

April 16, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Ms. Sylvie Giroux, Analyst

Dear Madam Secretary:

Re: The Nawrots v. Sunwing Airlines
File No.: M 4120-3/13-01696 / Our reference: 0575-Nawrot
Complaint concerning denied boarding and/or failure to provide transportation
and/or delay on or around August 10, 2012
Sunwing Airlines' motion for an extension dated April 5, 2013.

Please accept the following submissions in relation to the above-noted matter as an answer to Sunwing Airlines' motion for an extension dated April 5, 2013.

I. Sunwing Airlines failed to serve notice of the motion until April 16, 2013

Rule 32(3) of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 states that:

A notice of motion shall be filed with the Agency, and the party filing the notice of motion shall serve a copy of the notice on the other parties.

[Emphasis added.]

The undersigned has exchanged a number of emails with Sunwing Airlines in the past, and so Sunwing Airlines did have the correct email address of the undersigned. Nevertheless, for reasons known only to Sunwing Airlines, it sent its motion for an extension to an incorrect and non-existent email address that looks similar to the address of the undersigned.

It is well known that when an email is sent to a non-existing address, the delivery system provides the sender (Sunwing Airlines) with an error message that the email was sent to a non-existing

address. On a balance of probabilities, Sunwing Airlines did receive such an error message, but inexplicably, Sunwing Airlines failed to disclose same to the Agency, and pretended that it served the undersigned with its motion for an extension. As a result of Sunwing Airlines' deceptive conduct, the Nawrots were deprived of their right to be heard, and the Agency granted the extension sought *ex parte*.

Sunwing Airlines' mischief was detected on April 16, 2013 thanks to the vigilance of the case officer, Ms. Giroux, who immediately directed Sunwing Airlines to serve the undersigned at the correct address. Subsequently, the Agency retracted its decision granting the extension, and provided the Nawrots with an opportunity to make submissions in answer to the motion for an extension.

II. The extension ought not be granted

As a general rule, Rule 6.03 (2) of the *Rules of Professional Conduct* requires the undersigned to consent to any reasonable request for an extension from opposing counsel that does not prejudice the rights of the client. In the present case, however, there are exceptional circumstances that leave the undersigned no choice but to oppose the motion.

(a) Sunwing Airlines' conduct

Although Sunwing Airlines was perfectly aware of the email address of the undersigned, it sent the motion to a different, non-existing address; subsequently, it ignored the standard error message of the email delivery system, and failed to disclose same to the Agency. Thus, Sunwing Airlines attempted to deprive the Nawrots of their right to be heard.

It is submitted that such conduct is reprehensible, and is in and on its own sufficient ground for denying a discretionary motion such as the present one.

(b) Sunwing Airlines failed to demonstrate exceptional circumstances for an extension

The Agency made it clear in its March 28, 2013 letter that it will "only grant extensions of time in exceptional circumstances," a view also expressed in the Agency's publication "Practice Regarding Requests for Extensions of Time to File Submissions."

Sunwing Airlines was provided with more than enough time to respond to all issues raised in the Nawrots' complaint, including the matters related to reasonableness of certain tariff provisions. Sunwing Airlines' internal review of its tariffs is fully within Sunwing Airlines' control. Sunwing Airlines has provided no explanation as to how the additional two weeks it is seeking are necessary to respond to the Nawrots' complaint with respect to these issues.

Therefore, it is submitted that Sunwing Airlines failed to meet its burden of proof that there are exceptional circumstances that warrant granting it an extension.

(c) Prejudice to the Nawrots

As the exhibits to Mr. Nawrot's affidavit demonstrate, Sunwing Airlines was constantly putting off addressing the Nawrots' complaint, and has refused to compensate them for a substantial amount of out-of-pocket expenses. While these amounts are trifles for Sunwing Airlines, they are significant to average passengers such as the Nawrots.

Sunwing Airlines has been made aware of the entire claim advanced in the present proceeding by the Nawrots on February 11, 2013, and it has had more than two months since then to address it. It is submitted that any further delay in the determination of the present complaint would further prejudice the Nawrots as well as other passengers who are similarly situated, and are affected by Sunwing Airlines' unreasonable tariff provisions.

(d) Sunwing Airlines' motion is a colourable attempt to bifurcate the present proceeding

Sunwing Airlines is improperly attempting to bifurcate the proceeding, with one set of submissions dealing with the amounts payable to the Nawrots (which Sunwing Airlines proposes to file by April 17, 2013), and another set dealing with reasonableness of certain tariff provisions (which Sunwing Airlines proposes to file 2 weeks later).

As a preliminary matter, the procedure sought by Sunwing Airlines is contrary to the Agency's rules and past practices of pleadings. Indeed, Rule 42(1) allows a respondent to a complaint to file one answer, but not two as Sunwing Airlines wishes to do, which would double the amount of paperwork both for the undersigned and the Agency.

The Nawrots' complaint involves both issues of compliance with tariff provisions and the *Montreal Convention* as well as reasonableness of tariff provisions. These issues are interrelated, inseparable, and they affect both the rights of the Nawrots and the remedies they seek.

It is submitted that Sunwing Airlines' attempt to bifurcate the proceeding is highly prejudicial to the Nawrots' case, because they also claim that Sunwing Airlines subjected them to terms and conditions that are unreasonable. Furthermore, having two separate answers and two separate replies in the same proceeding would result in additional costs for the Nawrots.

There is no doubt that Sunwing Airlines is entitled to retain an entire team to respond to the Nawrots' complaint; however, this does not alter the fact that Sunwing Airlines ought to file only a single answer pursuant to Rule 42.

Therefore, the Nawrots are asking that the Agency direct Sunwing Airlines to file a *single* answer to the present complaint, which is to address all issues, and set a single deadline for its filing.

(e) Conclusion

The Nawrots are asking that the Agency direct Sunwing Airlines to file a *single* answer to the present complaint, which addresses all issues raised in the complaint.

For the aforesaid reasons, the Nawrots submit that Sunwing Airlines' motion for an extension ought to be denied. In the alternative, Sunwing Airlines ought to be granted an extension until Monday, April 22, 2013 to file its answer to the complaint.

All of which is most respectfully submitted.

Louis Béliveau

Cc: Mr. Ray Nawrot
Mr. Clay Hunter, counsel for Sunwing Airlines