DECISION NO. 432-C-A-2013

November 15, 2013

COMPLAINT by Raymond Paul Nawrot, Kristina Marie Nawrot and Karolyne Theresa Nawrot against Sunwing Airlines Inc.

File No. M4120-3/13-01696

INTRODUCTION

[1] Raymond Paul Nawrot, Kristina Marie Nawrot and Karolyne Theresa Nawrot (Nawrots) filed a complaint with the Canadian Transportation Agency (Agency) against Sunwing Airlines Inc. (Sunwing) concerning alleged denied boarding on August 11, 2012 for Sunwing's Flight No. WG201 from London, United Kingdom to Toronto, Ontario, Canada, and the refusal by Sunwing to provide compensation.

[2] The Nawrots also allege that Existing Tariff Rule 18(g), governing check-in requirements, and Existing Tariff Rule 20, governing denied boarding compensation, of Sunwing's *International Scheduled Services Tariff*, CTA(A) No. 2 (Tariff) are unclear, therefore contrary to paragraph 122(*c*) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and unreasonable, therefore contrary to subsection 111(1) of the ATR.

[3] The Nawrots request that the Agency:

- order Sunwing to reimburse them the sum of CAD$4,963.32 for out-of-pocket expenses, plus interest, occasioned by the denied boarding;
- order Sunwing to pay them denied boarding compensation in the amount of 1800 euros;
- order Sunwing to pay them costs on a full indemnity basis; and,
- disallow Existing Tariff Rules 18(g) and 20 for being unclear and unreasonable.

[4] In its answer, Sunwing submits, among other things, that it revised Existing Tariff Rule 18, Refunds, and that the revisions resolve the Nawrots' complaint relating to Existing Tariff Rule 18(g). Sunwing also proposed certain revisions to Rule 20 (Proposed Tariff Rule 20) in an effort to respond to the Nawrots' complaint. In their reply, the Nawrots submit, among other things, that Proposed Tariff Rule 20 is unclear, unjust and unreasonable, and therefore should be disallowed, and they address certain revisions in Proposed Tariff Rule 18.

PRELIMINARY MATTER

[5] In their reply, the Nawrots submit that Proposed Tariff Rules 18(b) and 18(c)(i) are unreasonable. The Agency has considered this matter, and finds that this submission constitutes a new issue.

[6] A reply represents an opportunity for a party to address additional information or arguments that may have been raised in another party's submission. It should not include arguments contained in previous correspondence with the Agency or new arguments unrelated to those raised in the other party's submissions.

[7] Accordingly, the Nawrots' submission with respect to Proposed Tariff Rules 18(b) and 18(c)(i) will not be considered in this proceeding.

ISSUES

1. Did Sunwing properly apply the terms and conditions relating to check-in time limits specified in its Tariff, as required by subsection 110(4) of the ATR?

   – If not, should the Agency order Sunwing to reimburse the out-of-pocket expenses incurred by the Nawrots, plus interest?
   – If not, should the Agency direct Sunwing to provide the Nawrots with denied boarding compensation?

2. Is Existing Tariff Rule 18(g) unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

3. Is Existing Tariff Rule 20 unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

4. If Proposed Tariff Rule 20 were to be filed with the Agency, would it be found to be unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

5. Should the Nawrots be awarded costs, pursuant to section 25.1 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA)?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[8] The legislation, tariff provisions and provisions of the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Convention) relevant to this matter are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[9] As recently stated by the Agency in Decision No. 344-C-A-2013 (*Lukács v. Porter Airlines Inc.*), a carrier meets its tariff obligation of clarity when 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

[10] 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. 344-C-A-2013.

[11] 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.

[12] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

ISSUE 1: DID SUNWING PROPERLY APPLY THE TERMS AND CONDITIONS RELATING TO CHECK-IN TIME LIMITS SPECIFIED IN ITS TARIFF, AS REQUIRED BY SUBSECTION 110(4) OF THE ATR?

Positions of the parties

The Nawrots

[13] The Nawrots submit that the fundamental factual dispute between themselves and Sunwing is whether the Nawrots presented themselves for check in for Flight No. WG201. The Nawrots argue that both they and Sunwing agree that the departure time for that flight was 2:25 a.m. on August 11, 2012, and that the cut-off/check-in deadline is 60 minutes prior to departure. The Nawrots therefore contend that Sunwing was required to keep its check-in counter open until 1:25 a.m. on August 11, 2012. They argue that their account of events is corroborated by both documentary evidence and Sunwing's subsequent actions. In support of their submissions, the Nawrots filed an affidavit by Mr. Nawrot and declarations by Kristina Marie Nawrot and Karolyne Theresa Nawrot.

[14] The Nawrots submit that they left their hotel on August 10, 2012 at approximately 11:00 p.m. to head to the Gatwick International Airport (Airport). They advise that they first took the London Underground and then the train from the Victoria Station to the Airport. The Nawrots state that Mr. Nawrot's credit card statement indicates that the purchase of the train tickets at the Victoria Station occurred prior to midnight. They point out that the credit card statement also indicates that they travelled on a train operated by Southern Railway, and that the applicable timetable shows that Southern Railway operated two trains from the Victoria Station to the Airport shortly after midnight on August 11, 2012, on one of which they were passengers. The Nawrots point out that the timetable indicates that the latest departing train was scheduled to arrive at the Airport at 00:59 a.m.

[15] The Nawrots state that they presented themselves for check in at the Airport at approximately 1:10 a.m. on August 11, 2012, but found all counters to be unattended and the lights were dimmed.

[16] The Nawrots maintain that Mr. Nawrot spoke on the phone to an airport employee, who advised him that the Captain of Flight No. WG201 would not allow the Nawrots to board the flight. The Nawrots submit that, subsequently, a supervisor attended the check-in area, and the supervisor indicated to them that they were supposed to have checked in three hours prior to their flight. The Nawrots add that they attempted to persuade the supervisor to allow them to check in and board their flight, but without success.

[17] The Nawrots advise that they left the terminal at the Airport shortly after 1:45 a.m. and headed to the Sofitel London Gatwick Hotel (Sofitel). They add that Mr. Nawrot's credit card was preauthorized at the Sofitel at 2:05 a.m. on August 11, 2012.

