July 6, 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
Reply – issue 3

Please accept the following submissions in relation to the above-noted matter as a reply to Sunwing Airlines' April 22, 2013 and July 5, 2013 answers to the Nawrots' complaint as per the Agency's directions of June 14, 2013 and June 26, 2013.

OVERVIEW

On March 21, 2013, the Nawrot Family brought a complaint to the Agency against Sunwing Airlines concerning having been denied boarding and/or denied transportation and/or delay on or around August 10, 2013. As part of their complaint, the Nawrots also challenged the reasonableness of Sunwing Airlines' denied boarding compensation policy.

Sunwing Airlines answered the portion of the Nawrots' complaint concerning its denied boarding compensation policy on April 22, 2013 and on July 5, 2013. The answers did not address the reasonableness of Sunwing Airlines' current policy, and were confined to proposing a new denied boarding compensation policy.

In the present reply, the Nawrots are making submissions primarily on the reasonableness and clarity of Sunwing Airlines' proposed new denied boarding compensation policy as per the Agency's directions of June 14, 2013 and June 26, 2013.

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There have been three developments since the filing of Sunwing Airlines' April 22, 2013 answer that are relevant for determining the reasonableness and clarity of the denied boarding compensation policy proposed by Sunwing Airlines:

- On May 27, 2013, the Agency issued its final decision in *Lukács v. Air Canada*, 204-C-A-2013, in which the Agency considered, among other things, the circumstances where a carrier may refuse to pay denied boarding compensation in the case of substitution of an aircraft with one of a smaller capacity.

- On May 31, 2013, in *Lukács v. Sunwing Airlines*, File No. M 4120-3/13-02395, Sunwing Airlines proposed to rewrite its Rule 15 and to add Rule 15A to conform to the Agency's decisions from 2012 concerning the protection of passengers affected by denied boarding and flight cancellations. A copy of Sunwing Airlines' proposal[1] that was filed with the Agency is attached and marked as Exhibit "A".

- On June 12, 2013, the Agency issued its final decision in *WestJet v. Air Canada*, 227-C-A-2013, where the Agency held that a wealth of provisions in WestJet's international tariff governing denied boarding compensation were unreasonable and unclear.

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[1] http://docs.airpassengerrights.ca/CTA/Sunwing_Airlines/International_Flight_Delays_and_Cancellations/2013-05-31–Sunwing-answer–AMENDED.pdf

ANNEXES

I. Sunwing Airlines' Existing Rules 18(g) and 20

The Nawrots challenged the reasonableness and clarity of Rule 20 and the third paragraph of Existing Rule 18(g) of Sunwing Airlines' International Tariff.

Sunwing Airlines did not address the reasonableness or the clarity of its Existing Rules in any way in its April 22, 2013 or July 5, 2013 answers. Instead, Sunwing Airlines proposed to amend Rules 18 and 20 (the "Proposed Rules").

Thus, the Nawrots are asking the Agency to find that Sunwing Airlines' Existing Rules 18(g) and 20 are unclear and unreasonable.

II. Preliminary matter: finality of the decisions issued by the Agency

In the second paragraph of its July 5, 2013 answer, Sunwing Airlines refers to the Agency's decisions in *Lukács v. Air Canada*, 204-C-A-2013 and *Lukács v. WestJet*, 227-C-A-2013, and states that it reserves the right to make changes to its tariff Rule 20 once final decisions in these cases are rendered by the Agency.

It appears that Sunwing Airlines misunderstands the nature of these two decisions. Contrary to Sunwing Airlines' belief, both Decision No. 204-C-A-2013 and Decision No. 227-C-A-2013 of the Agency are final, a fact that is explicitly stated at para. 79 of Decision No. 204-C-A-2013.

III. Reasonableness and clarity of Proposed Rule 20 (July 5, 2013 version)

Sunwing Airlines proposed to amend Rule 20 in both its April 22, 2013 and July 5, 2013 submissions. Sunwing Airlines' April 22, 2013 proposal was substantially similar to WestJet's denied boarding compensation policy, which was held to be unreasonable and disallowed by the Agency in *Lukács v. WestJet*, 227-C-A-2013.

Thus, it appears that Sunwing Airlines' July 5, 2013 proposal was meant to replace and substitute its April 22, 2013 proposal. Consequently, the submissions below are confined to the Rule 20 that Sunwing Airlines proposed on July 5, 2013.

For the reasons explained below, the Nawrots submit that while Proposed Rule 20 is a substantial step in the right direction, it is still unreasonable, fails to strike the balance between the rights of passengers to be subject to reasonable terms and conditions and Sunwing Airlines' statutory, commercial, and operational obligations, and furthermore, it contains provisions that were found to be unreasonable by the Agency in *Lukács v. Air Canada*, 204-C-A-2013.

The Nawrots further submit that Proposed Rule 20(a) appears to be inconsistent with Proposed Rule 15 (Annex "A") that Sunwing Airlines filed with the Agency on May 31, 2013.

(a) Applicable legal principles

The legal principles applicable to the clarity and reasonableness of tariff provisions were summarized by the Agency most recently in *Lukács v. WestJet*, 227-C-A-2013 as follows:

> **Clarity**
>
> [6] As recently stated by the Agency in Decision No. 248-C-A-2012 (*Lukács v. Air Transat*), a carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.
>
> **Reasonableness**
>
> [7] To assess whether a term or condition of carriage is "unreasonable", the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 150-C-A-2013 (*Forsythe v. Air Canada*).
>
> [8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

The Nawrots adopt these findings of the Agency as their own position.

(b) Substitution of the aircraft with one of a smaller capacity

Proposed Rule 20(c) provides that:

> (c) **Compensation for Involuntary Denied Boarding**. If you are denied boarding involuntarily you are entitled to a payment of denied boarding compensation unless:
>
> ⋮
>
> - you are denied boarding because a small capacity aircraft was substituted for safety or operational reasons;

The Nawrots submit that this portion of Proposed Rule 20(c) is unreasonable for precisely the same reasons that a virtually identical provision in Sunwing Airlines' domestic tariff was held to be unreasonable by the Agency.

Indeed, in Decision No. 204-C-A-2013, the Agency considered the reasonableness of Air Canada's Domestic Tariff Rule 245(E)(1)(b)(iv):

> EXCEPTION: The passenger will not be eligible for compensation:
>
> [...]
>
> (iv) if, for operational and safety reasons, his aircraft has been substituted with one having lesser capacity.
>
> [...]

The Agency made the following findings in Decision No. 204-C-A-2013:

- If Air Canada is able to demonstrate that the events prompting the substitution of an aircraft were beyond its control, Air Canada should have the flexibility to control its fleet and determine when an aircraft should be substituted for operational and safety reasons (para. 41).
- The burden must rest with Air Canada to establish that the events prompting the substitution were beyond its control and that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures (para. 44).
- In order to relieve itself from the obligation to pay denied boarding compensation, Air Canada must demonstrate that:

  (1) substitution occurred for operational and safety reasons beyond its control, and

  (2) it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures.

  If Air Canada fails to demonstrate both of these, then compensation should be due to the affected passengers (para. 44).

Based on these findings, the Agency concluded that in the absence of specific language that establishes context or qualifies Air Canada's exemption from paying denied boarding compensation, Rule 245(E)(1)(b)(iv) is unreasonable (para. 45).

The Nawrots submit that the same findings and conclusions are applicable with respect to Sunwing Airlines' Proposed Rule 20(c).

The Nawrots ask the Agency to disallow the impugned portion of Proposed Rule 20(c), and direct Sunwing Airlines to amend Rule 20 in accordance with the principles laid out in Decision No. 204-C-A-2013.

