Office
des transports
du Canada

Canadian
Transportation
Agency

DECISION NO. 286-C-A-2016

September 21, 2016

APPLICATION by Christopher Johnson et al. against Air Canada also carrying on business as Air Canada rouge and as Air Canada Cargo (Air Canada).

Case No. 15-05627

INTRODUCTION

[1] On December 4, 2015, Christopher Johnson filed an application with the Canadian Transportation Agency (Agency) alleging that Air Canada did not properly apply the terms and conditions set out in its International Passenger Rules and Fares Tariff, NTA(A) No. 458 (Tariff) with respect to his travel on Flight No. AC889 on December 10, 2013 from London, England, to Ottawa, Ontario, Canada, and that Air Canada is applying policies that are not set out in its Tariff. The application was in fact filed on behalf of Mr. Johnson by Gabor Lukács, who represented himself as a co-applicant. Mr. Lukács did not travel on the subject flight. Mr. Johnson and Mr. Lukács are referred to as the applicants in this Decision.

[2] The applicants claim that the carrier's policies purport to limit its liability with respect to delay of passengers, that the policies are unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and that by applying these policies, Air Canada has failed to properly apply the terms and conditions set out in its Tariff, contrary to subsection 110(4) of the ATR. The applicants request that the Agency direct Air Canada to:

- reimburse Mr. Johnson for the amount of CAD$309.56, pursuant to section 113.1 of the ATR;
- cease and desist applying the policies;
- circulate a bulletin to its agents, retracting the policies and setting out Air Canada's obligations to compensate passengers for delay in transportation pursuant to Articles 19 and 22 of the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention); and,
- publish on its website and in the mainstream media an invitation for passengers who were delayed since January 1, 2013, to submit their claims for compensation in accordance with Articles 19 and 22 of the Montreal Convention; and process these claims and compensate the claimants in accordance with Articles 19 and 22 of the Montreal Convention.

[3] On December 29, 2015, the Agency opened pleadings, and on December 29, 2015 and January 12, 2016, the applicants filed notices requesting answers to written questions and the production of documents pursuant to subsection 24(1) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (Dispute Adjudication Rules). On January 20, 2016, Air Canada submitted its answer to the pleadings and made a request for confidentiality pursuant to section 31 of the Dispute Adjudication Rules with respect to information submitted in response to the aforementioned notices. On February 24, 2016, the Agency issued Decision No. LET-C-A-6-2016 and confirmed the confidentiality of one of the policies submitted.

[4] On March 18, 2016, the applicants filed an additional notice of written questions and production of documents, and on April 6, 2016, Air Canada filed its response. On April 8, 2016, the applicants filed a request pursuant to section 32 of the Dispute Adjudication Rules to require Air Canada to provide a complete response. On May 4, 2016, the Agency denied the applicants' request with reasons to follow in this Decision.

[5] On May 17, 2016, the applicants filed a request pursuant to sections 30 and 34 of the Dispute Adjudication Rules for an extension of time to file their reply and rebuttal evidence. On June 10, 2016, the Agency issued Decision No. LET-C-A-24-2016, granted the request for an extension of time, and denied the applicants' request to submit rebuttal evidence.

[6] On June 17, 2016, the applicants filed their reply to the pleadings.

PRELIMINARY MATTER

[7] On April 8, 2016, the applicants filed a request pursuant to subsection 32(1) of the Dispute Adjudication Rules asking the Agency to order Air Canada to produce a complete and unredacted copy of document A-2, referred to as an expense policy, including the portions pertaining to the expenses of passengers who were involuntarily denied boarding, and complete answers to questions Q12 and Q18 that are contained in the third notice of written questions and production of documents dated March 18, 2016.

[8] The following are the reasons for denying the applicants' request.

[9] Section 32 of the Dispute Adjudication Rules provides as follows:

> (1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.
>
> [...]