[18] The Nawrots submit that on the morning of August 11, 2012, Mr. Nawrot returned to the Airport and asked that they be transported to Toronto on Sunwing's next flight that day, but his request was refused. They further submit that Mr. Nawrot subsequently sent an e-mail to Sunwing seeking assistance to be transported to Toronto, and that Sunwing, in response, offered to transport them six days later than originally scheduled, i.e., on August 16, 2012. The Nawrots maintain that Sunwing's offer was unreasonable and unacceptable given that Kristina Marie Nawrot and Karolyn Theresa Nawrot were due to attend a sports camp near Toronto from August 12 to 19, 2012. According to the Nawrots, they had no choice but to purchase one-way tickets on an Air Canada flight to return to Toronto. They indicate that they also incurred out-of-pocket expenses with respect to their two-night stay at the Sofitel and meals during their unplanned two-day stay in London.

Sunwing

[19] Sunwing submits that the Nawrots' e-tickets provided information relating to their travel, the conditions of the contract and, by incorporation, the Tariff rules. Sunwing further submits that the e-tickets indicated that passengers were to check in no later than 1:25 a.m. local time on August 11, 2012. The e-tickets also indicated that the check-in counter was to open at 10:25 p.m. local time on August 10, 2012 (four hours prior to scheduled departure), and strongly recommended that passengers arrive at the Airport for check in at 10:25 p.m. local time on

August 10, 2012. Sunwing points out that the Nawrots admitted that they were aware of this, and that the Tariff rules and terms and conditions required that the cut-off for check in was 60 minutes prior to the scheduled departure time, or 1:25 a.m. local time on August 11, 2012. In support of its submission, Sunwing filed an affidavit by Joanne Dhue, National Director, Customer Relations Sunwing Vacations/Signature Vacations.

[20] Sunwing states that all of the reports generated pursuant to standard operating procedures indicate that the scheduled departure time for Flight No. WG201 was 2:25 a.m. local time on August 11, 2012. Sunwing submits that the Shift Report states that the check-in counter was in fact closed at 1:25 a.m. local time, one hour prior to the scheduled departure of the flight, i.e., 2:25 a.m. Sunwing asserts that the Passenger Services Supervisor, Vic Tydeman, who completed the Shift Report, recalls the incident and confirms that three passengers arrived at the check-in counter at 1:45 a.m. on August 11, 2012, and a fourth passenger arrived five minutes after that. In support of its submission, Sunwing filed an affidavit by Mr. Tydeman.

[21] Sunwing contends that prior to the Nawrots' complaint, Sunwing never had any report or complaints that check-in for a flight was closed prior to 60 minutes before the scheduled departure of the flight in question.

[22] Sunwing argues that the Nawrots have not provided consistent evidence as to when they presented themselves for check in, nor have they provided any independent or objective evidence to support their claim that they arrived at check-in prior to 1:25 a.m. local time on August 11, 2012. Sunwing submits that where there is such independent or objective evidence readily available, the Nawrots have chosen not to proffer this evidence.

[23] Sunwing argues that to support their contention that they presented themselves for check in at 1:10 a.m. local time on August 11, 2012, the Nawrots have attempted to establish a timeline based on assumptions derived from two documents: a credit card payment summary showing the purchase of a single train ticket from the Victoria Station to the Airport, and a pre-authorization for their hotel at the Airport dated August 11, 2012 at 2:05 a.m.

[24] Sunwing points out that Southern Railway owns and operates Gatwick Express, and therefore, the schedule for all the Southern Railway and Gatwick Express trains is irrelevant. Sunwing submits that without proof to the contrary, the submission that Mr. Nawrots' credit card was processed by Southern Railway does not exclude tickets purchased for the Gatwick Express trains.

[25] Sunwing submits that the statements of the Nawrot family members relating to this matter fail to acknowledge that all trains from the Victoria Station to the Airport arrive at the South Terminal. Sunwing adds that the Nawrots had at least three options to get to the Sunwing check-in counter located at the North Terminal: shuttle bus, walk or taxi, but no evidence was filed by the Nawrots to indicate which option they chose.

[26] Sunwing advises that in an e-mail to Sunwing, Mr. Nawrot stated that he arrived at the airport at 1:15 a.m., and on arrival, the check-in counter was closed. Sunwing submits that this means that the Nawrots arrived at the South Terminal at 1:15 a.m., and then made their way to the North Terminal, which would have taken them approximately 10 minutes, which places the Nawrots at the check-in counter at 1:25 a.m., the cut-off time.

[27] Sunwing contends that the Nawrots must make assumptions to establish they made the time for check in and, to that extent, they are self-serving. Sunwing adds that there is no evidence that the British rail system runs on time. Sunwing also states that the evidence filed by the Nawrots indicates that only one ticket was purchased.

[28] Sunwing maintains that the Nawrots have failed to proffer any objective documentary evidence of which train they actually took from the Victoria Station. Sunwing also maintains that, assuming that the Nawrots did leave their hotel between 10:00 p.m. and 11:00 p.m. on August 11, 2012, no explanation was provided for not having taken an earlier train.

[29] Sunwing submits that in the correspondence to Sunwing dated August 11, 2012; August 27, 2012; October 19, 2012; and January 21, 2013, respectively, the Nawrots repeatedly referred to another passenger who was denied boarding for the same reason the Nawrots allege they were denied boarding, i.e., presenting themselves for check in prior to the 60-minute cut-off. Sunwing contends that it received no claim or complaint from this fourth passenger, and that the Nawrots filed no evidence from that passenger.

[30] Sunwing asserts that it investigated each and every one of the passengers who did not show up for Flight No. WG201 to determine whether the alleged fourth passenger was indeed denied boarding for failing to be present for check in. Sunwing asserts that its investigation ruled out any such passenger.

[31] Sunwing states that it relies on complete and accurate reporting in all areas of its operations, and that its evidence reflects and confirms this reporting exists in the circumstances of this matter.

The Nawrots

[32] The Nawrots submit that the affidavit by Ms. Dhue indicates that Swissport, the ground handling agent for Sunwing, had serious staffing problems on the night of the incident, and that those problems may explain why Sunwing closed its check-in counter well before 1:25 a.m.