(c) Clarity and reasonableness of Proposed Rule 20(a)

Proposed Rule 20(a) reads as follows:

> (a) **General.** If a passenger has been denied a confirmed seat in the case of an oversold flight of the Carrier , the Carrier will offer the passenger the following options:
>
> (1) refund the total fare paid for each unused segment; or
>
> (2) arrange reasonable alternative transportation on its own services; or
>
> (3) if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the comparable booking code.

The Nawrots submit that Proposed Rule 20(a) is inconsistent with Proposed Rule 15 that Sunwing Airlines submitted with the Agency on May 31, 2013, and unreasonable in that it defines the scope of denied boarding too narrowly, and fails to adequately compensate passengers.

(i) Inconsistency with Proposed Rule 15

In *Lukács v. Sunwing Airlines*, File No. M 4120-3/13-02395, the tariff provisions of Sunwing Airlines' International Tariff governing flight delays, cancellations, and denied boarding were challenged. In response to the complaint, Sunwing Airlines proposed to amend its International Tariff to include Proposed Rules 15 and 15A (Annex "A"). It appears that Mr. Lukács, the complainant in that proceeding, endorsed the proposed amendments, and was of the opinion that they are reasonable and fully address his complaint.[2]

The Nawrots agree with the submissions of Sunwing Airlines and Mr. Lukács in File No. M 4120-3/13-02395 that Proposed Rule 15 and 15A (Annex "A") are reasonable.

Proposed Rule 15(1)(f) governs the reprotection of passengers in several cases, including in the case of denied boarding, and requires Sunwing Airlines to offer the passenger not simply the option of a refund of the unused segments, but rather:

> reimbursement of the total price of the ticket at the price at which it was bought, for the part or parts f the journey not made, and for the part or parts already made if they no longer serve any purpose in relation to the passengers original travel plan, together with, when relevant, transportation to the passengers point of origin, at the earliest opportunity, at no additional cost;

[2] http://docs.airpassengerrights.ca/CTA/Sunwing_Airlines/International_Flight_Delays_and_Cancellations/2013-06-03–reply-SWG-02–DIGITAL.pdf

Thus, the Nawrots submit that Proposed Rule 20(a), when read together with Proposed Rule 15, fails to be clear, contrary to subsection 122(c) of the *Air Transportation Regulations*, S.O.R./88-58.

(ii) Reasonableness

The Nawrots submit that Proposed Rule 20(a) fails to be reasonable for two reasons: first, it defines denied boarding unreasonably narrowly, and second, it is inconsistent with the principles laid down by the Agency in its five decisions in 2012 concerning the rights of passengers in the case of denied boarding.

Scope

Proposed Rule 20(a) purports to confine the scope of the rule to those cases when a passenger is denied a confirmed seat as a result of an oversold flight. This, however, appears to exclude many other cases when passengers may be denied boarding for reasons entirely outside their control, such as substitution of an aircraft with one of a smaller capacity, or (as in the case of the Nawrots) failure of the carrier to staff its check-in counters.

Proposed Rule 20(c) already exempts Sunwing Airlines from the obligation to pay denied boarding compensation to passengers who fail to fully comply with the ticketing or check-in requirements, or who are not acceptable for transportation under the tariff.

Thus, the additional limitation in Proposed Rule 20(a), which purports to confine the scope of the rule to those cases when oversale is the cause of denied boarding, is unreasonable. Indeed, the damage to passengers who are denied boarding is identical whether they were denied boarding as a result of an oversold flight, or substitution of the aircraft, or failure of the carrier to check them in, even though they presented themselves for check-in on time.

Therefore, the Nawrots submit that Proposed Rule 20(a) is unreasonable, because it deprives passengers with confirmed seats who present themselves for transportation on time, and who comply with all travel requirements, of denied boarding compensation if they are denied boarding for reasons other than an oversold flight.

The Nawrots further submit that such a narrow definition of the scope of Rule 20 is also inconsistent with the findings of the Agency in *Lukács v. Air Canada*, 204-C-A-2013 with respect to the obligation of the carrier to compensate passengers who are denied boarding due to substitution of the aircraft with one of a smaller capacity.

Hence, the Nawrots submit that the words “in the case of an oversold flight of the Carrier” ought to be deleted from Proposed Rule 20(a).

Agency's principles concerning protection of passengers

In June 2012, the Agency issued five landmark decisions concerning the rights of passengers in the case of flight cancellation and denied boarding: *Lukács v. Air Transat*, 248-C-A-2012; *Lukács v. WestJet*, 249-C-A-2012; *Lukács v. Air Canada*, 250-C-A-2012; *Lukács v. Air Canada*, 251-C-A-2012; and *Lukács v. WestJet*, 252-C-A-2012.

On July 3, 2013, the Agency issued a "Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights"[3], urging carriers to voluntarily amend their tariffs to reflect the principles laid down by the Agency in the aforementioned five decisions (Annex "B"). These principles require the carrier, at the discretion of the passenger, to:

> 1. rebook the passenger on alternate transportation to the passenger's intended destination, at no additional cost to the passenger and within a reasonable time, using:
>
> a. its own service;
>
> b. the services of carriers with which it has an interline agreement; or
>
> c. where possible and necessary, the services of carriers where no interline agreement exists, or:
>
> 2. if the purpose of the passenger's travel is no longer valid because of the delay incurred, provide the passenger with a full refund [Footnote: The passenger is entitled to a full refund even if travel has commenced, if the passenger has suffered a loss of purpose for the travel.], and, when travel has already commenced, return the passenger to their point of origin, within a reasonable time at no additional cost.

The Nawrots submit that Proposed Rule 20(a) is inconsistent with these principles, because it fails to incorporate option 2; in particular, Proposed Rule 20(a) fails to recognize the right of passengers for a full refund even if travel has commenced in certain cases, or the right of passengers for transportation to their point of origin at no additional cost.

Therefore, the Nawrots submit that Proposed Rule 20(a) is unreasonable, and ought to be substituted with a wording that takes into account both the Agency's principles on protection of passengers and the findings of the Agency in Decision No. 204-C-A-2013 with respect to the circumstances that require compensation of passengers who are denied boarding.

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[3] http://www.cta-otc.gc.ca/eng/publication/notice-industry-remedies-overbooking-cancellation

(d) Proposed Rule 20(d): definition of "fare" and "stopover"

The Nawrots submit that Proposed Rule 20(d) is reasonable to the extent that it is identical to the American denied boarding compensation regime. At the same time, the Nawrots would like to draw attention to a difference that can turn out to be substantial in some cases, namely, the way Proposed Rule 20(d) defines the notion of "fare":

> For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharges and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first stopover of four hours or greater are used to calculate the compensation payable.
>
> [Emphasis added.]

In the American denied boarding compensation scheme, 14 CFR Part 250.1 defines "stopover" as follows:

> *Stopover* means a deliberate interruption of a journey by the passenger, scheduled to exceed 4 hours, at a point between the place of departure and the final destination.
>
> [Emphasis added.]

Thus, under the American regime, a mere 5-hour waiting time for a connecting flight would not be considered a "stopover," because a "stopover" requires a deliberate interruption of the journey.

The Nawrots submit that for the sake of clarity, this definition ought to be added to Proposed Rule 20(d), and that without this addition, Proposed Rule 20(d) would be unreasonable.

(e) Proposed Rule 20(e): Right to bring private legal action

The last sentence of Proposed Rule 20(e) states that:

> The passenger may, however, insist on the cash payment, or refuse all compensation and bring private legal action.
>
> [Emphasis added.]