(2) The Agency may do any of the following:

(a) require that a question be answered in full or in part;
(b) require that a document be provided;
(c) require that a party submit secondary evidence of the contents of a document;
(d) require that a party produce a document for inspection only;
(e) deny the request in whole or in part.

[10] In Decision No. LET-C-A-154-2012 dated October 24, 2012 (*Lukács v. Air Canada*), the Agency established the test to use when making a determination on the relevancy of evidence. The Agency noted that in order to make a determination on the relevancy of evidence, it must:

1. examine the nature of what is claimed; and then
2. look at whether the question to be answered or the evidence that is to be produced/disclosed shows, or at least tends to show, or increases or diminishes the probability of the existence of the fact related to what is claimed.

If the answer to the second question is positive, the question/evidence is relevant. The Agency however retains discretion to decide to disallow a relevant question/document where responding to it would place undue hardship on the answering party, where there is any other alternative information, or where the question forms part of a "fishing expedition".

(a) Question Q9

Air Canada is requested to produce the complete and unredacted copy of document A-2, including the portions referring to the expenses of passengers who were involuntarily denied boarding.

[11] Document A-2 was filed with the Agency on January 20, 2016, along with a request for confidentiality. This document is referred to as an expense policy dated December 2015 and reference is also made to this document in Air Canada's answer to the application. In its answer, Air Canada specifically mentions that a section of document A-2 has not been disclosed as it does not relate to irregular operations or schedule changes. A section from the document is redacted.

[12] In Decision No. LET-C-A-6-2016 dated February 24, 2016, the Agency granted Air Canada's request for confidentiality with respect to document A-2. Air Canada was ordered to provide the applicants with a copy of this document upon receipt of a signed non-disclosure agreement.

[13] Following receipt of the document and by letter dated March 15, 2016, the applicants made reference to the section of the document that had been redacted and requested a copy of document A-2 without redaction. This was followed by a notice of written questions and production of documents dated March 18, 2016, in which the request for a complete copy is repeated as question Q9.

[14] In their notice dated March 18, 2016, the applicants argue that passengers can be delayed for a number of reasons, including being denied boarding as a result of overbooking. The applicants referred to Decision No. 250-C-A-2012 wherein the Agency found that overbooking and cancellation *within the carrier's control* may constitute delay for the purposes of Article 19 of the Montreal Convention. Therefore, the entire policy, including expenses that are paid in the case of denied boarding, is relevant, according to the applicants.

[15] Air Canada objects to the production of the document and argues that it maintained from the beginning that this section of the document was not being disclosed. Air Canada states that the application is based on Mr. Johnson's expense refund request made in the context of an *uncontrollable flight cancellation*. According to Air Canada, the information is not relevant and the applicants are attempting to extend the application to any circumstance that may lead to delay. Air Canada argues that the extension of relevance, in combination with the remedies being sought, is excessive, unnecessary, and disproportionate, as well as being outside of the mandate and jurisdiction of the Agency. Air Canada notes that the application is based on the "rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule", and that no allegation or reference is made to denied boarding.

[16] In the request dated April 8, 2016, the applicants respond by saying that the application is not limited to a specific policy or to specific causes of delay, and that it is in reference to the "Impugned Policy and/or other unofficial policies". The applicants seek only the policy as it relates to the reimbursement of expenses, and not with respect to other compensation to which passengers who are denied boarding might be entitled. The applicants state that Air Canada was fully aware of the allegations being made and that if clarification was required, it should have asked. The applicants argue that Air Canada is responsible for its choice of litigation strategy.

[17] The Agency is of the opinion that this application relates to the application of policies in the context of schedule irregularities. In this regard, the Agency agrees with Air Canada that the extension of the application to any circumstance that may lead to delay is, based on the evidence provided, excessive, unnecessary, and disproportionate. To allow this request would be contrary to Section 4 of the Dispute Adjudication Rules which requires that proceedings be conducted in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed.

