuration.⁶

In this proceeding, the Department has asked whether any of the minimal requirements in proposed Section 259.5 "would be inappropriate if applied to a foreign air carrier" (75 Fed. Reg. at 32324), but has not raised the same question with respect to U.S. carriers. RAA continues to believe that the customer service plan requirement should apply only to those carriers that hold

⁶ 74 Fed. Reg. at 68997-98 (Dec. 30, 2009).

out, market, sell and ticket air transportation, and that the Department should only hold such carriers responsible for compliance with such plans. Of the 13 subjects listed in proposed Section 259.5(b), more than half have no applicability to non-marketing carriers, and the remaining subjects are requirements of other regulations (*e.g.*, 14 C.F.R. Part 382, Part 250 and \$259.4). Thus, non-marketing carriers should be excluded from the requirement to have customer service plans. To the extent the Department continues to require non-marketing carriers to adopt such plans, however, it should revise Section 259.5 to clarify—consistent with its statements in the tarmac delay rulemaking—that non-marketing carriers are exempt from provisions which have no applicability to their operations.

- II. Tarmac Delay Contingency Plans: Contingency Plan Requirements Should Not Be Extended to Additional Airports, There Is No Need to Require 30-Minute Delay Updates, Marketing Carriers Should Have Primary Responsibility for Compliance with Contingency Plans, and Airports Should Coordinate with Federal Agencies at Smaller Airports.
 - A. Contingency Plan Requirements Should Not Be Expanded to Smaller Airports.

The Department proposes requiring a covered carrier to: (1) have contingency plans for all U.S. airports a carrier serves with at least 10,000 annual enplanements per year by adding small hub and non-hub airports. RAA believes the Department got the scope right the first time by limiting the requirement for tarmac delay contingency plans under the existing tarmac delay

At a minimum, the following subjects covered by proposed 14 C.F.R. § 259.5(b) have no applicability to non-marketing carriers: (1) offering the lowest fare available on the carrier's website, at the ticket counter or when a customer calls the carrier's reservation center to inquire about a fare or to make a reservation; (2) notifying consumers via a carrier's telephone reservation system and its Website of known delays, cancellations, and diversions; (3) compensating passengers for reasonable expenses that result due to delay in baggage delivery; (4) allowing reservations to be held; (5) providing refunds; (6) handling bumped passengers; (7) disclosing cancellation policies, frequent flyer rules, aircraft configurations, and lavatory availability on the selling carrier's Web site, and upon request, from the selling carrier's telephone reservation staff; (8) notifying consumers in a timely manner of changes in their travel itineraries; (9) ensuring good customer service from codeshare partners.

rule to those airports where the most delay occurs. There is no evidence that extending the rule to small hub and non-hub airports is necessary or would benefit consumers. Indeed, the Department's own analysis shows that the costs of expanding tarmac delay contingency plan requirements to smaller airports (and requiring foreign carriers to have a tarmac contingency plan) outweigh their benefits. Under these circumstances, the Department's proposal to expand contingency plan requirements is contrary to Executive Order 12866's mandate that an "agency shall . . . propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." (58 Fed. Reg. at 51736) Since the Department's own analysis shows that expanding the tarmac delay contingency plan requirement would have negative net benefits, it should be withdrawn as contrary to Executive Order 12866.

From a practical standpoint, most carriers operate with a single set of operational policies and apply the same standard of care on all flights and at all airports they serve wherever they operate. Requiring regional (and other) carriers that serve smaller airports to coordinate such plans with each small and non-hub airport served by the carrier, including diversion airports, and with federal officials assigned to such airports would require significant resources. Indeed, one RAA member estimates that it would have to coordinate with 273 additional airports as a result of this proposed extension. Many of these airports have never experienced a single tarmac delay of over three hours and some of these airports are served by only a few daily departures. The Department's "one-size fits all" approach to contingency plans does not recognize that many elements applicable to and realistic at larger airports are unworkable and unreasonable at smaller airports where there are fewer resources, personnel and flights. Nor is extension of the

The analysis provided by the Department with its proposed rule shows that Requirement 1 (expanding the tarmac delay contingency plan requirements to smaller airports and foreign air carriers) yields a result of -\$1.25 million annually without considering unquantifiable costs associated with increased flight cancellations or passenger anxiety. *See* 75 Fed. Reg. at 32333 (June 8, 2010).

contingency plan requirement necessary as a motivator to airlines. The marketplace, consumer satisfaction, media scrutiny, and potential Department enforcement action provide strong incentives for air carriers to avoid tarmac delays at smaller airports.⁹

Expanding the scope of 14 C.F.R. § 259.4 to include small and non-hub airports is unnecessary and unreasonable—especially in light of the Department's own cost benefit analysis, and the proposal should be dropped. For similar reasons, the Department should continue to exempt other commercial U.S. airports (*i.e.*, those with fewer than 10,000 annual enplanements, which are generally served by corporate Part 135 operators) from such requirements.