[33] The Nawrots point out that some of the staff working for Swissport that night were “borrowed” from another company, so they were likely unfamiliar with Sunwing’s procedures or its updated departure time, while others “stayed on” from the day shift, and were likely very exhausted.

[34] The Nawrots contend that Mr. Tydeman’s evidence is self-serving and not reliable as he is not an objective, neutral and disinterested witness, but rather an employee who has far more to lose in relation to the Nawrots’ complaint than a few thousand dollars. The Nawrots assert that there are a number of inconsistencies between Mr. Tydeman’s affidavit and the Shift Report, i.e., time of

arrival of the allegedly late passenger, grouping of allegedly late passengers, alleged state of boarding, and the evidence of reliable and independent third parties. They argue that giving any credence to Mr. Tydeman's recollection of events would amount to accepting claims that are contrary to common sense.

[35] The Nawrots maintain that, based on the credit card usage history received from Southern Railway, the train tickets for carriage from the Victoria Station to the Airport were purchased on August 10, 2012 at 11:56 p.m. The Nawrots submit that, contrary to Sunwing's submission, the credit card statement clearly identifies the date and postal code of the location where the tickets were purchased. They add that a copy of Southern Railway's transaction logs provides a complete and independent record of that purchase.

[36] The Nawrots argue that Gatwick Express has an entirely different and substantially higher fare structure than Southern Railway, and that it is not necessary to decide which train they took in order to determine the complaint; it is sufficient to observe that they took one of the two trains as both were on time. The Nawrots submit that there can be no doubt that they arrived at the Airport train stop at or shortly after 1:00 a.m., at the latest, on August 11, 2012, which is more than 25 minutes before Sunwing's check-in cut-off time. They advise that the shuttle between the North and the South Terminals operates 24 hours a day and the journey only takes two minutes. The Nawrots therefore contend that, on a balance of probabilities, they presented themselves for check in at 1:10 a.m. or shortly thereafter, and certainly several minutes before the 1:25 a.m. check-in cut-off time.

[37] The Nawrots argue that they have discharged their onus of proof, and further claim that according to Decision No. 54-C-A-2006 (*McIntyre v. Air Canada*), the burden of proof is on Sunwing to demonstrate that it was entitled to refuse to transport the Nawrots.

Analysis and findings

[38] When a complaint such as this one is filed with the Agency, the complainant must, on a balance of probabilities, establish that the air carrier has failed to apply, or has inconsistently applied, terms and conditions of carriage appearing in the applicable tariff.

[39] In *Smith v. Smith*, [1952] 2 S.C.R. 312, the Supreme Court of Canada discussed the notion of balance of probabilities and the degree of probability required to satisfy the burden of proof. The Supreme Court of Canada indicated, at pages 331 and 332, that:

> [...] before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

[40] Relying on *Briginshaw v. Briginshaw* (1938) 60 CLR 336, the Supreme Court of Canada went on and indicated that:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes [...] But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

[41] The Supreme Court of Canada also relied on *George v. George and Logie* [1951] 1 D.L.R. 278, and indicated that:

> [...] Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal - be it judge or jury - acting with care and caution, to the fair and reasonable conclusion that the act was committed.

[42] For this case, the onus is on the Nawrots, as they are making the allegations, to convince the Agency, on a balance of probabilities, that they presented themselves at the check-in counter on time. They have a greater burden of proof than simply presenting facts.

[43] The Agency notes that Sunwing's Tariff provides that check-in counters are open three hours prior to the scheduled departure and will close 60 minutes before scheduled departure, and that passengers arriving for check in after 60 minutes prior to the scheduled departure will not be accepted for travel.

[44] The Agency notes that the parties' versions of events are contradictory. The Nawrots allege that they arrived at the check-in counter at around 1:10 a.m., only to discover that it was closed. To support their position, the Nawrots provided a copy of their ticket to travel by train from the Victoria Station to the Airport, and a credit card statement showing the purchase of that ticket, as well as an affidavit and written declarations. Sunwing, on the other hand, submits that its check-in counter closed at 1:25 a.m. In support of this submission, Sunwing provided the Shift Report, which indicates that the check in for Flight No. WG201 closed at 1:25 a.m., and affidavits from, respectively, its National Director, Customer Relations, and its Passenger Services Supervisor, who completed the Shift Report.

[45] The evidence provided by the Nawrots strongly suggests that they bought train tickets, travelled by train from the Victoria Station to the Airport and later paid for accommodations at the Sofitel. While it is normal in such cases that the majority of the evidence is circumstantial, the totality of the evidence must be sufficient for the Agency to conclude, on a balance of probabilities, that the Nawrots presented themselves on time at the check-in counter at the Airport. This burden rests with the complainant and it has not been met.

[46] With respect to the Nawrots' claim relating to Decision No. 54-C-A-2006, that Decision can be distinguished from this case. In that Decision, the Agency concluded that the applicant had met its burden of proving that he was at the check-in counter in time. Therefore, the burden was then on Air Canada to prove that it was entitled to cancel the reservation.

[47] In this case, the Nawrots failed to provide evidence that would lead the Agency to the fair and reasonable conclusion that they arrived at the check-in counter 60 minutes before the scheduled departure of the flight. Therefore, the Agency finds that Sunwing has not contravened subsection 110(4) of the ATR in relation to this matter. Consequently, Sunwing is not required to reimburse the Nawrots for the out-of-pocket expenses they incurred or tender denied boarding compensation.

ISSUE 2: IS EXISTING TARIFF RULE 18(G) UNCLEAR, CONTRARY TO PARAGRAPH 122(*c*) OF THE ATR, AND UNREASONABLE, CONTRARY TO SUBSECTION 111(1) OF THE ATR?

Positions of the parties

The Nawrots

[48] The Nawrots take exception to the phrase "recommended times," appearing in the following provision of Existing Tariff Rule 18(g):

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

[49] The Nawrots assert that the phrase "recommended times" is not defined anywhere in the Tariff, and moreover, it is inconsistent with Existing Tariff Rule 19(c), which provides that the passenger is not eligible for compensation if the passenger is present at the boarding gate after the minimum check-in time or gate time.