[18] Moreover, the Agency finds that question Q9 is not relevant as the evidence that is to be produced or disclosed would not show, or at least tend to show, or increase or diminish the probability of the existence of the fact related to what is claimed.

(b) Question Q12

> Is it Air Canada's position that it is not liable under Article 19 of the Montreal Convention for the expenses of passengers who are delayed as a result of a schedule change?

[19] Air Canada claims that question Q12 as formulated is irrelevant to the matter at issue and that the fact that document A-1 contains different recommendations pertaining to "schedule changes" (beyond the recommendations of the impugned policy) does not extend the scope to all other recommendations related therefrom.

[20] Air Canada claims that it has presented an answer to the proceedings, based on the allegations contained in the application, and that the applicants' extension of the scope after it filed its answer would deprive Air Canada of its right to respond to the application. Furthermore, it would alter the Agency's complaint driven mechanism, based on principles of natural justice, to an inquisitorial process, where its scope would be dictated by the applicants, outside of the Agency's control.

[21] The applicants argue that the policies stated in document A-1 limit liability for accommodation of passengers who are delayed as a result of what Air Canada calls a "schedule change", and that Air Canada states that, "All compensation is goodwill and costs should never exceed amounts above." It is the applicants' position that Air Canada has chosen to evade addressing this portion of the policy, which does limit the reimbursement of expenses to a fraction of the liability limits set out in the Montreal Convention, and identifies them as "goodwill." The applicants argue that question Q12 will seek clarification about Air Canada's position, and that the answer will tend to show that Air Canada failed to apply the provisions of the Montreal Convention.

[22] In the context of this application, the Agency finds that question Q12 is not relevant as the information sought by the applicants would neither directly nor indirectly assist in addressing this matter. Moreover, the Agency is of the opinion that requiring Air Canada to provide an answer to question Q12 would be disproportionate to the issues at stake (i.e. the application of policies in the context of schedule irregularities).

(c) Question Q18

> According to the statement of Air Canada's Manager, Customer Relations, "In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization [...]", Air Canada is requested to provide particulars of this statement, including: (1) In the years 2013-2015, how many claims for expenses occasioned by delay did Air Canada receive?; (2) How many of these claims were in relation to delays that Air Canada considered to be within its control?; and (3) Air Canada is requested to provide a list of the amounts of compensation that it paid out to these passengers.

[23] Air Canada argues that the magnitude of information sought is excessive, and maintains that it compensated passengers for delays within its control in compliance with the Montreal Convention, and that the amounts in its internal recommendations are often exceeded. In addition, Air Canada submits that it makes a case-by-case determination of the situation and determines whether a situation is controllable or uncontrollable.

[24] Air Canada further submits that it does not keep a register of previously processed passenger refund requests that contains the itemized list of the compensation it paid to passengers, and does not keep a record of whether these payments were made pursuant to controllable or uncontrollable delays. Air Canada argues that the applicants cannot force Air Canada to create a register that does not exist.

[25] The applicants submit that in its answer of April 6, 2016, Air Canada states that the amounts set out in documents A-1 and A-2 are mere recommendations, that in reality, passengers are compensated in accordance with the Montreal Convention, and that the amounts set out in documents A-1 and A-2 "are often exceeded." The applicants dispute these allegations, and maintain that Air Canada has systematically failed to apply the provisions of the Montreal Convention, and was applying the policies found in documents A-1 and A-2 instead of compensating passengers in accordance with the Montreal Convention.

[26] The applicants argue that the answers to question Q18 and/or its sub-questions can demonstrate that even in cases that Air Canada considers controllable, it follows the maximums set out in documents A-1 and A-2, and that Air Canada labels most delays as "uncontrollable" to evade liability.