The Nawrots submit that the second part of this provision is similar to WestJet's Proposed Rule 110(G), which was considered by the Agency in *Lukács v. WestJet*, 227-C-A-2013:

> The passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

In Decision No. 227-C-A-2013, the Agency held that:

> [43] With respect to the clarity of Proposed Tariff Rule 110(G), the Agency agrees with Mr. Lukács' submission that the phrasing of that Rule, without being explicit, suggests that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by WestJet. The Agency finds, therefore, that Proposed Tariff Rule 110(G) would be considered unclear if it were to be filed with the Agency given that it is phrased in such a manner as to create reasonable doubt and ambiguity respecting its application.
>
> [44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács' submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

The Nawrots accept these findings of the Agency as their own position, and submit that the second part of the last sentence of Sunwing Airlines' Proposed Tariff Rule 20(e) is both unclear and unreasonable.

(f) Proposed Rule 20(e): Form of payment – vouchers

The last two sentences of Proposed Rule 20(e) read as follows:

> The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash payment, or refuse all compensation and bring private legal action.
>
> [Emphasis added.]

The Nawrots submit that it is unreasonable for Sunwing Airlines to offer travel vouchers in lieu of denied boarding compensation for a number of reasons outlined below.

(i) The general rule: compensation must be in cash or equivalent

In *Lukács v. WestJet*, LET-C-A-83-2011, the Agency held that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. This finding was reiterated by the Agency in *Lukács v. WestJet*, 227-C-A-2013 in the specific context of denied boarding compensation:

> [37] With respect to the form of payment to be offered to passengers affected by denied boarding, the Agency concurs with Mr. Lukács' submission that WestJet's

> restriction of payment to either a travel credit or refund of the fare paid is inconsistent with the Agency's findings in Decision No. LET-C-A-83-2011. As such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.

(ii) Passengers' acceptance of compensation other than cash must be an informed decision

There is no doubt that passengers may agree to accept other forms of compensation. This acceptance, however, must be an informed decision, based on the passenger being fully informed of the restrictions that accepting an alternative form of compensation may entail.

This principle is common to both the American and the European denied boarding compensation regimes. Indeed, 14 CFR Part 250.5(c) provides that:

> (c) Carriers may offer free or reduced rate air transportation in lieu of the cash or check due under paragraphs (a) and (b) of this section, if-
>
> [...]
>
> (2) The carrier fully informs the passenger of the amount of cash/check compensation that would otherwise be due and that the passenger may decline the transportation benefit and receive the cash/check payment; and
>
> (3) The carrier fully discloses all material restrictions, including but not limited to, administrative fees, advance purchase or capacity restrictions, and blackout dates applicable to the offer, on the use of such free or reduced rate transportation before the passenger decides to give up the cash/check payment in exchange for such transportation.

Similarly, Article 7(3) of *Regulation (EC) 261/2004* provides that:

> The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

In other words, passengers are entitled to a cash (or equivalent) compensation, but may agree to accept another form of payment if they choose to. The requirement that passengers provide a written agreement confirming that they accept compensation in the form other than cash (or equivalent) underscores the principle that the standard form of compensation is by cash, and that the passengers' decision to depart from this standard must be an informed one.

(iii) Disadvantages for passengers of compensation by travel vouchers instead of cash

Although in theory, receiving a travel voucher for an amount equal to double or triple the cash denied boarding compensation may mutually benefit Sunwing Airlines and its passengers, in practice, the vouchers tend to be nearly worthless due to the many restrictions imposed on their use, and benefit only Sunwing Airlines. One of these restrictions is that vouchers seem to be valid only for Sunwing flights (or possibly vacations). This is a substantial restriction, because Sunwing Airlines does not have an extensive network.

The vast majority of passengers are not aware of the many restrictions, and it is very difficult to verify whether passengers are adequately informed about their rights by the carrier.

Even if passengers are made aware of all the restrictions and limitations of Sunwing Airlines' travel vouchers, they cannot make an informed decision at the airport, in a matter of minutes, as to whether to seek cash compensation or accept a travel voucher instead. Indeed, in *Lukács v. WestJet*, 252-C-A-2012 (para. 83), the Agency recognized the importance of passengers having a reasonable opportunity to fully assess their options:

> The Agency is of the opinion that this Proposed Tariff Rule is unreasonable. Proposed Tariff Rule 12.5 does not provide the passenger with a reasonable opportunity to fully assess their options. Instead, the passenger must decide between two options as determined by the carrier, both of which have legal consequences on the passenger's rights without a reasonable period of time to assess the full potential of the impact of selecting one over another.

In the present case, acceptance of compensation by way of travel vouchers may have very significant disadvantages for passengers (although it undoubtedly benefits Sunwing Airlines), and there is a very serious concern about passengers being deprived of the ability to make an informed decision, based on considering all pros and cons, about the form of compensation that they wish to receive.

Thus, it is submitted that even if the Agency is of the opinion that paying compensation by way of travel vouchers, with the written consent of the passenger, is a reasonable alternative to a cash compensation, it is submitted that passengers ought to be able to change their minds within a reasonable amount of time, and exchange their travel vouchers to cash compensation.

(iv) Conclusions

The general rule is that all compensation payable pursuant to the tariff must be in cash or equivalent. This principle was recently endorsed by the Agency in *Lukács v. WestJet*, 227-C-A-2013 in the specific context of denied boarding compensation. While passengers may choose to accept compensation in a form other than cash or equivalent, the passengers' decision to do so must be an informed one, and passengers are entitled to a reasonable opportunity to fully assess their options.

The airport does not provide an adequate setting and opportunity for passengers to make an informed decision about their choice of denied boarding compensation.

Thus, requiring carriers to pay denied boarding compensation in cash or equivalent, and not by travel vouchers, offers the most protection for passengers.

If carriers are permitted to provide, at the passengers' option, travel vouchers in lieu of denied boarding compensation, the amount of the travel voucher ought to be determined as a multiple of the amount due in cash. Specifically, due to the restrictions imposed on travel vouchers, it is submitted that the exchange rate of 1:3, that is, $1 in cash being equivalent to $3 in travel vouchers, ought to be applied.

Furthermore, passengers ought to be able to change their minds at a later time, and request to receive denied boarding compensation in cash instead of travel vouchers.

(g) Flights departing from the European Community: *Regulation (EC) 261/2004*

The denied boarding compensation regime proposed by Sunwing Airlines fails to address and meet the obligations of Sunwing Airlines with respect to passengers who are denied boarding on a flight departing from the European Community.

For example, the present complaint arose in the context of a flight of Sunwing Airlines departing from Gatwick Airport to Toronto, that is, a flight of Sunwing Airlines departing from the territory of the European Community.

Compensation for denied boarding on such flights, and any flight departing from an airport in the territory of the European Community, is governed by *Regulation (EC) 261/2004*. However, Proposed Rule 20 makes no reference to *Regulation (EC) 261/2004*, and purports to apply the American compensation regime even to flights departing from the European Community.

The Nawrots submit that a tariff provision that clearly ignores and contradicts a carrier's statutory obligation cannot be reasonable, even if the statute is a foreign legislation.

In their March 21, 2013 complaint, the Nawrots asked the Agency, among other things, that:

> D. the Agency disallow Sunwing Airlines' International Tariff Rule 20 as unclear and unreasonable, and substitute it with a denied boarding compensation policy similar to that of major airlines, such as Air France or Lufthansa;
>
> [Emphasis added.]

Sunwing Airlines made no submissions to oppose this relief sought by the Nawrots, nor did it lead any evidence that granting the relief would adversely affect its ability to meet its statutory, commercial, or operational obligations.