[50] The Nawrots also submit that the phrase renders Existing Tariff Rule 18(g) unclear, and ought to be replaced with "cut-off times" or "minimum times." The Nawrots argue that while it is reasonable to expect passengers to comply with minimum check-in time requirements, it is unreasonable to expect passengers to comply with "recommended times."

Sunwing

[51] Sunwing advised that it would revise Existing Tariff Rule 18(g) so as to delete the following sentence in its entirety:

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

Analysis and findings

[52] Subsequent to its response to the complaint, Sunwing deleted the Tariff provision at issue. This matter, therefore, has been rendered moot.

ISSUE 3: IS EXISTING TARIFF RULE 20 UNCLEAR, CONTRARY TO PARAGRAPH 122(*c*) OF THE ATR, AND UNREASONABLE, CONTRARY TO SUBSECTION 111(1) OF THE ATR?

Positions of the parties

The Nawrots

[53] The Nawrots submit that Existing Tariff Rule 20 is unclear as it fails to specify where the choice lies between the two options of either refunding the total fare paid for each unused segment or arranging to provide reasonable alternate transportation on Sunwing's own services, when a passenger is denied a reserved seat because of an oversold flight. The Nawrots point out that in Decision No. LET-A-82-2009 (*Air Canada's Proposed Additional Service Commitments*), the Agency considered a similar provision in Air Canada's tariff that raised concerns respecting clarity, and that, subsequently, Air Canada amended its tariff to retain the choice, thereby addressing the matter of clarity. The Nawrots refer to Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*), where the Agency determined that, for the tariff provision at issue to be considered reasonable, the choice of option should lie exclusively with the passenger.

[54] The Nawrots point out that Existing Tariff Rule 20 states, in part, that "the carrier will try to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the same comparable, or lower booking code." The Nawrots submit that the term "will try" renders Existing Tariff Rule 20 unclear in that it does not impose a clear

obligation on Sunwing, and the term ought to be replaced by the word "shall." The Nawrots further submit that Existing Tariff Rule 20 also purports to limit Sunwing's obligation to secure alternate transportation on flights "in the same comparable, or lower booking code." According to the Nawrots, this phrase is unclear because Sunwing's booking codes may not be comparable to booking codes of other air carriers. They also maintain that this restriction is unreasonable. The Nawrots argue that excluding the possibility of reprotecting victims of denied boarding on a booking class higher than their original booking is inconsistent with the obligations of Sunwing under Article 19 of the Convention and, as such, it is unreasonable.

[55] The Nawrots assert that while Existing Tariff Rule 20 does not explicitly exonerate Sunwing from liability for damages for delay in connection with denied boarding, that Rule is silent about compensation to victims of denied boarding for damages occasioned by delay, including meals, accommodation and transportation. According to the Nawrots, this omission, when read in conjunction with Existing Tariff Rule 18, creates uncertainty and is not clear about the rights of passengers who are denied boarding, and therefore renders Existing Tariff Rule 20 at least unclear, and possibly also unreasonable.

[56] The Nawrots contend that although Existing Tariff Rule 20 is labeled as "Denied Boarding Compensation," it contains no provision for any compensation to passengers who are denied boarding, and is confined to reprotection of passengers who are denied boarding. According to the Nawrots, reprotection for passengers is not a form of compensation. They maintain that compensation has two components:

- reimbursement for out-of-pocket expenses; and,
- denied boarding compensation.

[57] In this regard, the Nawrots argue that Existing Tariff Rule 20 is unreasonable because it provides neither for reimbursement of out-of-pocket expenses nor for any monetary compensation for denied boarding.

[58] The Nawrots assert that the failure to pay any denied boarding compensation to victims of denied boarding is of particular concern in light of the legal obligation to do so both pursuant to Regulation No. 14 CFR 250.5(b) of the Department of Transportation (DoT) of the United States, as amended by Final Ruling No. 76 FR 23110 of the DoT, and Regulation (EC) No. 261/2004 of the European Parliament and of the Council.

[59] The Nawrots indicate that while other carriers, such as Air Canada, do comply with these legal obligations, and have incorporated them into their tariffs (for example, Rule 89 of Air Canada), it appears that Sunwing refuses to comply with these obligations, and is attempting to benefit from an unfair competitive advantage compared to its main competitors.

[60] In particular, the Nawrots submit that Sunwing would suffer no competitive disadvantage if it adopted a denied boarding compensation policy similar to that of Air Canada or other major carriers, such as Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) [Lufthansa] and Société Air France carrying on business as Air France (Air France).

[61] The Nawrots therefore argue that Existing Tariff Rule 20 is unreasonable, because it fails to impose any obligation of paying denied boarding compensation to passengers, contrary to the Agency's findings in Decision No. 666-C-A-2001.

Sunwing

[62] In response to this part of the complaint, Sunwing filed Proposed Tariff Rule 20 that would replace in its entirety Existing Tariff Rule 20.

Analysis and findings

Choice of options

[63] As stated by the Nawrots, Existing Tariff Rule 20 is silent with respect to who has the choice between the two options (refund or alternate transportation), i.e., the passenger or the carrier, when a passenger is denied a reserved seat because of an oversold flight.

[64] As correctly pointed out by the Nawrots, previous Agency Decisions addressed, respectively, the clarity of a tariff provision similar to that currently before the Agency (Decision No. LET-A-82-2009) and whether the passenger or carrier should have the choice of options (Decision No. LET-C-A-80-2011).

[65] The Agency finds that, by failing to identify who may choose between the options of obtaining a refund or having alternate carriage arranged, Existing Tariff Rule 20 creates reasonable doubt, ambiguity or uncertain meaning as to that Rule's application. As such, Existing Tariff Rule 20 is unclear.

[66] With respect to the matter of where the choice must rest, the Agency is of the opinion that the passenger is in a better position than the carrier to determine which is most appropriate for the passenger. As such, the Agency finds that to strike a balance between the passenger's right to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations, the choice of option must reside with the passenger.

Clarity of the phrase "carrier will try"

[67] The Agency finds that the phrase "carrier will try" creates ambiguity and doubt as to the application of the Tariff provision. The particular undertaking by Sunwing leaves doubt as to the outcome of that undertaking. As such, the Agency finds that the phrase is unclear.