[27] The applicants submit that Air Canada is falsely claiming to not have the requested information for the following reasons:

- Air Canada tendered no evidence in support of its allegation that the information requested does not exist.
- The main part of question Q18 is asking Air Canada "to provide particulars" of the statement put forward by its Manager, Customer Relations, who is an employee of Air Canada, and thus must be available to Air Canada at any time. The applicants argue that unless the Manager was merely speculating, she must have had some factual basis for making the statement in question.
- The expenses of an airline relating to reimbursing passengers for delay-related expenses is significant data regarding the airline's operations that any reasonable business would collect and analyze in great detail.
- Section 230 of the *Income Tax Act*, [R.S.C. ,1985, c. 1 (5th Supp.)] requires corporations to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate. Since Air Canada is a Canadian corporation that is subject to the *Income Tax Act*, it must have retained every "record" relating to expenses it incurred in regard to the reimbursement of expenses of delayed passengers.

[28] According to the applicants, there is no need to review and analyze the file of each and every passenger, and the requested information can be obtained from the Manager, Customer Relations and/or through a standard query of Air Canada's electronic databases.

[29] In addition, the applicants submit that in Decision No. LET-C-A-173-2009, the Agency itself directed the airline (WestJet) to answer a number of questions relating to the amount of compensation tendered to individual passengers for damage to, or loss or delay of checked baggage over a period of 6 months, and that as the Agency made that order, it was clearly viewed as proportional, and as such there is no reason to conclude in this case that answering questions of the same nature would be disproportional for Air Canada.

[30] Having considered the matter, the Agency determined that Air Canada should not be compelled to produce the requested information.

[31] The applicants seek particulars of the statement made by the Manager, Customer Relations to the effect that the recommended limits are often exceeded as per the Lead's authorization, particularly when customers allege, and it is verified, that they were unable to connect with the Air Canada agents issuing vouchers or making hotel arrangements. With respect to the Manager, Customer Relations' statement, it is noted that she has been an employee with Air Canada for 30 years and has held numerous positions, including Customer Relations Representative and Lead Customer Relations Representative. Her statement confirms that she is involved in handling passenger claims and in the formulation of Air Canada customer service policies and internal recommendations. Therefore, the Agency is of the opinion that her statement was made based on her experience and would be within her knowledge, rather than mere speculation as suggested by the applicants.

[32] With respect to the specific particulars sought, the Agency is of the opinion that the applicants have failed to establish that this evidence is relevant. This information alone would not assist the Agency in determining whether Air Canada is complying with the Montreal Convention. Without having more details about the nature of the cause of the delay, the nature of the amounts being claimed, the category of expense, the reasonableness of the expense, and details regarding the amount being paid, it would be difficult, if not impossible, to determine if the compensation being paid is consistent with that required by the Montreal Convention.

[33] The applicants' reliance on the *Income Tax Act* is misplaced. Air Canada does not argue that it does not keep records of the expenses that it pays. Air Canada states that it does not keep a register of the details of what was paid and in what type of situation. There is no evidence that these types of details would be required for income tax purposes.

[34] Moreover, to require Air Canada to attempt to compile the information being sought would be excessive in the circumstances of this case. Section 4 of the Dispute Adjudication Rules requires that the Agency conduct all proceedings in a manner that is proportionate to the importance and complexity of the issue at stake and the relief claimed. To require Air Canada to conduct a review of the expenses that it paid over the period requested would be inconsistent with this rule.

[35] In Decision No. LET-C-A-173-2009, the only issue was compensation for damage to, or loss or delay in delivery of, baggage. There was no need for the carrier, in that case, to further categorize the types of compensation paid in order for the information to be relevant. In this case, the amount of compensation is not of assistance unless there is more information about the amount claimed, the category of expense, as well as the amount paid.

[36] For these reasons, the Agency d finds that Air Canada should not be compelled to respond to question Q18.

