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Via E-mail: sylvie.giroux@otc-cta.gc.ca

Canadian Transportation Agency
Air and Accessible Transportation Branch
Air & Marine Investigation Division
Ottawa, Ontario
K1A 0N9

Attention: Sylvie Giroux, Analyst

Dear Sirs/Mesdames:

**RE: File No. M4120-3/13-01696
Complaint by the Nawrots Family against
Sunwing Airlines
Our File No. 213062**

**Submissions by Sunwing Airlines Inc. in Answer to the
Complainants' Notice of Motion dated April 23, 2013**

We write with the following submissions with respect to the Complainants' motion for directions, productions and extension.

The Complainants' request for directions from the Agency

There is no requirement or need for the Canadian Transportation Agency ("the Agency") to provide directions with respect to the evidence provided by the Complainants.

Fundamental principles of evidence apply. The Complainants have the burden of proving their claim on the civil standard of a balance of probabilities. Sunwing Airlines Inc. ("Sunwing") has no such burden. In its submissions, Sunwing has raised the issue that evidence is lacking in support of the Complaint. Sunwing is not required to formally request the production of such evidence. If the Complainants choose not to proffer that evidence that is their choice. They do not need nor should they require the Agency to direct them.

The Complainants' request for unredacted documents.

The Complainants seek production of certain unredacted documents attached as Exhibits to the Affidavit of Joanne Dhue sworn April 17, 2013.

The redacted information has been redacted on the basis of relevance and privacy legislation and concerns.

The threshold test with respect to disclosure of documents is relevance. The redacted information the Complainant has requested be disclosed is not relevant to the determination of the Complaint. Whether there are "potential witnesses" is not the consideration; rather, it is whether there are witnesses relevant to the issue.

What is at issue on the Complaint is whether the Complainants presented themselves at the check-in counter prior to cut-off for check-in. It is a simple issue of fact.

The Complainants have provided and rely upon the Affidavit of Raymond Paul Nawrot sworn February 28, 2013 in which Mr. Nawrot states that the only persons present at the check-in counter at the time the Nawrots arrived and during their time at the check-in counter were a passenger that arrived from Toronto and was complaining of his delayed arrival at Gatwick; a bystander named Asif Tourab; and, the Supervisor.

By their own sworn evidence, the Complainants state that there was no other passenger of Flight WG201 present at the time they were at the check-in counter for Flight WG201.

The Complainants have proffered no other affidavit evidence or even declarations or statements from either the inbound passenger or Mr. Tourab.

Accordingly, the disclosure of the names of the crew of Flight WG201, the Ramp Lead and any of the passengers listed as "no-shows", "go-shows" or "elite plus sold" will not provide any information that could assist the Agency in the determination of the Complaint.

Furthermore, and with respect to the passenger names, Sunwing has proffered the sworn Affidavit of Joanne Dhue in which she states she investigated all of the "no-show" passengers. That and the Affidavit of Raymond Paul Nawrot is the material evidence on this issue before the Agency and which will either be believed or not believed and will in any event be accorded the weight that the Agency so determines.

It is submitted that the Complainants' requests with respect to the disclosure of the redacted portions of Exhibits "H", "K" and "L" to the Affidavit of Joanne Dhue are nothing more than a "fishing expedition" and should be rejected. The disclosures requested are irrelevant to the issue to be determined and are not in the public interest given that they serve only to infringe upon the privacy of the individuals whose identity the Complainants seek to reveal.

With respect to Exhibit "I" to the Affidavit of Joanne Dhue, "Passenger Supervisor Shift Report – North Terminal" our submissions above apply equally to the redacted names of individuals contained therein. The remaining redacted contents set out in its second paragraph are irrelevant to the Complaint but we take no issue with disclosing them now and attach a copy of Exhibit "I" with an unredacted second paragraph. (please find attached the partially unredacted copy of Exhibit "I" to the

Affidavit of Joanne Dhue sworn April 17, 2013 - Swissport Passenger Services Supervisor Shift Report – North Terminal dated August 10, 2012)

The nature of the evidence

The Complainants take issue with their not having as yet been provided with a sworn Affidavit of Vic Tydeman. Again, it is the Complainants' case to prove. Whether Sunwing provides a sworn Affidavit, a Declaration or nothing at all is its prerogative.

That said, we are in the process of obtaining a sworn Affidavit of Mr. Tydeman and expect to deliver it to the Agency and counsel shortly and upon our receipt. It should be noted, if not yet appreciated by the Complainants, the affiant is located in London, UK and Sunwing has no control over the affiant or Swissport, his employer.

Yet again, with respect to the Complainants' stated exceptions to the identities of the individuals redacted in the contents of Exhibit "L" to the Affidavit of Joanne Dhue, the material evidence is Joanne Dhue's sworn statements in her Affidavit. In the normal course, we have no doubt the Agency will accord that evidence its proper weight.

Authorities

The Complainants rely on two authorities. We can find no reference to *Azar v. Air Canada*, LET-C-A-140-2012 in the Agency's database. Not having this decision does not affect our submissions but we ask that the Complainants provide us with a copy in any event.

We have reviewed *Spence v. Perimeter Aviation*, 349-C-A-2102 (a copy of which is attached). While it is trite law that sworn evidence will carry more weight than unsworn evidence particularly where the sworn evidence could reasonably be obtained, this decision supports Sunwing's position on this Motion. The Agency held:

[20] On complaint made pursuant to section 67.1 of the CTA, the burden of proof lies with the complainant to prove to the Agency that the carrier did not apply the terms and conditions of carriage specified in its tariff. It is therefore incumbent on the complainants to demonstrate that Perimeter did not apply the terms and conditions of carriage set out in its Tariff.

[21] Where contradictory evidence is presented by the parties, the Agency determines which version of events is the more probable, based on the preponderance of evidence. The burden falls on the complainants to establish that their version of events is most likely to have occurred.

[22] The complainants maintain that Mr. Bingham stated that the complainants would be responsible for the cost of their accommodation in Winnipeg, as well as for the purchase of

another ticket to travel again from Winnipeg to Norway House. Mr. Bingham claims that at no time did he tell any of the Norway House passengers that they would have to purchase an additional ticket for transport back to Norway House.

[23] Mr. Bingham's statement was made by affidavit, and the Agency is of the opinion that the statement carries greater weight than the submissions made by the complainants. The complainants had an opportunity to clarify their version of events or rebut Mr. Bingham's statement, but chose not to do so.

Summary

The Complainants have consciously chosen to pursue this aspect of the Complaint through the Agency's process. If they wish full discovery and cross examination on the evidence, the proper forum is a court of law. Whether in the process of a complaint to the Agency or by way of a civil action, any and all productions must be relevant to the issue to be decided. The Complainants are not entitled to the identity of any "potential witnesses" as to allow them such latitude would sanction a "fishing expedition" which would not only subvert the process but cause harm to the privacy of the individuals whose identities are sought and for no good purpose.

For the above reasons Sunwing submits the Complainants' motion should be denied in its entirety and that they be put to delivering their Reply no later than April 29, 2013 as previously directed.

Yours truly,


Clay S. Hunter

CSH/
encl.