Office
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Canadian
Transportation
Agency

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Case No. 15-05627

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Christopher C. Johnson
Gábor Lukács

Dear Sirs:

Re: Application by Christopher Johnson and Gábor Lukács against Air Canada

BACKGROUND

On December 4, 2015, Gabor Lukács, on behalf of himself and Christopher Johnson (the applicants), filed an application alleging that Air Canada is applying a policy that is not set out in its International Tariff and which purports to limit Air Canada's liability with respect to delay of passengers, contrary to section 122 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). The applicants claim this impugned policy is unreasonable within the meaning of section 111 of the ATR as it purports to fix a lower limit of liability than what is set out in the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention). They also allege that Air Canada has failed to apply the terms and conditions set out in its tariff by applying the impugned policy and/or other unofficial policies instead of the provisions of the Montreal Convention, contrary to subsection 110(4) of the ATR.

The Canadian Transportation Agency (Agency) opened pleadings on December 29, 2015. On January 20, 2016, Air Canada filed its answer to the application. From January 2016 to the present, the Agency has addressed a number of requests made by the parties. On May 18, 2016, the applicants' reply to the answer was due.

On May 17, 2016, the applicants, pursuant to sections 34 and 30 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (Dispute Adjudication Rules), made a request to submit rebuttal evidence and to extend the time for filing of their reply to 10 business days after the disposition of the present request.

ISSUE

Should the Agency approve the applicants' request to submit rebuttal evidence and to extend the time for the filing of their reply?

Position of the parties

The proposed evidence consists of witness statements signed by two passengers (passengers) who travelled with Air Canada in April of 2016. The applicants allege that the passengers were delayed for a total of 65 hours for reasons within Air Canada's control and were refused reimbursement of their expenses related to the delay in accordance with the impugned policy.

The applicants argue that these statements establish that Air Canada acknowledged that it was required to provide these passengers with accommodation in accordance with its tariff (indicating that the delay was within its control), that the passengers were not offered hotel accommodation, and that the passengers were provided with compensation as a measure of goodwill based on guidelines that are used consistently.

The applicants claim that the evidence demonstrates that Air Canada's representations in its answer that the impugned policy does not constitute its expense policy for expense refund requests, that it reviews claims made under the Montreal Convention in accordance with the provisions of the Convention, and that it does not have a policy limiting reimbursement of passengers' expenses for delays or cancellations that are within its control, are false.

The applicants also claim that the evidence shows that Air Canada continues to apply the impugned policy, thereby denying passengers' claims under the Montreal Convention even in cases where it is not disputed that the delay was within Air Canada's control.

Air Canada maintains that a reading of the evidence on its face clearly demonstrates that it had denied the full compensation requested by the passengers on the understanding that the passengers were offered accommodation and refused, which triggered Air Canada's goodwill offer, and that the evidence does not support the disputed allegation that Air Canada limits its liability to levels below the limits of the Convention. Air Canada contends that the Montreal Convention provides for liability limits for claims based on delays, and that said claims remain subject to the rules of evidence and damage mitigation.

Air Canada argues that should the Agency allow the applicants' request pursuant to section 34 of the Dispute Adjudication Rules, it would be left without an opportunity to respond to the new issues raised by the evidence, and that further, the Agency may draw conclusions affecting the rights of Air Canada and the passengers in its judgment on the merits of the present application without a fair adjudication process.

Air Canada also argues that a new debate on the evidence would hinder and delay the fair conduct of the application, and would be disproportionate and unnecessary.

The applicants, in reply, argue that the passengers are witnesses, not parties, and that the un-contradicted evidence is relevant as it tends to increase the probability of occurrence of what is alleged by the applicants because it shows that the passengers were also not offered accommodation by Air Canada.

Should their request be refused, the applicants argue that they would suffer prejudice given that their opportunity to contest the allegations using the new evidence would be deprived.

Analysis

The Agency has the power to accept new evidence at this late stage of the proceeding and will do so where:

1. it is rebuttal evidence to address new fact issues raised by the respondent in the answer; or,
2. it is in the interests of justice to do so, by re-opening the case.

However, the general rule is that a party cannot be permitted to split its case and that a respondent is entitled to know the case that it has to meet.

In *The Law of Evidence in Canada* (Toronto: Butterworths,1999) at pages 958-959, the authors explain the rule against allowing a party to split its case.

> At the close of the defendant's case, the plaintiff or Crown has the right to adduce rebuttal evidence to contradict or qualify new fact issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff's case in chief are to be excluded.

The authors then identify 2 reasons for this rule.

> [F]irst, the unfairness to the opponent who has unjustly supposed that the case in chief was the entire case which he had to meet and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning.

In *R. v. Miazga,* 2003 SKQB 559 (CanLII) at para. 483, the Court noted that the potential for prejudice to a defendant in a civil case when permitting rebuttal evidence is less than that in a criminal case. However, the potential for "the interminable confusion that would be created by an unending alternation of successive fragments of each case" is greater in a civil case.

In *Allcock, Laight & Westwood Ltd. v. Patten* [1967] 1 O.R. 18 (C.A.) the Court stated that a plaintiff should not be permitted to adduce evidence in rebuttal which is essentially confirmatory only of the plaintiff's case [see also *Halford v. Seed Hawk Inc.* 24 CPR (4th) 220; [2003] FCJ No. 237 at para. 13].

1. Rebuttal Evidence

In this case, the applicants do not point to any unforeseen argument or issue raised in the answer other than to say that the representations contained therein are false.