ISSUES

1. Did Air Canada properly apply the terms and conditions set out in its Tariff with respect to Mr. Johnson's travel, as required by subsection 110(4) of the ATR? If Air Canada did not properly apply its Tariff, what remedies, if any, are available to the applicants?
2. Has Air Canada contravened subparagraph 122(c)(x) of the ATR, by failing to clearly state its policies regarding limitations of liability with respect to delay of passengers in its Tariff?
3. Are the policies unreasonable within the meaning of subsection 111(1) of the ATR, as they purport to fix a lower limit of liability than what is set out in the Montreal Convention?

RELEVANT TARIFF AND STATUTORY EXTRACTS

[37] The legislation, Tariff provisions, and provisions of the Montreal Convention relevant to this Decision are set out in the Appendix.

ISSUE 1: DID AIR CANADA PROPERLY APPLY THE TERMS AND CONDITIONS SET OUT IN ITS TARIFF WITH RESPECT TO MR. JOHNSON'S TRAVEL, AS REQUIRED BY SUBSECTION 110(4) OF THE ATR? IF AIR CANADA DID NOT PROPERLY APPLY ITS TARIFF, WHAT REMEDIES, IF ANY, ARE AVAILABLE TO THE APPLICANTS?

Positions of the parties

[38] The applicants rely on a statement signed by Mr. Johnson dated November 27, 2015, which provides details of his experience with Air Canada when he was scheduled to travel from London to Ottawa on December 10, 2013, on Flight No. AC889. According to the statement, the flight was first delayed for more than four hours while the passengers were on board before it was cancelled, and Air Canada requested 20 volunteers to agree to stay in London overnight and to travel the following day. Air Canada offered to provide the volunteers with accommodation,

airport-hotel transfers and meals. The remaining passengers were to travel on another flight later that day. According to the statement, Mr. Johnson volunteered and was told to collect his baggage and that there would be a van outside the arrivals area to take the passengers to a local hotel where he and the others would be provided with a room and meal vouchers.

[39] Based on these representations, Mr. Johnson collected his baggage and waited outside, but saw neither a van nor any other of the volunteers. He re-entered the terminal and asked an attendant to contact any Air Canada representative who might still be available to assist him. The attendant was unable to locate a representative and spoke by telephone with a reservations person located in Montréal. He was also unable to locate a representative in London. According to the applicants, Mr. Johnson was told to seek his own accommodation and dinner, and seek reimbursement from Air Canada later.

[40] Mr. Johnson states that he stayed at a local hotel and paid for his own meals, incurring expenses of $461.77 for accommodation and $69.79 for meals. When he subsequently requested reimbursement from Air Canada, he was told that the flight was cancelled due to mechanical requirements, that there are instances where avoiding a flight delay is impossible and that times shown on tickets are not guaranteed. According to the applicants, Mr. Johnson was advised that "in a delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim," and that for meals Air Canada would pay $7 for breakfast, $10 for lunch and $15 for dinner. In a subsequent e-mail submitted by the applicants, Air Canada explained that all passengers receive the same amount for meal vouchers, that Air Canada's partner hotels are within its policy guideline costs, and that these guidelines are consistently followed.

[41] Eventually, Mr. Johnson received a payment of $222.00 CAD. It was explained to him that as he is a premium passenger, he received $150 towards his hotel, $7 for breakfast, $15 for dinner and $50.00 for transportation to the hotel.

[42] According to Air Canada, Flight No. AC889 was cancelled due to low hydraulic system pressure caused by a wiring fault, and most passengers were re-protected on another flight the same day. Those who were required to stay overnight in order to travel on the following day were provided with accommodation, airport-hotel transfers and meals. In a statement dated January 20, 2016, Air Canada's Senior Director of Maintenance Operations Control states that the hydraulic system of the aircraft used to operate Flight No. AC889 was checked prior to every flight, that no defect was detected on the inbound flight, and that the malfunction could not have been detected or prevented by Air Canada. Air Canada claims that to limit the effects of this irregular operation, it called for volunteers to stay overnight in London.