Clarity of the phrase "the same comparable, or lower booking code"

[68] The Agency finds that this phrase is unclear because doubt is created respecting the phrase's application given that the booking codes of carriers may not be at all comparable.

Reasonableness of the application of the phrase "the same comparable, or lower booking code"

[69] Article 19 of the Convention provides that:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[70] The Agency agrees with the Nawrots that in restricting alternate carriage to a comparable or a lower booking code, Sunwing is not taking all reasonable measures to mitigate delays resulting from overbooking. As such, Existing Tariff Rule 20 is contrary to Article 19 of the Convention, and it is therefore unreasonable.

Clarity and reasonableness given the silence respecting compensation for damages suffered by passengers affected by denied boarding

[71] The Agency agrees with the Nawrots that Existing Tariff Rule 20 creates doubt as to whether passengers who are denied boarding are entitled to damages. As such, the Agency finds that Existing Tariff Rule 20 is unclear. The Agency also agrees with the Nawrots' argument that the absence of language providing that passengers affected by denied boarding will be eligible for compensation arising from the delay in carriage, including meals, accommodation and transportation, renders Existing Tariff Rule 20 contrary to Article 19 of the Convention. As such, the Agency finds that Existing Tariff Rule 20 is unreasonable.

Reasonableness given the absence of denied boarding compensation

[72] As pointed out by the Nawrots, Existing Tariff Rule 20 does not provide for denied boarding compensation. The Agency determined in Decision No. 666-C-A-2001 that any passenger who is denied boarding is entitled to compensation, and that the non-existence of a tariff provision in this regard is unreasonable. Given the absence of a provision in Existing Tariff Rule 20 requiring Sunwing to tender denied boarding compensation, the Agency finds that such Rule is unreasonable because it fails to strike a balance between Sunwing's statutory, commercial and operational obligations and the passenger's right to be subject to reasonable terms and conditions of carriage.

ISSUE 4: IF PROPOSED TARIFF RULE 20 WERE TO BE FILED WITH THE AGENCY, WOULD IT BE FOUND TO BE UNCLEAR, CONTRARY TO PARAGRAPH 122(*c*) OF THE ATR, AND UNREASONABLE, CONTRARY TO SUBSECTION 111(1) OF THE ATR?

Positions of the parties – Proposed Tariff Rule 20(a)

The Nawrots

[73] The Nawrots submit that Proposed Tariff Rule 20(a), which sets out the options should a passenger be denied a confirmed seat because of an oversold flight, is inconsistent with Existing Tariff Rule 15(1)(f), which requires Sunwing, in the event of flight advancement or cancellation, or overbooking, 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 [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.

[74] The Nawrots therefore maintain that when read together with Existing Tariff Rule 15(1)(f), Proposed Tariff Rule 20(a) is unclear.

[75] The Nawrots also maintain that Proposed Tariff Rule 20(a) is unreasonable because it defines "denied boarding" too narrowly. They submit that, in purporting to confine the scope of denied boarding compensation to cases where a passenger is denied a confirmed seat because of an oversold flight, Proposed Tariff Rule 20(a) excludes many other cases where 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 this case, failure of the carrier to staff its check-in counters. The Nawrots contend that Proposed Tariff Rule 20(c) already exempts Sunwing 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. The Nawrots therefore argue that the additional limitation in Proposed Tariff Rule 20(a) is unreasonable.

[76] The Nawrots maintain that the damage to passengers who are denied boarding is identical whether they were denied boarding as a result of an oversold flight, substitution of the aircraft or failure of the carrier to check them in, even though they presented themselves for check in on time. They submit that the words "in the case of an oversold flight of the Carrier" ought to be deleted from Proposed Tariff Rule 20(a).

[77] The Nawrots also assert that Proposed Tariff Rule 20(a) is inconsistent with the principles established by the Agency in five Decisions issued in June 2012 respecting flight cancellation and denied boarding (Decision No. 248-C-A-2012 – *Lukács v. Air Transat*; Decision No. 249-C-A-2012 – *Lukács v. WestJet*; Decision No. 250-C-A-2012 – *Lukács v. Air Canada*; Decision No. 251-C-A-2012 – *Lukács v. Air Canada*; and Decision No. 252-C-A-2012 – *Lukács v. WestJet*). Specifically, the Nawrots submit that Proposed Tariff Rule 20(a) fails to recognize the right of passengers to a full refund even if travel has commenced in certain cases, or their right to transportation to their point of origin at no additional cost.

Analysis and findings – Proposed Tariff Rule 20(a)

[78] The Agency notes that Existing Tariff Rule 15, to which the Nawrots refer, was filed with the Agency, with an effective date of June 14, 2013, during the course of the proceedings relating to a different case for which the Agency issued Decision No. 313-C-A-2013 (*Lukács v. Sunwing)*.

Clarity

[79] The Agency agrees with the Nawrots respecting the inconsistency between Proposed Tariff Rule 20(a) and Existing Tariff Rule 15(1)(f)(i)(a). When reading Proposed Tariff Rule 20(a) together with Existing Tariff Rule 15(1)(f)(i)(a), it is not clear as to what remedy is available to a passenger affected by overbooking. Proposed Tariff Rule 20(a) provides the option of choosing a refund of the total fare paid for each unused segment, while Existing Tariff Rule 15(1)(f)(i)(a) provides that if a passenger's journey is interrupted, they will be entitled to a reimbursement of the total price of the ticket, 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 original travel plan. Existing Tariff Rule 15 also provides that, when relevant, Sunwing will transport passengers to their point of origin, at the earliest opportunity, at no additional cost. The Agency finds that this inconsistency would make Proposed Tariff Rule 20(a) unclear if it were to be filed with the Agency because it creates reasonable doubt, ambiguity or uncertain meaning as to its application.

