

July 10, 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 to reopen pleadings dated July 9, 2013**

Please accept the following submissions in relation to the above-noted matter as an answer to Sunwing Airlines' motion dated July 9, 2013 to effectively reopen pleadings.

**PROCEDURAL HISTORY**

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 (Issue 3).

Sunwing Airlines answered the portion of the Nawrots' complaint concerning its denied boarding compensation policy (Issue 3) on April 22, 2013. 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.<sup>1</sup>
- 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.

Consequently, in order to allow Sunwing Airlines to address these new developments, on June 14, 2013, the Agency directed the parties as follows:

— Sunwing is given the opportunity to file comments, by no later than June 19, 2013 at 17:00, respecting the relevance of Agency Decision 227-C-A-2013 to the present matter; and

— the Nawrot family is given until June 21, 2013 at 17:00 to file a reply to Sunwing's answer of April 22, 2013, regarding Issue 3, and to the submission that may be filed by Sunwing by June 19, 2013. This submission will represent the Nawrot family's final reply and will conclude pleadings.

On June 19, 2013, shortly before the expiry of the deadline the Agency provided to Sunwing Airlines to file its comments, Sunwing Airlines brought a motion seeking an extension of thirty (30) days to "fully assess" Decision No. 227-C-A-2013 of the Agency, and to propose appropriate amendments to its International Tariff Rule 20.

On June 26, 2013, the Agency directed the parties as follows:

1) Sunwing's request for an extension of 30 days is denied but an extension until July 5, 2013 at 17:00 is granted;

2) the Nawrot family is given until July 9, 2013 at 17:00 to file a reply to Sunwing's answer of April 22, 2013, regarding Issue 3 strictly, and to the submission that may be filed by Sunwing by July 5, 2013. This submission will represent the Nawrot family's final reply and will conclude pleadings.

[Emphasis added.]

On July 5, 2013, Sunwing Airlines filed a revised answer to the portion of the Nawrots' complaint concerning its denied boarding compensation policy (Issue 3), and provided a new proposal for its Rule 20.

On July 6, 2013, the Nawrots filed their reply to Sunwing Airlines' April 22, 2013 and July 5, 2013 submissions. Pleadings were then closed as per the Agency's June 26, 2013 directions.

<sup>1</sup> [http://docs.airpassengerrights.ca/CTA/Sunwing\\_Airlines/International\\_Flight\\_Delays\\_and\\_Cancellations/2013-05-31-Sunwing-answer-AMENDED.pdf](http://docs.airpassengerrights.ca/CTA/Sunwing_Airlines/International_Flight_Delays_and_Cancellations/2013-05-31-Sunwing-answer-AMENDED.pdf)

On July 9, 2013, Sunwing Airlines brought a motion to amend and/or vary and/or review the Agency's June 26, 2013 directions, and to grant Sunwing Airlines a third opportunity to propose revisions to its Rule 20.

## **THE NAWROT FAMILY'S SUBMISSIONS**

### **I. The motion is moot**

The Agency directed Sunwing Airlines to file its revised answer with respect to its denied boarding compensation policy by July 5, 2013. Sunwing Airlines complied with these directions, and filed its revised answer and revised Proposed Rule 20.

Thus, the Nawrots submit that Sunwing Airlines' motion for an extension to file its revised answer with respect to its denied boarding compensation policy (Issue 3) is moot, because Sunwing Airlines already filed said answer on July 5, 2013. In particular, the present motion, seeking the review of the disposition of the motion for an extension, is moot.

### **II. Sunwing Airlines is effectively seeking to reopen pleadings**

The pleadings process before the Agency was never meant to be an open ended *ad infinitum* argument and submissions war, but rather an orderly complaint-answer-reply sequence, which is also the common form of making submissions in writing in the Federal Courts (see Rule 369 of the *Federal Court Rules*). Indeed, Rules 42-44 of the Agency's *General Rules* clearly describe the manner and order in which parties may make submissions.

Under the Agency's *General Rules*, Sunwing Airlines is not entitled, as of right, to amend its answer or make additional submissions.

Thus, if Sunwing Airlines wishes to obtain a third chance to propose a reasonable denied boarding compensation policy, then it must seek the Agency's leave to reopen the pleadings. Consequently, Sunwing Airlines' motion of July 9, 2013 is effectively seeking to reopen the pleadings.

### **III. Considerations on a motion to reopen pleadings**

The Agency's guidelines entitled "Requests for Additional Filings after the Close of Pleadings"<sup>2</sup> provides a list of factors that the Agency may consider on a motion to reopen pleadings.

The Nawrots submit that consideration of these factors strongly militates against granting Sunwing Airlines' motion to reopen the pleadings.

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<sup>2</sup> <http://www.cta-otc.gc.ca/eng/publication/requests-additional-filings-after-close-pleadings>

**(a) The information has been publicly available since June 2012**

Sunwing Airlines is asking to reopen the pleadings based on the “Notice to the Industry” that was issued by the Agency on July 3, 2013. The “Notice to the Industry” starts as follows:

Air carriers are required by law to have and apply a tariff, 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. 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.

[Emphasis added.]