[43] Air Canada states that pursuant to the Montreal Convention, it was not required to reimburse out of pocket expenses or provide accommodation and meals following the uncontrollable cancellation of Flight No. AC889. Air Canada further states that Mr. Johnson was offered accommodation and meals for an overnight stay, as he answered a call for volunteers to travel on the subsequent day. Air Canada provided, as evidence, Mr. Johnson's Passenger Name Record (PNR), which states that after Mr. Johnson missed transportation to the hotel, an Air Canada agent advised him to prepare a claim. Air Canada states that when Mr. Johnson asked if there was a limit to the amount he might claim, he was told that only the customer relations representatives would have this information.

[44] The applicants accept that Flight No. AC889 was cancelled due to mechanical failure. However, the applicants argue that Air Canada has failed to establish that itself, its servants, and its agents have taken all reasonable measures to prevent the delay or that such measures were not available. The applicants rely on *Elharradji c. Compagnie Nationale Royal Air Maroc,* 2012 QCCQ 11 (CanLII) [Elharradji] for the proposition that "mechanical issues affecting only one particular aircraft are not recognized as *force majeure* capable of establishing a defence under Article 19 of the Montreal Convention" They further rely on *van der Lans v. KLM,* European Court of Justice, Case C-257-14, which, according to the applicants, states that the prevention of mechanical breakdowns, including the replacement of a prematurely defective component, is not beyond the control of the carrier. The applicants also refer to *Quesnel c. Voyages Bernard Gendron Inc.,* [1997] J.Q. No. 5555, which states that the carrier [translation] "should provide for the possibility of mechanical breakdowns and have in place efficient replacement solutions in order to provide the service that has been promised." According to this decision, [translation] "the onus is on the carrier to establish that no other reasonable substitutions were available, including the putting into service of a replacement aircraft."

[45] With respect to the facts of this case, the applicants allege that Air Canada could and should have anticipated the breakdown of the aircraft as there is no evidence to suggest that the breakdown was caused by a systemic (manufacturing) issue affecting all aircraft of this model or by an act of terrorism or sabotage, that it has full control over its fleet and its maintenance, and that it chose to use a 25-year-old aircraft that could be prone to mechanical issues.

[46] The applicants contend that Air Canada has not provided evidence to show that once Flight No. AC889 was cancelled, it took all reasonable measures to transport Mr. Johnson to his destination on the same day, or that it was impossible to do so. In addition, the applicants argue that no evidence was provided regarding the availability of seats, including seats in higher classes, on its flights on December 10, 2013, or about the availability of seats on flights of other airlines.

ANALYSIS AND FINDINGS

Application of the Tariff

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

[48] The issue in this case is whether Air Canada complied with the Montreal Convention and properly applied its Tariff (which incorporates the Montreal Convention by reference) in the case of Mr. Johnson. Article 19 of the Montreal Convention establishes that Air Canada is liable for damage occasioned by delay, unless it can prove 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 them to take such measures.

[49] It is undisputed that Flight No. AC889 was cancelled due to low hydraulic system pressure caused by a wiring fault. It is also undisputed that Air Canada accommodated most of the passengers of Fight No. AC889 on another flight to Canada that arrived on the same day. Mr. Johnson volunteered at Air Canada's request to be part of a group that would travel on the next day and have their accommodation, meals and airport transfers paid by Air Canada.

[50] As a volunteer, Mr. Johnson was directed to pick up his luggage and was advised that a van would be waiting to take him to a local hotel where he would be provided with accommodation and meal vouchers. Mr. Johnson claims that he followed the instructions of Air Canada's agents and collected his checked baggage at the arrivals area, but was unable to find the arranged transportation to the hotel. Mr. Johnson's evidence is that the other passengers were able to obtain transportation to the hotel, hotel rooms, and meal vouchers, but that he was not. He does not explain how this happened.

[51] According to Air Canada, the hydraulic system was checked prior to every flight, there was no history of a defect, and no defect was detected on the inbound flight using the same aircraft. The Agency accepts this evidence and finds that Air Canada took all reasonable measures in the circumstances of this case to avoid this mechanical failure.