Thus, the Nawrots submit that the Agency ought to direct Sunwing Airlines to implement a denied boarding compensation similar to that of major European airlines, such as Air France or Lufthansa, at least with respect to flights departing from airports located in the European Community.

IV. Proposed Rule 18

Proposed Rule 18 appears to be a new rule, which is substantially different than Rules 18 or 18(g) that was a subject of the complaint; however, since Sunwing Airlines put it forward in the present proceeding, the Nawrots will be addressing the reasonableness of Proposed Rule 18 as well.

The Nawrots submit that Proposed Rule 18(b), governing involuntary refunds, is unreasonable and unclear, because it contradicts Proposed Rule 15(1)(f) with respect to what portion of the ticket needs to be refunded, and it also contradicts the Agency's principles on protection of passengers quoted earlier.

The Nawrots further submit that the portion of Proposed Rule 18(c)(i) that purports to exonerate Sunwing Airlines from the obligation to compensate or refund passengers if they fail to present themselves at the boarding gate due to being delayed in security or customs is unreasonable, because it is inconsistent with the legal principles of the *Montreal Convention*.

Indeed, the *Air France c. M. X...*, 07-16102 appeal (Annex "C") decided by the Supreme Court of France (Cour de cassation, the highest national court) on June 19, 2008, concerned a passenger whose flight from Roissy to Rome departed one hour late, resulting in him missing his connecting flight from Rome to Tel-Aviv, and arriving at his final destination with a 13-hour delay. The reason for the late departure from Roissy was congestion at the security screening (para. 3). The Supreme Court of France considered the *Montreal Convention*, and upheld the damage award of the trial judge of 750 EUR, and dismissed the appeal:

> Mais attendu que le juge du fond a relevé que le contrôle de sécurité des passagers relevait d'une action normale et qu'il appartenait à la compagnie aérienne d'organiser ses vols en conséquence, qu'il en a déduit que la société Air France n'apportait pas la preuve suffisante qu'elle n'a pu prendre les mesures nécessaires pour éviter le retard subi; que non tenu de répondre aux conclusions visées par les deux premières branches du moyen, rendues inopérantes par ces constatations, il a légalement justifié sa décision;

In a different and unrelated case, *M. X... Jean-Baptiste et Madame X... Pascale Marie-Françoise c. Air France France*, N° de RG: 07/00145 (Annex "D"), the Tribunal d'instance d'Aulnay-sous-Bois reached the same conclusion. This latter case involved four passengers who were delayed by airport security, and thus were late for their boarding gate. The court ordered Air France to pay compensation for out-of-pocket expenses pursuant to the *Montreal Convention* and to also pay denied boarding compensation as per *Regulation (EC) 261/2004*.

Based on these authorities, the Nawrots submit that it is unreasonable to deprive passengers of compensation if they are late to their boarding gates due to security or customs.

Therefore, the Nawrots submit that Proposed Rule 18(c)(i), in its present form, is unreasonable.

All of which is most respectfully submitted.

Louis Béliveau

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

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.

2. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

3. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

Foreign legislation

4. European Union: *Regulation (EC) 261/2004*.

5. United States: 14 CFR Part 250, as amended by 76 FR 23100.

Case law

6. *Air France c. M. X...*, France, Cour de cassation, Chambre civile 1, 19 juin 2008, 07-16102. http://www.juricaf.org/arret/FRANCE-COURDECASSATION-20080619-0716102

7. *Lukács v. Air Canada*, Canadian Transportation Agency, 250-C-A-2012.

8. *Lukács v. Air Canada*, Canadian Transportation Agency, 251-C-A-2012.

9. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.

10. *Lukács v. Air Transat*, Canadian Transportation Agency, 248-C-A-2012.

11. *Lukács v. WestJet*, Canadian Transportation Agency, LET-C-A-83-2011.

12. *Lukács v. WestJet*, Canadian Transportation Agency, 249-C-A-2012.

13. *Lukács v. WestJet*, Canadian Transportation Agency, 252-C-A-2012.

14. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.

15. *M. X... Jean-Baptiste et Madame X... Pascale Marie-Françoise c. Air France France*, Tribunal d'instance d'Aulnay-sous-Bois, Audience civile 8 octobre 2007, N° de RG: 07/00145.

CANADIAN TRANSPORTATION AGENCY

IN THE MATTER OF A COMPLAINT BY DR. GÁBOR LUKÁCS AGAINST SUNWING AIRLINES INC. CONCERNING TARIFF RULES 3.4, 15, 18(c), 18(e) AND 18(f) OF ITS INTERNATIONAL TARIFF CTA(A) NO. 2

AMENDED ANSWER

OF

SUNWING AIRLINES INC.

1. Pursuant to the request of Dr. Gábor Lukács (the "Applicant") and Sunwing Airlines Inc. ("Sunwing Airlines") to permit Sunwing Airlines to file an Amended Answer by May 31, 2013 and the granting of that request by the Canadian Transportation Agency (the "Agency"), Sunwing Airlines hereby:

   - replaces its existing proposed Rules 15 and 15A with the copies of the proposed Rules 15 and 15A attached to this Amended Answer;
   - amends paragraph 8 with respect to the reference to proposed Rule 15(1)(c) to 15(1)(e);
   - amends paragraph 9 with respect to the reference to Rule 20 to proposed Rule 15(1)(f).
   - amends paragraph 11 with respect to the reference to proposed Rule 15(1)(d) to 15(1)(g); and
   - amends paragraph 12 with respect to the reference to proposed Rule 15(1)(c) to 15(1)(e)

2. All of the other submissions in the Answer remain the same.

DATED at Toronto, this 31st day of May, 2013.

SUNWING AIRLINES INC.
By its solicitor

EDWIN T. NOBBS, Q.C.
PROFESSIONAL CORPORATION
33 Yonge Street, Suite 201
Toronto, Ontario
M5E 1G4

RULE 15 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

(1) **General**

(a) For the purposes of this Rule, the term *"Advance Flight Departure"* shall mean an advancement of the scheduled flight departure by more than the minimum period established in the Carrier's tariff for the passenger to check-in in accordance with this Rule 15(2).

(b) The provisions of this Rule are not intended to make Carrier responsible for the acts of third parties that are not deemed employees and/or agents of the Carrier under applicable law or international conventions and all the rights herein described are subject to the following exception, namely, that Carrier shall not be liable for damage occasioned by overbooking or cancellation if the Carrier proves that it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents to take such measures.

(c) The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed.

(d) The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.

(e) Passengers have a right to information on flight times and schedule changes. In the event of a delay, an advanced flight departure or schedule change the carrier will make reasonable efforts to inform the passengers of delays, proposed advanced flight departures and schedule changes, and, to the extent possible, the reasons for them.

(f) (i) If the passenger's journey is interrupted by an Advance Flight Departure, a flight cancellation or overbooking, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:

a) reimbursement of the total price of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if they no longer serve any purpose in relation to the passengers original travel plan, together with, when relevant, transportation to the passengers point of origin, at the earliest opportunity, at no additional cost;

b) transportation to the passenger's intended destination at the earliest opportunity, at no additional cost;.

(ii) When determining the transportation service to be offered, the Carrier will consider:

a) available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;

b) the circumstances of the passenger, as known to it, including any factors which impact upon the importance of timely arrival at destination.

(iii) having taken all the known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the Advance Flight Departure, overbooking or cancellation. Where a passenger nevertheless incurs expense as a result of the overbooking or cancellation, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.

(iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the Advance Flight Departure, overbooking or cancellation, as for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.