Reasonableness

[80] The Nawrots submit that Proposed Tariff Rule 20(a) is unreasonable for the following reasons:

- The narrow definition of "denied boarding" is inconsistent with the findings of the Agency in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) respecting the obligation of the carrier to compensate passengers who are denied boarding due to substitution of aircraft with one of a lower capacity;
- With respect to the Agency's decisions issued in June 2012 relating to flight cancellation and denied boarding, Proposed Tariff Rule 20(a) fails to recognize the right of passengers for a full refund, even if travel has commenced in certain cases, or their right to transportation to their point of origin at no additional cost;
- Proposed Tariff Rule 20(a) deprives passengers with confirmed seats who present themselves for transportation on time, and who comply with all travel requirements, of denied boarding compensation if those passengers are denied boarding for reasons other than an oversold flight.

[81] With respect to denied boarding arising from substitution of aircraft, in Decision No. 204-C-A-2013, the Agency directed Air Canada to show cause why it should not have a revised tariff provision that provides that in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers. In Decision No. 342-C-A-2013 (*Lukács v. Air Canada*), the Agency determined that Air Canada had failed to show cause in respect of that matter, and ordered Air Canada to include the aforesaid provision in its tariff.

[82] The Agency finds that the absence of a provision in Proposed Tariff Rule 20(a) providing for payment of denied boarding compensation if Sunwing fails to demonstrate that all reasonable measures were taken to avoid substitution to a smaller aircraft, or that it was impossible for Sunwing to take such measures, would render that Rule unreasonable, if it were to be filed with the Agency.

[83] With respect to the matter of refunds, although Existing Tariff Rule 15(1) provides for full refunds, under certain circumstances, even if travel has commenced, and for return of the passenger to the point of origin, without charge, Proposed Tariff Rule 20(a) fails to do so. If Proposed Tariff Rule 20(a) were filed with the Agency, it would be considered unreasonable because it fails to strike a balance between Sunwing's statutory, commercial and operational obligations and a passenger's right to be subject to reasonable terms and conditions of carriage.

[84] Where a carrier fails to check in passengers because of the absence of personnel at the counter prior to the cut-off time for check in, the Agency is of the opinion that it is reasonable that compensation be tendered:

- when passengers holding confirmed and ticketed reservations can demonstrate that they presented themselves at the ticket counter prior to the cut-off time for check in; and,
- when the ticket counter was closed.

[85] For greater clarity, where such passengers present themselves for boarding before the cut-off time, only to discover that the check-in counter has been closed, the carrier cannot avoid paying denied boarding compensation, regardless of whether or not the flight is fully booked, nor can it avoid liability by closing the check-in counter early.

[86] The Agency finds that this requirement strikes a balance between Sunwing's statutory, commercial and operational obligations and a passenger's right to be subject to reasonable terms and conditions of carriage.

Positions of the parties – Proposed Tariff Rule 20(c)

The Nawrots

[87] The Nawrots note that Proposed Tariff 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.

[88] The Nawrots maintain that this portion of Proposed Tariff Rule 20(c) is unreasonable for the same reasons that a virtually identical provision in Air Canada's domestic tariff was held to be unreasonable by the Agency in Decision No. 204-C-A-2013. They submit that in that Decision, the Agency found that to relieve itself from the obligation to pay denied boarding compensation, Air Canada must demonstrate the following, failing which compensation should be due to the affected passengers:

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.

[89] The Nawrots argue that the same finding is applicable to Proposed Tariff Rule 20(c).

Analysis and findings – Proposed Tariff Rule 20(c)

[90] The Agency notes that Proposed Tariff Rule 20(c) contains the same language as that appearing in Air Canada's domestic tariff, which was determined to be unreasonable in Decision No. 204-C-A-2013.

[91] As previously mentioned, the Agency is of the opinion that a carrier should not be expected to tender compensation when it has demonstrated that substitution occurred for operational or safety reasons beyond its control, and that it took all reasonable measures to avoid the substitution or that it was impossible to take such measures. In the event that the carrier fails to so demonstrate, compensation should be due to the affected passengers.

[92] In this regard, the Agency is of the opinion that the absence of specific language that establishes context or qualifies Sunwing's exemption from paying compensation would render Proposed Tariff Rule 20(c) unreasonable if it were to be filed with the Agency because it fails to strike a balance between Sunwing's statutory, commercial and operational obligations and a passenger's right to be subject to reasonable terms and conditions of carriage.

Positions of the parties – Proposed Tariff Rule 20(d)

The Nawrots

[93] The Nawrots submit that Proposed Tariff Rule 20(d) is reasonable to the extent that it is identical to the American denied boarding compensation regime. At the same time, they indicate that a difference exists that can turn out to be substantial in some cases, namely, the way Proposed Tariff 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.

[94] The Nawrots point out that in the American denied boarding compensation scheme, the DoT Regulation No. 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.

[95] The Nawrots therefore submit that 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.

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

[97] The Nawrots assert that the denied boarding compensation regime proposed by Sunwing fails to address and meet its obligations with respect to passengers who are denied boarding on a flight departing from the European Union. They point out that compensation for denied boarding on such flights, and any flight departing from an airport in the territory of the European Union, is governed by Regulation (EC) 261/2004. The Nawrots also point out that Proposed Tariff 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 Union.

[98] According to the Nawrots, a tariff provision that clearly ignores and contradicts a carrier's statutory obligation cannot be reasonable, even if the statute is a foreign legislation. The Nawrots indicate that in their complaint, they asked, among other things, that:

> 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]

[99] The Nawrots point out that Sunwing made no submissions to oppose this relief, nor did Sunwing 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 to implement a denied boarding compensation similar to that of major European carriers, such as Air France or Lufthansa, at least with respect to flights departing from airports located in the European Union.

Analysis and findings – Proposed Tariff Rule 20(d)

Clarity

[100] The Agency notes that Rule 1, Definitions and Interpretation, of the Tariff provides the following definition of the term "stopover":

> Stopover means a **deliberate** interruption of a journey by the passenger, agreed to in advance by the carrier, at a point between the place of departure and the place of destination. [Emphasis added]

[101] Given the inclusion of the word "deliberate" in Sunwing's definition of the term "stopover," the Agency finds that Proposed Tariff Rule 20(d) would be found to be clear if it were to be filed with the Agency because it excludes any reasonable doubt, ambiguity or uncertain meaning as to the Rule's application, and does not require further clarity to render it reasonable.