[52] The applicants rely on Elharradji, and cite from paragraph 13 of that decision which refers to the book *Droit du tourisme au Québec*. The passage quoted from this book indicates that mechanical breakdown is not generally considered by judges to constitute *force majeure,* but that weather conditions and employee strikes can be. However, in the following paragraph of that decision, the Judge refers to another decision of the Court that found that:

> The carrier's exculpation does not constitute proof of the absence of fault or a case of *force majeure* as the cause of the delay. Rather, it is the proof of the measures taken to avoid the damage caused by the delay.

[53] In Elharradji, the passengers were delayed as a result of intermittent strikes by the carrier's pilots. They landed in Montréal late at night and were unable to rent a vehicle to get to their home in Gatineau because the car rental businesses were closed. The passengers sought damages as a result of being forced to stay in the airport overnight and for a missed meeting. The Court, relying on the passage quoted above, found that it was not sufficient that the strike constituted *force majeure*. The Court found that the carrier was required to take reasonable measures to avoid the damages or at least to mitigate them, once at the destination, and that it did not take these steps. The carrier was ordered to pay to the plaintiffs damages equivalent to taxi fare from the airport to their home.

[54] While the Agency is not bound by the Court's decision in Elharradji, the case supports the conclusion that Air Canada is not liable for Mr. Johnson's out-of-pocket expenses. Unlike in Elharradji, where the carrier did not provide the cost of transportation required as a result of the delay, Air Canada made available to Mr. Johnson transportation to the hotel, a room, and meals. The Agency is satisfied that, in the circumstances of this case, Air Canada took all reasonable measures required to avoid the damages incurred by Mr. Johnson.

[55] Moreover, the Agency is not satisfied that the damages incurred by Mr. Johnson were the result of the delay and, therefore, compensable pursuant to the Tariff and the Montreal Convention. In this case, the damages appear to have been the result of Mr. Johnson's failure to present himself, as did the other volunteers, to obtain transportation to the hotel, a room and meal vouchers. For this reason as well, Air Canada was not obligated to compensate Mr. Johnson for the expenses he incurred as a result of failing to avail himself of the accommodations offered by Air Canada and, therefore, did not contravene the Montreal Convention or its Tariff when it offered only a goodwill payment.

[56] Based on the foregoing, the Agency finds that Air Canada has properly applied the terms and conditions set out in its Tariff with respect to Mr. Johnson's travel, as required by subsection 110(4) of the ATR.

Remedy

[57] Subsection 113(1) of the ATR contemplates certain remedial actions only if a carrier has failed to apply the terms and conditions set out in its tariff. Based on the above finding that Air Canada properly applied its Tariff, the Agency cannot grant the requested remedy.

[58] In its answer to the application, Air Canada offered to pay Mr. Johnson CAD$309.56 as a goodwill gesture. Notwithstanding the fact that the Agency cannot award Mr. Johnson his expenses in this case, the Agency encourages Air Canada to honour its offer to pay Mr. Johnson CAD$309.56.

ISSUE 2: HAS AIR CANADA CONTRAVENED SUBPARAGRAPH 122(c)(x) OF THE ATR, BY FAILING TO CLEARLY STATE ITS POLICIES REGARDING LIMITATIONS OF LIABILITY WITH RESPECT TO DELAY OF PASSENGERS IN ITS TARIFF?

Positions of the parties

[59] The applicants submit that paragraph 122(c) of the ATR provides that carriers are required to include in their tariff terms and conditions relating to schedule irregularities and liability limits. The applicants argue that Air Canada is applying a policy that is not set out in its Tariff, and which purports to govern the rights of passengers affected by Air Canada's failure to operate the service or failure to operate on schedule, and limits Air Canada's liability for the accommodation and meal expenses incurred by such passengers.