(g) Passengers have a right to retrieve their luggage quickly. If the luggage does not arrive on the same flight as the passenger, the airline will take steps to delivery the luggage to the passenger's residence/hotel as soon as possible. The airline will take steps to inform the passenger on the status of the luggage and will provide the passenger with an over-night kit as required. Compensation will be provided as set out herein.

(h) The rights of a passenger against the Carrier are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could be reasonably expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of the passengers are not governed by an international convention. In such

cases only, a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

(2) **Cut-off Times**

Check-in counters are open 3 hours prior to the scheduled departure, and will close 60 minutes before scheduled departure. Passenger(s) arriving for check-in after 60 minutes prior to the scheduled departure will not be accepted for travel.

After passenger(s) have checked in for their flight, they should be available at the gate not later than 30 minutes prior to the scheduled departure for boarding the aircraft. Passengers who arrive at the boarding gate after the gate has closed will not be accepted for travel.

Passenger(s) who arrive later than the times referred to above for check-in or at the boarding gate will not be eligible for any denied boarding compensation or refund.

(3) **Passenger Expenses Resulting from Flight Delays or Advanced Flight Departures**

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a flight delay or an Advance Flight Departure, subject to the following conditions:

(a) The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays or advance flight departures if the Carrier proves it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;

(b) Any passenger seeking reimbursement for expenses resulting from delays or advance flight departures must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and

(c) The Carrier may refuse or decline any claim, in whole or in part, if:

i. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay or advanced flight departure for which compensation is available under this Rule 15; or

ii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay or

advanced flight departure as determined by the Carrier, acting reasonably.

Without affecting any obligation to reimburse a passenger as provided for in this tariff, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or advanced flight departure.

(4) **Baggage Delays**

(a) The carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.

(b) Notwithstanding the foregoing, passengers whose baggage does not arrive on the same flight as the passenger will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of the baggage delay, subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays in the delivery of baggage if the Carrier proves it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or it was impossible for the Carrier and it employees or agents to take such measures;

ii. In order to assist the Carrier in commencing the tracing of the baggage in question, the passenger is encouraged to report the delayed baggage to the Carrier as soon as reasonably practicable following the completion of the flight;

iii. The passenger must provide the Carrier with (a) written notice of any claim for reimbursement within 21 days of the date on which the baggage was placed at the passenger's disposal, or in the case of loss within 21 days of the date on which the baggage should have been placed at the passenger's disposal; (b) particulars of the expenses for which reimbursement is sought; and (c) original receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred;

iv. The liability of the Carrier in the case of lost or delayed baggage shall not exceed 1,131 Special Drawing Rights (the "basic carrier liability" which is the approximate Canada dollar equivalent of CAD$1,800 for each passenger, unless the passenger has declared a higher value and paid the supplementary sum in accordance with Rule 11(c) of this tariff, in which case the Carrier's liability will be limited to the lesser of the value of the delayed baggage or the declared value, up to a maximum of CAD$3,000.

(c) After a 21 day delay, the Carrier will provide a settlement in accordance with the following rules:

i. if no value is declared per Rule 11(b), the settlement will be for the value of the delayed baggage or 1131 SDR (the "basic carrier liability" which is the approximate Canadian dollar equivalent of CAD$1,800), whichever is the lesser;

ii. if value is declared per Rule11(b), the settlement will be for the value of the delayed baggage or the declared sum (per Rule 11(b)) up to a maximum of $3,000, whichever is the lesser, and

iii. In connection with any settlement under the subsection (c), the passenger shall be required to furnish proof of the value of the delayed baggage which establishes such value to the satisfaction of the Carrier, acting reasonably.

(d) The Carrier may refuse or decline any claim relating to delayed baggage, in whole or in part, if:

i. the conditions set out in subsection 15.3(b) above have not been met;

ii. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 15; or

iii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

RULE 15A. TRAVELLER'S RIGHTS

(a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the Carrier will provided the passenger with a meal voucher.

(b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the Carrier will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.

(c) If the passenger is already on the aircraft when a delay occurs, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart if safe and practical to do so.

(d) The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.

(e) The agreed stopping places are those places shown in the Carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.

(f) The rights do not exclude additional rights a passenger may have under this tariff or legal rights that international and trans-border passengers have pursuant to international conventions (e.g., the *Montreal Convention*) and related treaties.

Notice to Industry: Initiative to level the playing field among air carriers and increase rights and remedies for passengers delayed because of overbooking and cancellation of flights

Air carriers are required by law to have and apply a tariff[1], and their terms and conditions of carriage in the tariff must be clear, just and reasonable. The Agency has the authority to suspend, disallow or substitute a term or condition of carriage it deems unclear, unjust or unreasonable.

Based on this authority, the Agency, in June, 2012, issued five final decisions on the reasonableness of international and domestic tariff provisions of some carriers about overbooking and cancellation of flights[2]. The rulings significantly increased the rights and remedies of the passengers travelling with the air carriers named in the decisions. However, as these rulings do not apply to all air carriers, not all passengers can benefit from the same rights and remedies.

The Agency is of the opinion that if all air carriers were to apply the rulings on overbooking and cancellation, it would further enhance consumer protection while ensuring a level playing field among air carriers.

Accordingly, the Agency will take measures to encourage carriers to voluntarily amend their tariffs to reflect the following two principles.

If a passenger is delayed due to the overbooking or cancellation of a flight **within the carrier's control**[3], at the passenger's discretion, the carrier will:

1. **rebook the passenger on alternate transportation**to the passenger's intended destination, at no additional cost to the passenger and within a reasonable time, using:
    a. its own service;
    b. the services of carriers with which it has an interline agreement; or
    c. where possible and necessary, the services of carriers where no interline agreement exists, or:

2. if the purpose of the passenger's travel is no longer valid because of the delay incurred,

provide the passenger with a full refund[4], and, when travel has already commenced, **return the passenger to their point of origin**, within a reasonable time at no additional cost.

In addition, the Agency considers it good practice for carriers to always assessthe needs of the passengers on a case-by-case basis, and take into account all known circumstances to avoid or mitigate the disruptions caused by the overbooking or the cancellation of flights.

Agency staff is available to work with carriers and provide guidance to help them incorporate these principles into their tariffs. Rules 90, 95 and 125 of the Agency's Sample Tariff reflect these principles and provide carriers with text that they can choose to add to their terms and conditions of carriage.

The Canadian Transportation Agency is an independent, quasi-judicial tribunal and economic regulator of the Government of Canada. It makes decisions and determinations on a wide range of matters involving air, rail and marine modes of transportation under the authority of Parliament, as set out in the *Canada Transportation Act* and other legislation.

For further information:

Telephone: 1-888-222-2592
TTY: 1-800-669-5575
E-mail: info@otc-cta.gc.ca
Website: www.otc-cta.gc.ca

Notes

1 A tariff is a schedule of fares, rates, charges and terms and conditions of carriage applicable to an air service.

2 The Agency ruled that overbooking and cancellation that are within the control of the carrier constitute a delay.

3 The Montreal Convention (Article 19) states that an air carrier is always liable for damage occasioned by delay in the carriage of passengers and their baggage. However, for delays outside the control of the carrier, the Montreal Convention provides that the carrier cannot be held liable if it proves that it took all measures that could reasonably be required to avoid the damage or if the carrier proves that it was impossible to take such measures.

4 The passenger is entitled to a full refund even if travel has commenced, if the passenger has suffered a loss of purpose for the travel.