Reasonableness

[102] The Nawrots maintain that, with respect to flights originating in the European Union, Proposed Tariff Rule 20 does not reflect Sunwing's obligations relating to denied boarding as imposed by Regulation (EC) 261/2004. They argue that the Agency should direct Sunwing to apply a denied boarding compensation regime similar to that of major European carriers, at least with respect to flights departing from airports located in the European Union.

[103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

Positions of the parties – Proposed Tariff Rule 20(e)

Right to bring legal action – The Nawrots

[104] The Nawrots point out that the last sentence of Proposed Tariff Rule 20(e) provides that:

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

[105] The Nawrots indicate that in Decision No. 227-C-A-2013 (*Lukács v. WestJet*), the Agency considered a similar provision, and held that:

> 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.
>
> 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.

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

Form of payment (vouchers) – The Nawrots

[107] The Nawrots point out that the second last sentence of Proposed Tariff Rule 20(e) provides that:

> The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment.

[108] The Nawrots maintain that it is unreasonable for Sunwing to offer travel vouchers in lieu of denied boarding compensation. They submit that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency held that any compensation paid in accordance with the tariff must be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. The Nawrots point out that that finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding compensation.

[109] The Nawrots argue that acceptance of other forms of compensation must be an informed decision, based on the passenger being fully advised of the restrictions that those other forms entail. They assert that the requirement that passengers provide a written agreement confirming that they accept compensation in a 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. According to the Nawrots, the vast majority of passengers are not aware of the many restrictions associated with vouchers, and it is very difficult to verify whether passengers are adequately informed by the carrier about their rights. The Nawrots also maintain that passengers should be able to change their minds within a reasonable length of time, and exchange their travel vouchers for cash.

Analysis and findings – Proposed Tariff Rule 20(e)

Right to bring legal action

[110] The Nawrots point out that in Decision No. 227-C-A-2013, the Agency held that a provision respecting the right to initiate legal action similar to that appearing in Proposed Tariff Rule 20(e) was unclear and unreasonable. The Nawrots accept the Agency's findings as their own position in this matter, and submit that Proposed Tariff Rule 20(e) is unclear and unreasonable.

[111] The Agency agrees with the Nawrots' submission, and finds that if the provision at issue in Proposed Tariff Rule 20(e) were to be filed with the Agency, it would be found to be unclear and unreasonable for the same reasons set out in Decision No. 227-C-A-2013.

Form of payment – vouchers

[112] The Nawrots point out that in previous decisions, the Agency determined that compensation paid in accordance with the tariff must be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. They also submit that passengers must be advised of the restrictions associated with vouchers and afforded ample opportunity to determine whether they wish to choose them in lieu of a cash payment as denied boarding compensation.

[113] The Agency agrees with the Nawrots' submission respecting this particular matter, and finds that if the provision at issue were to be filed with the Agency, it would be found to be unreasonable for the same reasons set out in Decision Nos. LET-C-A-83-2011 and 227-C-A-2013.

[114] With respect to the length of time to be afforded to passengers to change their minds regarding the form of compensation to be tendered by the carrier, the Agency notes that in Decision No. 342-C-A-2013, the Agency determined that a period of one month is reasonable.

ISSUE 5: SHOULD THE NAWROTS BE AWARDED COSTS, PURSUANT TO SECTION 25.1 OF THE CTA?

Positions of the parties

The Nawrots

[115] The Nawrots assert that it appears that the Agency has never exercised its powers pursuant to subsection 25.1(4) of the CTA to establish a scale for taxation of costs, and has been reluctant to make cost awards. They submit that in Decision No. 20-C-A-2011 (*Kipper v. WestJet),* the Agency held:

> As a general rule, costs are not awarded, and the Agency's practice has been to award these only in special or exceptional circumstances. In making its determination in a given case, the Agency considers a combination of factors such as the nature of the application, the length and complexity of the proceeding, whether the Agency held an oral hearing, whether parties have acted efficiently and in good faith, or if a party has incurred extraordinary costs to prepare and defend its application.

[116] The Nawrots contend that the "general rule" to not award costs is inconsistent with the dicta of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71(*Okanagan*). That case is a leading authority on cost awards, and the Supreme Court of Canada described the traditional principles for awarding costs.

[117] According to the Nawrots, the Agency is bound by the principles laid down in *Okanagan* and, as such, the Agency must exercise the powers and discretion conferred upon it by subsection 25.1(1) of the CTA judicially, and the ordinary rules of costs (namely, that costs follow the event) should be followed unless the circumstances justify a different approach. Therefore, awarding costs to the successful party against the unsuccessful one ought to be the "general rule" for awarding costs by the Agency, and not awarding costs ought to be the exception.

[118] The Nawrots submit that the preamble of the Convention recognizes "the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution." They add that while Article 22(6) of the Convention explicitly recognizes that costs are to be awarded in accordance with the own law of the court seized with the matter, the aforementioned underlying principles of the Convention strongly militate in favour of awarding costs on a full indemnity basis against carriers who fail to offer compensation to passengers in accordance with the provisions of the Convention.

[119] The Nawrots maintain that access to justice has been recognized as a consideration in awarding costs, in particular, in the context of public interest litigation, in the landmark decision of the Supreme Court of Canada in *Okanagan.*

[120] The Nawrots argue that although the Agency's procedures are somewhat simpler than those of a court of law, they nevertheless involve an adversarial process, strict deadlines and complex legal arguments that are clearly beyond the legal knowledge and skill of an average air passenger.

[121] The Nawrots submit that none of the common cost-reducing methods (such as commencing a class proceeding or a contingency fee agreement) are available to consumers before the Agency. They contend that the Agency has neither jurisdiction nor procedures for adjudicating class proceedings, and the amounts typically involved in individual consumer complaints are too small for contingency fee agreements.

[122] According to the Nawrots, individual consumers are left with only one avenue to obtain legal representation before the Agency: paying the legal fees from their own resources. These fees significantly exceed the amount of damages sought, and render such complaints economically infeasible if the Agency follows its "general rule" to not award costs to successful consumers.