Rather, this evidence appears to be tendered to support the allegations made in the application. The applicants allege that Air Canada was applying a policy which purports to limit its liability with respect to delay of passengers contrary to the Montreal Convention. The application cites Article 19 of the *Montreal Convention* which states that the carrier is liable for damage occasioned by delay except if it proves that its servants and agents "took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures." The applicants seek to adduce this new evidence to establish that "Air Canada continues to apply" this policy "even where it is not disputed that the delay was within Air Canada's control". The applicants confirm in their reply submissions (paras. 6-7) that the evidence tends to increase the probability of what is alleged, namely, that Air Canada was ignoring the provisions of the *Montreal Convention* and applying instead the impugned policy. Therefore, the evidence is only confirmatory of the applicants' case, that is, assuming one could draw the conclusions from this evidence which the applicants suggest.

Therefore, the Agency finds that the evidence is not proper rebuttal evidence as it is not responsive to new issues in the answer but, instead, is being submitted in support of the allegations in the application.

2. Re-Open the Case

What is clear is that this evidence was not available at the time of the application. The events described in the statements took place in April of this year, whereas the application was submitted in December of 2015. Although the applicants have not asked that the case be reopened, the Agency is of the view that this would be the proper mechanism to admit newly discovered evidence.

In *Conseil scolaire francophone de la Colombie-Britanique v. British Columbia (Education),* 2015 BCSC 1555 (CanLII) the plaintiffs sought to tender a recently prepared report dated after the close of their case as rebuttal evidence. The defendants objected on the basis that it was not proper rebuttal just because it was recent. The Court noted that the report did not go to an issue raised by the defendants. Rather, it was being submitted to support the claims made by the plaintiffs. The Court found that the plaintiffs misunderstood the concept of rebuttal evidence and how it differs from reopening a case.

> [13] The plaintiffs' position seems to misconceive the test for rebuttal evidence, and how it differs from the test for reopening a case, "two procedural steps that are partially joined at the conceptual hip" (*Thompson v. Choi*, 2015 BCSC 35 (CanLII) at para. 16).
>
> [14] In my view, because the test for rebuttal evidence is designed to ensure the defendants know the case to be met (*Allcock* and *Krause*), it is concerned with whether the plaintiffs could have anticipated a position taken or evidence put forward by their adversaries. By contrast the test on re-opening a case is concerned with the discovery of new evidence to support the plaintiffs' case (*Mohajeriko v. Gandomi,* 2010 BCSC 60 (CanLII) at para. 21, citing *Clayton v. British American Securities Ltd.,* [1934] 49 B.C.R. 28 (C.A.)) [emphasis added].

Whether an application to reopen is granted is a matter of discretion. Where the request to reopen is made prior to a decision being made, as opposed to after the decision has issued, a broader discretion is recognized. However, the Agency has determined that it would not be in the interest of justice in this case to admit the new evidence at this stage of the proceedings *Whyte v. Canadian National Railway,* 2010 CHRT 6 (CanLII) at para. 31 citing *Vermette v. Canadian Broadcasting Corporation* [1996] F.C.J. No. 1274.

It is not clear that one can draw from this new evidence the conclusions suggested by the applicants, that Air Canada continues to deny claims for expenses even in cases where it is not disputed that the delay was within Air Canada's control. The statements of these passengers indicate that they were delayed and that Air Canada did not offer accommodation. However, attached to one of the statements is an email dated April 21, 2016, wherein an Air Canada representative states that in accordance with its tariff a hotel room is provided, that hotel rooms had been booked and blocked for passengers on the flight which was delayed, and that the accommodation was offered but declined. Payment towards the expenses claimed by the passengers was offered but only as a gesture of goodwill, according to the email.

A review of this evidence, therefore, establishes that there was a dispute as to whether Air Canada offered accommodation in these circumstances. The evidence therefore does not tend to establish a fact in issue in this proceeding and, as such, is of limited probative value.

There is a risk that the passengers who provided these statements would be prejudiced by a decision of the Agency addressing this dispute in a proceeding in which they are not a party. While the applicants point out that these passengers are witnesses and not parties, they also are asking that the Agency find that Air Canada did not comply with its tariff and the *Montreal Convention* in dealing with their complaint. Such a determination is more appropriately dealt with in a separate application. In such a context, these passengers would be entitled to full participation. Such a determination should not be made here where only one of the parties to the dispute is represented.

Contrary to what is indicated by the applicants at paragraph 9 of their reply submissions, Air Canada was under no obligation to submit evidence to challenge the statements before the request to submit rebuttal evidence was granted as per subsection 34(2) of the Dispute Adjudication Rules.

Air Canada argued that it would be denied the opportunity to respond to the issues raised. While the Agency could grant Air Canada an opportunity to respond as part of a decision allowing the evidence to be admitted, such an order would result in further delays in a proceeding which has already been marred by significant procedure and delays. Also, such an order could mark the beginning of "the interminable confusion that would be created by an unending alternation of successive fragments of each case" (*R. v. Miazga, supra*.).

Rule 4 of the Dispute Adjudication Rules states that the Agency is to conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed. To allow this new evidence at this stage would not be consistent with this principle.

Accordingly, the Agency will not accept the filing of this new evidence.

The applicants request for an extension of time was not strenuously opposed and is reasonable in the circumstances. The reply was previously due May 18, 2016, and should be filed without further delay.

<u>Conclusion</u>

The applicants' request pursuant to section 34 of the Dispute Adjudication Rules to submit the proposed evidence in rebuttal is denied.

The Agency grants the applicants' request made pursuant to section 30 of the Dispute Adjudication Rules, and provides the applicants until 5:00 pm Gatineau local time on June 17, 2016 to file its reply, and to provide a copy to Air Canada.

All correspondence and pleadings should refer to Case No. 15-05627 and be filed through the Agency's Secretariat e-mail address: secretariat@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

William G. McMurray
Member

(signed)

Sam Barone
Member

(signed)

P. Paul Fitzgerald
Member