Date Modified :
2013-07-03

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Important Notices

Cour de cassation
chambre civile 1
Audience publique du jeudi 19 juin 2008
N° de pourvoi: 07-16102
Non publié au bulletin **Rejet**

M. Bargue (président), président
SCP Rocheteau et Uzan-Sarano, avocat(s)

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, PREMIÈRE CHAMBRE CIVILE, a rendu l'arrêt suivant :

Sur le moyen unique, pris en ses quatre branches :

Attendu que M. X..., ayant décollé une heure après celle prévue de l'aéroport de Roissy pour se rendre à Rome, n'a pu prendre une correspondance à destination de Tel Aviv qu'après 8 heures d'attente ; qu'il est parvenu à destination avec 13 heures de retard ; que la société Air France, dont il a engagé la responsabilité du fait du dommage en résultant, a seulement offert de créditer son compte de 10 000 miles et d'un avoir de 120 euros ;

Attendu qu'il est fait grief au jugement (juridiction de proximité d'Aulnay-sous-Bois, 9 octobre 2006) d'avoir condamné la société Air France à payer à M. X..., à titre de dommages-intérêts, la somme de 750 euros avec les intérêts au taux légal à compter de son prononcé, alors, selon le moyen :

1°/ qu'en application de l'article 9 des Conditions générales de transport Air France, article rappelé sur la pochette de chaque billet : si le transporteur s'engage à faire de son mieux pour transporter les passagers et les bagages avec une diligence raisonnable, les heures indiquées sur les horaires ou ailleurs ne sont pas garanties ; qu'une telle clause est stipulée dans chaque contrat de transport aérien à raison de la complexité de ce type de transport, des impondérables météorologiques, des contrôles de sécurité d'intensité variable et du fait que l'autorisation de décollage échappe à la volonté du transporteur pour ne dépendre que de la tour de contrôle ; qu'en tenant, en l'espèce, la société Air France responsable du non-respect des horaires, la juridiction de proximité a donc violé ensemble l'article 1134 du code civil et l'article 9 des Conditions générales précitées ;

2°/ dans ses conclusions signifiées pour l'audience du 11 septembre 2006, la société Air France rappelait les termes de ses Conditions générales de transport (elles-mêmes reproduites sur la pochette du billet remis à M. X...) en faisant valoir qu' "aux termes du contrat de transport, Air France s'engage seulement "à faire de son mieux pour transporter le passager et les bagages avec une diligence raisonnable", ce qui signifie qu'elle n'était tenue que d'une obligation de moyens et non de résultat, les horaires n'étant pas garantis dans le contrat de transport aérien" et que "en conséquence, Air France ne saurait se voir reprocher de ne pas

avoir respecté le contrat de transport la liant au demandeur" ; qu'en laissant sans réponse ce moyen péremptoire, explicité et illustré par la production des conditions générales de transport et d'une pochette de billet, la cour d'appel a violé les articles 455 et 458 du code de procédure civile ;

3°/ que le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre ; qu'en l'espèce, bien loin de se contenter d'affirmer que le retard pris était dû aux contrôles normaux de la Police de l'air et des frontières, la société Air France établissait que le contrôle des passagers en provenance des Etats-Unis avait été inopinément renforcé jusqu'à entraîner la saturation du "filtre de sûreté" directement à l'origine du retard au décollage de son appareil ; qu'en la déclarant néanmoins responsable de ce retard, au motif général et inopérant que le contrôle de sécurité des passagers relève d'une "action normale", de sorte qu'il appartient aux compagnies aériennes d'organiser leurs vols en conséquence, sans vérifier, comme elle y était expressément invitée, si ce contrôle n'avait pas dépassé en l'espèce ce qui était normalement prévisible par la société Air France, la juridiction de proximité a privé sa décision de toute base légale au regard des articles 19 et 29 de la Convention pour l'unification de certaines règles relatives au transport aérien international, faite à Montréal, le 28 mai 1999 ;

4°/ que le transporteur aérien n'est, en toute hypothèse, pas tenu d'indemniser le retard en soi, mais le dommage résultant de ce retard ; qu'en condamnant la société Air France à indemniser le retard à l'arrivée de M. X... sans s'expliquer sur le ou les dommages qui ont pu résulter pour lui de ce retard, la juridiction de proximité a privé sa décision de base légale au regard des articles 19 et 29 de la Convention précitée ;

Mais attendu que le juge du fond a relevé que le contrôle de sécurité des passagers relevait d'une action normale et qu'il appartenait à la compagnie aérienne d'organiser ses vols en conséquence, qu'il en a déduit que la société Air France n'apportait pas la preuve suffisante qu'elle n'a pu prendre les mesures nécessaires pour éviter le retard subi ; que non tenu de répondre aux conclusions visées par les deux premières branches du moyen, rendues inopérantes par ces constatations, il a légalement justifié sa décision ;

D'où il suit que le moyen, qui manque en fait dans ses troisième et quatrième branches, ne peut qu'être rejeté ;

PAR CES MOTIFS :

REJETTE le pourvoi ;

Condamne la société Air France aux dépens ;

Vu l'article 700 du code de procédure civile, rejette la demande d'Air France ;

Ainsi fait et jugé par la Cour de cassation, première chambre civile, et prononcé par le président en son audience publique du dix-neuf juin deux mille huit.

Décision attaquée : Juridiction de proximité d'Aulnay-sous-Bois du 9 octobre 2006

Tribunal d'instance d'Aulnay-sous-Bois
ct0367
Audience publique du 8 octobre 2007
N° de RG: 07/00145

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

JURIDICTION DE PROXIMITE
...
93600 AULNAY-SOUS-BOIS

Tél : 01.48.66.09.08

RG N 91-07-000145
Minute :
SL

Monsieur X... Jean-Baptiste
Madame X... Pascale Marie-Francoise

C/

S.A. AIR FRANCE

Exécutoire, copie, dossier
délivrés à :
SCPA BUISSON et ASSOCIES
Copie, dossier délivrés à :
Me PRADON Fabrice

le :

AUDIENCE CIVILE

Jugement rendu et mis à disposition au Greffe de la Juridiction de Proximité en date du HUIT OCTOBRE DEUX MILLE SEPT

par Monsieur CORBU Jean, Juge de Proximité,
Assisté de Madame MARTIN Esther, Adjoint Administratif Assermenté faisant fonction de Greffier

Après débats à l'audience publique du 10 Septembre 2007
tenue sous la Présidence de Monsieur CORBU Jean, Juge de Proximité,
Assisté de Madame LENART Sonia, Greffier audiencier

ENTRE DEMANDEURS :

Monsieur X... Jean-Baptiste demeurant ...,

Madame X... Pascale Marie-Francoise née Z... demeurant ...,
représentés par la SCPA BUISSON et ASSOCIES, avocats au barreau de PONTOISE domiciliés 29 rue Pierre Butin 95300 PONTOISE

D'UNE PART

ET DEFENDERESSE :

S.A. AIR FRANCE dont le siège social est 45 rue de Paris, 95747 ROISSY CDG CEDEX, agissant poursuites et diligences de son représentant légal domicilié en cette qualité audit siège représentée par Maître PRADON Fabrice, avocat au barreau de PARIS domicilié 4 rue de Castellane, 75008 PARIS,

D'AUTRE PART

.../...

FAITS ET PROCEDURE :

Par acte d'huissier en date du 17 avril 2007, Monsieur Jean Baptiste X... et Madame Pascale Marie-Françoise Z... épouse X... sollicitent la condamnation de la Société Air France (RCS Bobigny B420495178) à devoir leur payer les sommes de:

1288 euro au titre de l'article 1142 du Code Civil,

1000 euro en application de l 'article 1147 du Code Civil,

500 euro au titre de l'article 700 du NCPC.

Il est demandé que soit prononcée l'exécution provisoire de la présente décision et la condamnation de la société AIR FRANCE aux entiers dépens sur le fondement de l'article 696 du NCPC.