B. Carriers Already Provide Frequent Tarmac Delay Updates.

The Department proposes to require carriers to update passengers on tarmac delays every 30 minutes and to provide the reasons for such delays. Regional carriers agree that passengers should be updated frequently on flight status changes (and the causes for delay to the extent carriers know or should know those causes). In fact, the flight crew and attendants of regional carriers typically provide tarmac delay updates more frequently than the proposed 30 minute intervals. RAA is not aware of a need to include such a regulatory requirement in carrier contingency plans since flight status changes quickly for a variety of reasons that are often unknown to carriers and beyond their control. To the extent the Department enforces this provision, however, we ask that the Department consider that carriers, in turn, are not always updated by the FAA on a timely basis.

See Orders 2009-11-16, 2009-11-17 and 2009-11-18 related to a well-publicized incident concerning a flight diverted to Rochester International Airport in Minnesota during bad weather. DOT's preliminary investigation found that the flight crew "was not at fault" and had "repeatedly tried to get permission to deplane the passengers at the airport or obtain a bus for them." DOT Press Release, August 21, 2009. RAA objects to the Department's punitive enforcement policy on tarmac delay incidents, particularly in those situations resulting from weather and other circumstances beyond the carriers' control.

C. Marketing Carriers Should Have Primary Responsibility for Contingency Plan Compliance.

Comments are also sought on whether the obligation to adopt and comply with a tarmac delay contingency plan should apply to the carrier that markets a flight, in addition to the codeshare partner that operates a particular flight. In the tarmac delay rulemaking, RAA advocated limiting the contingency plan requirement to carriers holding out services to the public and ticketing passengers. RAA adheres to its view that the marketing carrier—not the operating carrier—should have sole responsibility to the Department and consumers for contingency plan compliance on flights held out, sold and ticketed by such carriers, with liability of the operating carrier determined by its contract with the marketing carrier. To the extent the Department continues to insist that operating carriers adopt contingency plans, however, it should at least place primary responsibility for adoption and compliance with such plans on the marketing carrier.

It is the marketing carrier that: 1) establishes the schedules to be operated; 2) determines the aircraft type to be flown; 3) handles advertising, marketing, booking and ticketing for the flights; 4) enters contracts of carriage with passengers; 5) determines what amenities will be provided during the flight; and 6) decides how flights and passengers will be handled in the event of delays, diversions and cancellations. While regional airlines are responsible for safe operation of their flights and can cancel or divert them for safety reasons, most delays, diversions, and cancellations are determined by the mainline carrier partner or by the FAA, and not by regional airlines. Moreover, even before the tarmac delay rule was issued, the evidence showed that regional airline flights are the first to be subject to FAA ground stops and cancelled by the mainline carriers because they typically carry fewer passengers than flights operated with larger

See RAA March 9, 2009 Comments at 5-9; RAA January 22, 2008 Comments at 7-9.

aircraft. Finally, now that the tarmac delay rule is in place, and mainline carriers face the threat of "strong enforcement" with \$27,500 *per person* fines for violations, it is even more likely that those flights on smaller aircraft will be the first cancelled, delayed or diverted.

Thus, the concept of imposing responsibility on both the carrier that markets a flight and the carrier that operates the same flight for adherence to the operating carrier's contingency plans causes concern to RAA. Such redundant obligations and enforcement could lead to dangerous confusion and potential conflict between the mainline carriers that market flights and the regional carriers that operate them. As explained above, the practicalities warrant placing responsibility for failures to meet contingency plan requirements on marketing carriers.¹²

D. Airports Can Facilitate Coordination with Federal Agencies At Smaller Airports.

As noted above, RAA sees no need or basis for extending contingency plan requirements to smaller airports. If the Department wants smaller airports covered by some sort of contingency plan, one way to do so would be by placing responsibility on the airport itself for coordinating delays with federal agencies. Small airports are in a better position than carriers to coordinate with the limited TSA and CBP staff available at their own facilities, and requiring each carrier to coordinate with those officials individually would be time-consuming and counterproductive at small-hub and non-hub airports. At larger airports, especially those with a

[&]quot;DOT plans 'strong enforcement' for tarmac delay rule," Marnie Hunter, CNN; http://www.cnn.com/2010/TRAVEL/04/27/tarmac.delays/index.html.