Thus, the “Notice to the Industry” simply drew the attention of carriers to five decisions that the Agency released in 2012, and which have been publicly available on the Agency’s website since June 2012. Back in 2012, these decisions were also very widely reported in the Canadian media.

Thus, Sunwing Airlines could have informed itself about the five decisions more than a year ago.

**(b) Sunwing Airlines was already aware of the information in May 2013**

On April 22, 2013, a complaint was filed with the Agency concerning Sunwing Airlines’ failure to comply with the principles laid down in the Agency’s aforementioned 2012 decisions. The complaint was assigned File No. M 4120-3/13-02395.<sup>3</sup> On May 23, 2013, Sunwing Airlines submitted its initial answer to the complaint in File No. M 4120-3/13-02395.<sup>4</sup> On page 5 of this initial answer, Sunwing Airlines submitted that:

Upon Sunwing Airlines amending the Tariff as described in this Answer, Rules 15 and 15A will:

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- reflect the jurisprudence of the Agency in Decisions 248-C-A-2012, 249-C-A-2012, 250-C-A-2012 and 16-C-A-2013.

Thus, it is plain and clear that on May 23, 2013, Sunwing Airlines was fully aware of the decisions and principles referred to in the “Notice to the Industry.”

<sup>3</sup> [http://docs.airpassengerrights.ca/CTA/Sunwing\\_Airlines/International\\_Flight\\_Delays\\_and\\_Cancellations/2013-05-02-LET-C-A-72-2013-open\\_pleadings-questions\\_premature-R.pdf](http://docs.airpassengerrights.ca/CTA/Sunwing_Airlines/International_Flight_Delays_and_Cancellations/2013-05-02-LET-C-A-72-2013-open_pleadings-questions_premature-R.pdf)

<sup>4</sup> [http://docs.airpassengerrights.ca/CTA/Sunwing\\_Airlines/International\\_Flight\\_Delays\\_and\\_Cancellations/2013-05-23-Sunwing-answer.pdf](http://docs.airpassengerrights.ca/CTA/Sunwing_Airlines/International_Flight_Delays_and_Cancellations/2013-05-23-Sunwing-answer.pdf)

**(c) Sunwing Airlines failed to exercise due diligence**

The “Notice to the Industry” that was issued by the Agency on July 3, 2013 has been publicly available on the Agency’s website since July 3, 2013.

The Nawrots submit that Sunwing Airlines’ failure to regularly visit the Agency’s website and search for notices to the industry amounts to wilfully avoiding such notices, and certainly demonstrates a lack of due diligence.

**(d) Sunwing Airlines’ motion is an attempt to split and/or reargue part of the case**

Sunwing Airlines was already provided with two opportunities to propose a reasonable denied boarding compensation policy, first on April 22, 2013, and then subsequently on July 5, 2013.

Unfortunately, both proposals turned out to be unreasonable, and inconsistent with the Agency’s jurisprudence.

Sunwing Airlines’ present motion is an attempt to obtain a third opportunity to propose a denied boarding compensation policy, and to effectively bifurcate the proceeding and/or reargue part of the case (Issue 3).

The Nawrots submit that Sunwing Airlines has already been provided with a more than fair opportunity to address their complaints, and Sunwing Airlines ought to simply allow the Agency to carry out its mandate and render a decision in the complaint without repeated attempts by Sunwing Airlines to improve its case.

**(e) Prejudice by granting the motion**

Section 29(1) of the *Canada Transportation Act* envisages the Agency reaching a final decision in proceedings before it within 120 days. In the case of the Nawrots, whose complaint was filed on March 21, 2013, this means a decision by July 21, 2013.

The Nawrots incurred substantial out-of-pocket expenses nearly a year ago for which they have not yet been compensated. Thus, delaying the determination of their claim for out-of-pocket expenses is prejudicial to them.

Furthermore, granting Sunwing Airlines’ motion and reopening the pleadings would result in the expenditure of additional resources of the Nawrots on filing yet another reply to Sunwing Airlines’ third proposed denied boarding compensation policy.

Finally, it is also worth noting that maintaining Sunwing Airlines’ Existing Rule 20, which Sunwing Airlines has implicitly admitted to be unreasonable, does harm the travelling public at large. The longer it remains unchanged, the more harm is caused.

**(f) Conclusion**

The Nawrots submit that Sunwing Airlines' present motion is lacking any merit, and it is merely an attempt to reopen the pleadings in order to allow Sunwing Airlines to improve its answer to certain portions of the complaint (Issue 3). As such, Sunwing Airlines' motion is even arguably an abuse of process and/or an attempt to unnecessarily increase the legal expenses incurred by the Nawrots.

**IV. Costs**

Sunwing Airlines' present motion forced the Nawrots to expend resources to answer a motion that is entirely meritless. The Nawrots respectfully ask the Agency to take this into account in the context of costs at the time of rendering its final decision.

**RELIEF SOUGHT**

For the aforementioned reasons, the Nawrots are asking the Agency to dismiss Sunwing Airlines' motion of July 9, 2013 in its entirety.

All of which is most respectfully submitted.

Louis Béliveau

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