La société AIR FRANCE conclue au débouté des demandes et sollicite 1000 euro au titre de l'article 700 du NCPC et la condamnation des demandeurs aux entiers dépens.

A l'audience du 10 septembre 2007, les demandeurs précisent que les 1288 euro demandés correspondent à 125 euro de remboursement de taxi, 1143 pour l'achat rendu nécessaires de nouveau billets le 30/12/06 et 20 euro pour le véhicule ayant dû être réservé en Ecosse.

Ils réitèrent également leurs autres demandes susvisées.

La Société AIR FRANCE renouvelle sa demande reconventionnelle de 1000 euro au titre de l'article 700 du NCPC.

MOYENS ET PRETENTIONS :

Les époux X... indiquent avoir réservé et payé le 25 novembre 2005, quatre billets aller-retour Paris/Edimbourg sur le site de la compagnie AIR France pour un montant total de 1100,24 euro, pour eux et leurs deux filles.

Ils précisent que les dates étaient le 29/12/06 à 7H20 pour le départ et au 1er janvier pour le retour.

Ils ajoutent avoir enregistré leurs bagages au comptoir AIR FRANCE le 29/12 vers 06H30, pour un embarquement prévu à 06H45.

Ils allèguent que la présence d'un groupe d'adolescent au passage du contrôle de police les a retardé alors qu'ils tentaient de se rendre vers la salle d'embarquement et qu'ils se trouvaient contraints de laisser passer ledit groupe sur ordre des forces de l'ordre.

Ils affirment avoir pu regagner la salle d'embarquement peu après 07H00 et soulignent qu'aucun personnel de la compagnie AIR France n'était présent et une personne employée par la société ADP les a alors avertis que l'embarquement était fermé.

Ils ajoutent s'être vus refuser l'accès à bord alors même que ce vol n'avait fait l'objet d'aucun appel pour l'embarquement et que l'avion était toujours sur le tarmac.

Ils allèguent que la compagnie AIR FRANCE à préféré décharger leurs bagages déjà placés dans la soute de l'avion ainsi que ceux de dix huit clients se trouvant dans la même situation qu'eux, c'est-à-dire dans la salle d'embarquement.

Ils soulignent qu'à l'instar des dix huit autres personnes, ils ont été contraints de payer une nouvelle fois d'autres billets, soit 1143 euro pour partir le 30 décembre 2005 à 07H20, sans remboursement du 1er vol. Ils ajoutent avoir du faire face à des frais supplémentaires d'aller-retour en taxi pour rentrer chez eux et revenir le lendemain à hauteur de 125 euro et 20 euro de supplément sur la location d'une voiture en Ecosse d'une catégorie supérieure, celle initialement prévue n'étant plus disponible.

Les époux X... rappellent que selon l'article L322-1 du Code de l'aviation civile : « le contrat de transport des passagers doit être constaté par la délivrance d'un billet. » Ils se considèrent à ce titre contractuellement liés avec la compagnie AIR France et versent aux débats leurs quatre billets aller-retour.

Ils considèrent que la société défenderesse n'a pas respecté ses obligations contractuelles et a fait montre d'une désorganisation interne ne pouvant leur être préjudiciable.

Ils allèguent que la société AIR FRANCE à reconnu sa responsabilité dans une lettre du 30 janvier 2006 où elle écrit : « je vous remercie d'avoir pris la peine de nous écrire et vous présente au nom d'AIR FRANCE, mes excuses pour les dérangements que vous avez connus. Toutefois, dans le cas que vous évoquez, je suis au regret de vous informer qu'il n'est pas prévu de compensation. Je tiens néanmoins à vous assurer que les remarques que vous avez bien voulu faire ont été portées à la connaissance des responsables concernés, ainsi que de nos correspondants chargés du suivi de la qualité du service… »

Les demandeurs font également état de courriers de la défenderesse en date du 07 avril 2006 dans lesquels ils indiquent que cette dernière précise ne pouvoir être tenue pour responsable de longueurs excessives des contrôles de sécurité mettant ensuite les passagers en difficulté pour embarquer. Les demandeurs considèrent qu'il s'agit d'un argument de mauvaise foi et qu'il appartient à la société de faire concorder les horaires d'enregistrement des bagages et ceux des passagers et non d'imputer ses propres dysfonctionnements aux différents contrôles de Police.

Les époux X... produisent une lettre adressée le 16/02/07 par la défenderesse à une autre passagère, Madame B..., lequel, affirment-ils, indique que s'il y a eu effectivement 17 autres annulations, il s'agissait de passagers en correspondance n'ayant pu embarquer suite à un retard du vol d'apport, ce qu'ils considèrent comme mensonger puisque eux-mêmes, soit quatre passagers, ne pouvaient faire partie des passagers prétendus en correspondance.

Ils soulignent que leur séjour, visant à faire oublier la maladie dont est atteinte Madame X... a été réduit d'un tiers et considèrent que la compagnie AIR FRANCE, malgré sa notoriété, est condamnable au titre de sa non-réactivité.

La compagnie AIR FRANCE réplique que les billets dont il s'agit étaient non remboursables et non échangeables. Elle rappelle que les demandeurs ont été enregistrés à 6H31 et que l'article 6 des conditions générales de transport, qu'elle produit en pièce No 5, précise en son alinéa 4 : « le passager doit être présent à la porte d'embarquement au plus tard à l'heure indiquée lors de l'enregistrement. Le transporteur pourra annuler la réservation du passager si celui-ci ne s'est pas présenté à la porte d'embarquement à l'heure indiquée, sans aucune responsabilité envers le passager.

Elle rappelle que sur chaque carte d'accès à bord figurait l'information de devoir être présent à 6H45, porte F43, pour un départ au plus tard prévu à 07H20.

Elle souligne que les demandeurs indiquent s'être présentés à la porte d'embarquement peu après 07H00 et qu'à cette heure le vol était clôturé.

Elle souligne également n'être pas propriétaire des infrastructures de l'aéroport, ni responsable des contrôle de police, de sorte que le retard de la famille X... ne peut lui être imputée.

Elle indique que d'autres passagers ayant procédé à leur enregistrement à 06H48, ont pu néanmoins prendre place dans l'avion, compte tenu de quelques minutes supplémentaires dégagés par l'embarquement de tous les autres passagers. Elle illustre son propos par le client de la place 5A (pièce No6) et 4F (pièce No7) dont elle soutient que malgré un enregistrement 17 minutes après les demandeurs, soit à 06H48, ceux-ci n'ont eu aucune difficulté pour se présenter à temps à la porte F43 pour embarquer sur le vol AF5050 dont il s'agit.

Elle rappelle que les bagages des demandeurs ont été enregistrés à 06H31 et dirigés avec les autres bagages pour être placés dans les soutes de l'appareil. Elle ajoute que pour des raisons de sécurité, ceux-ci ont été automatiquement retirés pour être rendus aux demandeurs car ils n'étaient pas présents à l'embarquement.

La défenderesse conteste sa responsabilité et estime que si les demandeurs allèguent et prouvent que leur retard a bien pour origine le contrôle de police, il leur incombe alors de rechercher la responsabilité de l'Etat pour les défaillances commises éventuellement par ses services ou ses délégataires. Elle ajoute n'avoir nullement vocation à demander une quelconque garantie de l'Etat en l'espèce, d'autant que la juridiction judiciaire est incompétente pour en connaître.

Elle estime que ses conditions d'exploitations au regard des heures limites d'enregistrement et d'embarquement ne sont pas en cause.

L'affaire a été mise en délibéré au 08 octobre 2007.