As RAA explained in the tarmac delay rulemaking, "regional airlines incur significant costs, negative publicity adverse consumer reaction, and consequences from mainline partners when on-time performance suffers. In fact, under certain contracts, poor-on-time performance by a regional airline partner is cause for dismissal by the mainline partner. Beyond these existing penalties for poor on-time performance, airlines must also pay crews overtime when flights run late and burn more fuel than planned if the schedule is 'unrealistic.' These factors already motivate airlines to provide delay-free service." RAA March 9, 2009 Comments at 14.

dominant carrier, it would be exceptionally challenging for the airport operator to balance the needs of competing carriers which serve the airport.

III. Tarmac Delay Data: The Department Should Not Expand Tarmac Delay Data Reporting Requirements to Additional U.S. Carriers.

While the Department believes it should expand the pool of carriers that must file information regarding tarmac delays to include U.S. carriers and foreign carriers that operate aircraft originally designed for 30 or more passenger seats, the Department asks whether it should limit the tarmac delay data filing requirement to carriers operating aircraft designed for 60 or more seats. First, the Department should strive for consistency in data collection, both as an aid to the general public and for its own internal information management. Additionally, RAA believes that the costs of imposing tarmac delay reporting requirements on any carrier that is not currently required to report such data pursuant to Part 234 of the Department's rules outweigh any benefit from obtaining such data. Thus, any carrier not currently subject to Part 234 reporting should be exempt from tarmac delay data reporting requirements, whether or not it is required to implement a tarmac delay contingency plan. The current tarmac delay rule requires carriers to retain tarmac delay data for two years (see 14 C.F.R. § 259.4(d)), thus the Department can simply request the data if it wants to determine the causes for delay for future planning purposes. The Department says it is "mindful of the costs associated with submitting data to the Department, especially in light of the relatively limited resources of smaller carriers . . . and [does] not intend with this proposal to impose a comprehensive on-time reporting scheme, as exists for the largest U.S. carriers." (75 Fed. Reg. at 32322) Given the absence of quantifiable benefits from the reporting provision (see 75 Fed. Reg. at 32334), the Department should not extend tarmac delay reporting to any U.S. carrier not currently subject to Part 234 reporting.

IV. Contracts of Carriage: The Department Lacks Authority to Require Carriers to Incorporate Their Contingency and Customer Service Plans into Their Contracts of Carriage.

The Department proposes to require scheduled carriers operating any aircraft with 30 or more seats to incorporate contingency plans and customer service plans into their contracts of carriage. RAA opposes this requirement for reasons noted in our January 22, 2008 Comments¹³ and questions whether the Department has authority to impose such a requirement.

V. Responses to Consumer Complaints: Using Social Media Will Frustrate Not Facilitate Carrier Attempts to Address Consumer Complaints.

The Department seeks comments on operational difficulties faced by carriers in responding to consumer complaints received through social networking mediums such as Facebook or Twitter. Regional carriers have well-publicized and established channels that ensure a clear path of communications with consumers. These channels are designed to lead consumers with complaints to appropriate carrier personnel with the expertise and training to assist them and resolve their complaints to the extent possible. Dynamic, user-controlled social media outlets are useful tools for gauging customer service trends and honing the quality experience for consumers, but such outlets are too fluid and generalized to serve as official mechanisms for addressing or even tracking individual consumer complaints

- VI. Oversales: The Department Should Continue to Cap Denied Boarding Compensation At 100% and 200% the Amount of the Original Ticket and Permit Oversales on Flights on aircraft with 19-29 seats.
 - A. The Proposed New Limits on DBC Should Maintain the Percentage Caps.

The new DBC maximum rates of \$650 (if the substitute transportation for domestic flight is planned to arrive at the passenger's destination within 1-2 hours after the originally

RAA January 22, 2008 Comments at 7 and n.4. Additionally, as noted above, RAA supports ATA's arguments on the contract of carriage issue as set forth in its comments in this docket and in the tarmac delay rulemaking.

scheduled arrival time) and \$1300 (when that substitute transportation is scheduled to arrive more than 2 hours late) far exceed the cost of tickets on most regional flights. Many RAA members do not have fares approaching the proposed limits, and most of the charges for "oncefree amenities" do not apply to most regional carriers (for example, there are no preferred seat or food charges on regional carriers). While RAA believes that involuntarily bumped passengers are entitled to compensation, this compensation should bear some relationship to the fare paid, and the percentage limits in the present rule serve that purpose. Additionally, DOT should consider basing any adjustment it makes in compensation on relative changes in cost of airline tickets rather than on the Consumer Price Index.