[123] The Nawrots therefore argue that awarding costs in favour of consumers who are successful in a proceeding before the Agency is absolutely necessary to ensure that the complaint process remains accessible for the travelling public at large, and not only to the exceptionally wealthy or the legally trained.

[124] The Nawrots submit that costs should be awarded against an unsuccessful consumer only in cases of vexatious complaints, which are brought in bad faith.

[125] The Nawrots maintain that it is important to also reflect on the public policy effect of the Agency's current "general rule" of not awarding costs, which (as this case exemplifies) encourages carriers to ignore consumer complaints that could be settled as hoped for by the drafters of the Convention, without the involvement of the Agency. According to the Nawrots, a significant portion of consumers are deterred from pursuing their claims before the Agency due to the associated legal fees, which they would not be compensated for due to the Agency's "general rule" on costs.

[126] Considering this, the Nawrots contend that the current "general rule" provides a disincentive for carriers to settle claims, and encourages them to not take consumer complaints seriously until they are brought before the Agency or a court. The Nawrots argue that the exceptional circumstances of this case therefore warrant an award of costs in favour of the Nawrots and against Sunwing, even under the Agency's current "general rule."

Sunwing

[127] Sunwing submits that any discussion with respect to costs should follow the determination of the Nawrots' complaint. Sunwing requests that it be permitted to make costs submissions at that time.

Analysis and findings

[128] Section 25.1 of the CTA states:

> (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.
> (2) Costs may be fixed in any case at a sum certain or may be taxed.
> (3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.
> (4) The Agency may make rules specifying a scale under which costs are to be taxed.

[129] The Agency has full discretion to award costs and, in the past, has relied on a set of general principles in determining whether to award costs, including whether the applicant for an award of costs has a substantial interest in the proceeding, has participated in the proceeding in a responsible manner, has made a significant contribution that is relevant to the proceeding, and has contributed to a better understanding of the issues by all the parties before the Agency. In addition, the Agency may consider other factors, such as the importance and complexity of the issues, the amount of work and the result of the proceeding in justifying an award of costs.

[130] The Nawrots rely on the Supreme Court of Canada ruling in *Okanagan*, and argue that the Agency is bound by the principles laid down by that Court. To clarify, the question on appeal before the Supreme Court of Canada in that case related to the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause. Also important in that case is that the Supreme Court of Canada referred to judicial proceedings as opposed to quasi-judicial Agency proceedings. In *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 S.C.R. 190, the issue that the Supreme Court of Canada had to decide was whether, in the exercise of the discretion to award costs conferred by section 73 of the *National Transportation Act, 1987*, the Canadian Radio-television and Telecommunications Commission was bound by the principle of indemnification as it is applied in the award of costs by the courts. The Supreme Court of Canada stated:

> On the application of the principle of indemnification to the award of costs by the Commission pursuant to s. 73 of the Act, Urie J. expressed himself as follows: The principal issue in this appeal is whether the meaning to be ascribed to the word ["costs"] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.

[131] What an award of costs means when judicial courts are dealing with judicial proceedings is not necessarily the same as when a quasi-judicial tribunal, such as the Agency, is dealing with quasi-judicial proceedings.

[132] Another consideration is that in judicial courts, there are always litigation expenses, even if only for judicial fees to be paid for the issuance of, for example, a statement of claim, a statement of defence, a notice of application, a notice of motion, a requisition for a hearing date, a notice of appeal and a subpoena. The Agency, however, does not charge fees for the filing of applications, responses, replies and motions, or other documents.

[133] The Agency, as a quasi-judicial tribunal, is, by its very nature, a forum in which a party can successfully plead without representation by counsel. For the vast majority of consumer complaints, including successful ones, the complainant is not represented by counsel.

[134] With respect to the argument that proceedings before the Agency involve an adversarial process, strict deadlines and complex legal arguments that are clearly beyond the legal knowledge and skill of an average air passenger, the Agency reminds the Nawrots of the existence of the *Canadian Transportation Agency General Rules*, SOR/2005-35, as amended (General Rules). The General Rules set out a full procedural code for proceedings before the Agency that can be used by an individual who is self-represented.

[135] The Nawrots are of the opinion that awarding costs in favour of consumers who are successful in a proceeding before the Agency is absolutely necessary to ensure that the Agency's complaint process remains accessible to the travelling public at large, and not only to the exceptionally wealthy or the legally trained. The Nawrots are also of the opinion that a significant portion of consumers are deterred from pursuing their claims before the Agency due to the associated legal fees, which they would not be compensated for due to the Agency's "general rule" on costs. The Nawrots provide no substantiation for this position. The Agency has been in existence for a long time; the complaint process has been used successfully on many occasions.

[136] In light of the above, the Agency maintains, as it has in past decisions, that an award of costs is warranted only in special or exceptional circumstances. There are no special or exceptional circumstances in this case.

SUMMARY OF CONCLUSIONS

Issue 1

[137] Sunwing properly applied the terms and conditions relating to check-in time limits specified in its Tariff.

Issue 2

[138] Revised Tariff Rule 18(g), now in effect, is clear and reasonable.

Issue 3

[139] Existing Tariff Rule 20 is unclear and unreasonable.

Issue 4

[140] The Agency has determined that:

- Proposed Tariff Rule 20(a) would be found to be unclear and unreasonable if it were to be filed with the Agency.
- Proposed Tariff Rule 20(c) would be found to be unreasonable if it were to be filed with the Agency.
- Proposed Tariff Rule 20(d) would be found to be clear if it were to be filed with the Agency; however, the Agency is not making a determination as to the reasonableness.

– Proposed Tariff Rule 20(e) would be found to be unclear and unreasonable if it were to be filed with the Agency.

Issue 5

[141] The Agency does not order costs against Sunwing.

ORDER

[142] The Agency, pursuant to section 113 of the ATR, disallows Existing Tariff Rule 20 of Sunwing's Tariff.

[143] The Agency orders Sunwing, by no later than December 16, 2013, to amend its Tariff to conform to this Order and the Agency's findings set out in this Decision.

[144] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rule 20 shall come into force when Sunwing complies with the above or on December 16, 2013, whichever is sooner.

(signed)

Raymon J. Kaduck
Member

(signed)

Sam Barone
Member