EXPOSE DES MOTIFS :

Il est constant que la société AIR FRANCE a procédé à l'enregistrement de la famille X... à 06H31 sur le vol Paris-Edimbourg du 29 décembre 2006 de 07H20 et l'a invitée à se présenter à la porte d'embarquement 14 minutes plus tard, soit à 06H45.

La pièce No11des demandeurs démontre que la compagnie AIR FRANCE admet par ce courrier du 16 février 2006, qu'il y a bien eu 18 annulations de passagers sur ce vol dont il s'agit. Elle démontre également que la société AIR FRANCE use d'une explication pour le moins erronée lorsqu'elle s'adresse à Madame B..., passager destinataire dudit courrier en ces termes : « effectivement, comme vous le dites dans votre lettre, il y a eu aussi 17 autres annulations mais de passagers en correspondances suite à un retard du vol d'apport, ce qui n'est pas votre cas. » Force est de constater que ce n'est également pas le cas des quatre membres de la famille X..., pourtant manifestement comptabilisés ici par la défenderesse parmi les 17 autres passagers prétendument en correspondance.

Il convient en outre de constater que la société AIR FRANCE ne produit pas la liste définitive, donc complète, des passagers ayant effectivement voyagés sur le vol en question, permettant dès lors de constater son occupation effective et la détermination des sièges occupés ou non. Ces indications nécessairement éclairantes pour la solution du présent litige, notamment au regard dudit courrier du 16 février 2006 précité, lequel n'a appelé aucune observation en défense, ne peuvent être compensées par la production par la société AIR FRANCE de documents partiels, masqués (pièces No6/7/8) ou pour l'essentiel incomplets, codifiés et ne présentant aucune garantie de précision, car ni circonstanciés, ni explicites (pièces No2/3/4/6/7).

Compte tenu du nombre anormalement important d'annulations avérées sur ce vol de fin d'année, n'ayant également appelé aucune réponse de la société AIR FRANCE en défense sur ce point, compte tenu du temps anormalement court imparti de 14 minutes entre les opérations d'enregistrement de toute la famille et le délai maximal accordé pour embarquer, compte tenu de la possibilité matérielle manifeste d'embarquer l'ensemble des passagers en attente mais de l'absence de Personnel de la compagnie pour ce faire, l'avion se trouvant visible à quelques mètres, encore immobile sur le tarmac peu après 07H00 et susceptible de décoller environ vingt minutes plus tard, il y a lieu de constater que les époux X... ne peuvent être tenus pour responsables de procédés nécessairement inhabituels et inattendus de la part de professionnels réputés compétents et diligents. Il convient enfin d'observer que la défenderesse tout en alléguant ne pouvoir faire monter à bord lesdits passagers pour des raisons d'horaires, prendra curieusement le temps nécessairement plus long de retrouver et décharger chaque bagage y afférent.

A la lumière des circonstances anormales ainsi observées et telles que démontrées par les explications et pièces produites par les demandeurs, il ne peut leur être sérieusement reproché de ne pas avoir été en mesure de respecter l'article 6 alinéa 4 des conditions générales de transport dont se prévaut la défenderesse.

La société AIR FRANCE ne pouvant ignorer avoir enregistré deux adultes et deux enfants ne pouvait sérieusement vingt minutes avant le départ les laisser ainsi en errance aux portes de l'appareil dans les circonstances susvisées. Il lui appartenait de mettre en œuvre tous moyens requis pour assurer dans les délais nécessaires et adaptés, eu égard notamment au contrôle de police, l'acheminement des demandeurs dans des conditions normales.

Le présent litige ne peut que s'analyser en un refus d'embarquement dommageable, et imputable à la société AIR France devant en répondre.

Le règlement Européen No261/2004 applicable en l'espèce dispose qu'en cas de refus d'embarquement involontaire,

le transporteur est tenu de verser une indemnisation dans les conditions établies dans l'article

7 dudit règlement,

D'assurer une prise en charge des passagers au titre de l'article 9 de ce même règlement,

D'assurer dans le cas où le passager ne renonce pas à son voyage, son re-acheminement vers sa destination finale dans les meilleurs délais et dans les conditions de transport comparables au titre de l'article 8 du présent règlement.

Il ne peut être retenu de circonstances extraordinaires exonératoires de responsabilité pour la société AIR France, laquelle en imposant un délai trop réduit entre l'enregistrement qu'elle accepte sans réserve et l'embarquement qu'elle refuse, tout en ne pouvant ignorer l'alea de temps que représentent les contrôles de police, a été directement à l'origine du dommage subi par la famille X....

L'article 7-1 du règlement précité prévoit une indemnisation de 250 euro par passager pour les vols inférieurs à 1500 Km, comme en l'espèce.

La société AIR France doit donc indemniser les demandeurs à hauteur de 1000 euro de ce chef.

L'article 12 du Règlement susvisé traite de l'indemnisation complémentaire.

Il indique en paragraphe 1 que « le présent règlement s'applique sans préjudice du droit d'un passager à une indemnisation complémentaire. L'indemnisation accordée en vertu du présent règlement peut être déduite d'une telle indemnisation ;

Le paragraphe 2 ajoute : « sans préjudice des principes et règles pertinents du droit national, y compris la jurisprudence, le paragraphe 1 ne s'applique pas aux passagers qui ont volontairement renoncé à leur réservation conformément à l'article 4, paragraphe 1. »

Les demandeurs n'ayant nullement renoncé à leur réservation mais s'étant vue contraints de ne pas embarquer peuvent se voir appliquer la disposition de cet article 12 susvisée. S'agissant d'un transport international, le droit applicable au présent litige sur ce second point est la Convention de Montréal, entrée en vigueur en France depuis le 28 juin 2004 par décret du 17 juin 2004.

(article 1er), et non les articles 1142 et 1147 du Code Civil, laquelle précise que : « en cas de dommage subi par des passagers résultant d'un retard, aux termes de l'article 19 (lequel précise que le transporteur est responsable du dommage résultant d'un retard dans le transport aérien des passagers, bagages ou marchandises), la responsabilité du transporteur est limitée à la somme de 4150 droits de tirage spéciaux par passager.

Il convient de constater que les époux X... ont subi du fait de ce retard, un préjudice spécial et particulièrement accru par le fait d'avoir dû, par leurs propres moyens et sans assistance, rentrer chez eux, réorganiser leur départ pour le lendemain et à leurs frais, se voir réduire leur séjour d'un tiers du temps prévu, changer la réservation, du véhicule de location initialement prévue. Ils doivent en être indemnisés à hauteur de 1431,90 droits de tirage spéciaux du fonds monétaire (au taux de change actuel de 0,899499 XDR pour un euro). Cette indemnisation s'ajoute donc à celle des 1000 euro précédemment indiquée.

Il n'est pas inéquitable de condamner la société AIR France à 500 euro en application de l'article 700 du NCPC.

La société AIR FRANCE, partie perdante, doit assumer les dépens en application de l'article 696 du NCPC.

PAR CES MOTIFS :

Statuant publiquement par jugement contradictoire rendu en dernier ressort :

Condamne la société AIR France à payer aux époux X... les sommes de :

1000 euro au titre du refus d'embarquement,

1431,90 droits de tirage spéciaux du fonds monétaire (au taux actuel de 0,899499 XDR pour un euro) au titre de l'indemnisation complémentaire du préjudice,

500 euro en application de l'article 700 du NCPC,

Condamne la Société AIR FRANCE aux dépens.

Ainsi jugé, prononcé par mise à disposition au greffe le 08 octobre 2007, la minute étant signée par :

Le Juge de Proximité Le Greffier