As RAA pointed out two years ago when the Department last raised DBC limits, "[r]egional airlines must adjust to the fact that their aircraft are the first to be put on ground holds and the last to be released, resulting in cancellations down line." (RAA comments in Docket DOT-OST-2001-9325, dated January 22, 2008, at 2) The Department's decision two years ago to double the potential compensation for denied boarding while at the same time imposing those DBC amounts on aircraft with 30-60 seats was a double whammy on regional carriers, which are the only carriers that serve many small and mid-size communities. That decision reversed the CAB's recognition that exemption of aircraft up to 60 seats was warranted by the "disproportionate size of the penalty relative to the typical short-haul fare" and because "the viability of the small-aircraft segment of the industry, which competes most directly with ground transportation, depends partly on its ability to minimize its costs, respond flexibly to consumer demand and maintain high load factors." 14

[&]quot;Small Aircraft Operations; Oversales and Denied Boarding Compensation," 46 Fed. Reg. 42442, 42443 (Aug. 21, 1981).

B. The Department Should Not Outlaw Overselling of Flights Operated with Smaller Aircraft.

The Department also asks whether it should expand the applicability of the oversales rule to the operations of U.S. certificated and commuter carriers and foreign carriers using aircraft originally designed for 19 or more seats, and whether it should "allow those flights to be oversold at all." RAA strongly objects to extension of the DBC rule to aircraft with fewer than 30 seats, for many of the reasons advanced in our January 22, 2008 comments in Docket DOT-OST-2001-9325. Whether the Department extends the rule to flights with smaller aircraft, it must allow carriers to continue to analyze booking trends and permit "overselling" as a means of preserving service to small communities. Eliminating the ability of carriers to oversell flights with smaller aircraft would threaten service to smaller communities as carriers would be unable to take the economic risk of operating with empty seats. Moreover, the risk of denied boardings on such aircraft is relatively low, since while regional carriers attempt to maintain high load factors, their load factors consistently lag behind those of carriers operating larger aircraft, suggesting that they are less likely overall to cause denied boardings.

Similarly, RAA opposes the Department's proposal to require carriers to verbally inform passengers of carrier policies during the boarding process. This proposal reflects a lack of understanding about the effort it takes to board passengers and to achieve an on-time departure.¹⁷

¹⁵ 75 Fed. Reg. at 32327.

RAA incorporates those January 22, 2008 comments by reference herein.

See also RAA Comments in Docket DOT-OST-2001-9235, dated January 22, 2008 at 9-11.

VII. The Cost Benefit Analysis Does Not Justify the Proposals.

The Department's cost benefit analysis is insufficient and shows further why the proposed rule should be withdrawn at least until the effects of the recently implemented tarmac delay rule can be assessed. Of the eleven subject areas examined in the Department's Preliminary Regulatory Analyses, seven areas lack either a cost or benefit estimate, and for ten of the areas examined, the estimated cost exceeds the estimated benefit. (*See* 75 Fed. Reg. 32318, at 32333-32335 (Comparison of Requirement-Specific Benefits and Costs, 2010-2020 Table). Additionally, a study conducted by experts at the International Institute of Tourism Studies (Aviation Program) in the Business School at George Washington University showed that the ratio of potential fines under the tarmac delay rule to potential revenue for operating 70-seat regional jet flights (at an 81% load factor) is as follows:

Aircraft Type	Potential Revenue	Potential Fine	Fine to Revenue Ratio
Regional Jet 70 seats	\$75 per passenger \$4,253 per flight (81% load factor)	\$1.56 million	366:1
A320/B737 144 seats	\$119 per passenger \$13,880 per flight (81% load factor)	\$3.21 million	231:1

This ratio for regional carriers is even higher than the ratio for mainline carriers under the new rule. Although the Department dismissed this study because its authors have worked as consultants to carriers on other issues, the Department has not countered their findings, which reveal deep conflicts between the stated purpose of the tarmac delay rule and its actual effects

http://www.centreforaviation.com/news/2010/07/21/tarmac-delay-rules-to cost-the public welfare-usd4-billion/page1, at 1 (July 13, 2010); Source: Marks Aviation.

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and illuminates the cost ratio discussed above. Should DOT prefer to commission its own study,

RAA urges the Department to contract with NAS, GAO or academics of its own choosing to

examine whether the tarmac delay rule results in significant economic harm to the public

welfare, with the "real loser in all this [being] the consumer." ¹⁹

VIII. Effective Date.

The Department proposes that any final rule should take effect 180 days after its

publication in the Federal Register. If the Department's proposals are finalized in any form, RAA

anticipates that its members will need a minimum of 180 days to implement them.

Conclusion

For the foregoing reasons, RAA urges the Department to reconsider its proposed rule and

to consider suspending further proceedings until the full effects of the tarmac delay rule are

realized and evaluated; only then should the Department consider whether further regulation is

necessary and beneficial. To the extent the Department believes further regulation is needed, the

proposal should be revised consistent with the requirements of Executive Order 12866, but only

after the Department has considered whether non-marketing carriers, carriers operating small

aircraft, or operations at small airports should be exempted.

Respectfully submitted,

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September 23, 2010

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Id.