[60] In support of the argument that Air Canada has such a policy, the applicants filed evidence relating to the reimbursement of expenses incurred by Mr. Johnson as a result of the cancellation of Flight No. AC889, and submit that he was advised that "in a delay or cancel situation such as the one you encountered, our hotel accommodation policy allows up to $100 reimbursement towards your claim." He was also advised that for meals, Air Canada would pay $7 for breakfast, $10 for lunch and $15 for dinner.

[61] As further proof of the existence of the policy, the applicants filed an e-mail dated February 6, 2014, from Air Canada to a passenger who complained about a delay of 24 hours, which he alleged was due to crew availability and not due to weather (as presumably suggested by Air Canada). The passenger indicates that he was provided with a meal voucher of $32, which was insufficient to cover the cost of the meals at the hotel where he had been sent by Air Canada. In the e-mail, Air Canada states that there are instances where avoiding a flight delay is impossible, and that the times shown on tickets are not guaranteed. Air Canada also states that it provides accommodation and meals to passengers when they are forced to stay overnight, and repeats the maximums, which were indicated to Mr. Johnson.

[62] The applicants also submitted a similar e-mail from Air Canada to a different passenger dated November 12, 2014. This e-mail is in response to a complaint dated October 14, 2014, which references attachments containing details of the complaint, but which attachments are not provided. In Air Canada's response, it is indicated that passengers not provided with vouchers would receive compensation for meals up to $15 for dinner, $10 for lunch, and $7 for breakfast. The passenger was invited to send in receipts and it was indicated that she would be reimbursed up to the maximum amounts. Reference is then made to hotel expenses, and it is indicated that consequential expenses such as hotel expenses at destination or intangible losses such as loss of vacation, work time or enjoyment, are not considered.

[63] With respect to the complaint of Mr. Johnson, Air Canada states that it was not obligated to compensate Mr. Johnson because the cancellation was due to a malfunction that could not have been detected and controlled by Air Canada. As the delay was outside of Air Canada's control, the amounts offered to Mr. Johnson, beyond the offer the carrier made to him as a volunteer, were on the basis of goodwill. With respect to the applicants' reference to the other instances involving passengers who are not parties to this application, Air Canada states that the reference to a policy in refusing to reimburse the totality of claimed expenses does not equate to a systemic denial of expenses in controllable situations.

[64] Air Canada argues that the policy in effect at the relevant time of the application constitutes internal recommendations for its customer relations representatives (representatives) and submits that the internal recommendations provide internal guidance for expenses in the context of irregular operations and schedule changes. Air Canada argues that the policies found in documents A-1 and A-2 do not constitute its actual policy for passenger claims, and denies having a policy that limits the reimbursement of passenger expenses for delays that are within its control. Air Canada states that where delays and cancellations are controllable, Air Canada is liable to reimburse out of pocket expenses as per the Montreal Convention and its Tariff.

[65] Air Canada contends that while the Montreal Convention provides for a liability threshold limiting passenger claims for events such as delays, the claims remain subject to the rules of evidence and damage mitigation and, as such, while it has no policy limiting its reimbursement of expenses for controllable delays, a representative will consider all of the elements in deciding to allow or refuse, in totality or in part, the refund request. Air Canada states that while the Montreal Convention prevents the limitation of liability for expenses resulting from a controllable delay, the applicable liability principles may sometimes allow an airline not to reimburse the totality of expenses claimed where damages could have been further mitigated.

[66] The applicants submit that the policies are based on the erroneous premise that under the Montreal Convention Air Canada is not liable for the damages of delayed passengers unless the delay was caused by controllable events. The applicants allege that Air Canada seeks to circumvent the Montreal Convention by using a cause-and-fault oriented terminology of "controllable" and "uncontrollable" events and "schedule change". The applicants submit that liability does not depend on the choice of terminology.

[67] According to the applicants, the policies distinguish between the three different types of delay, and, in cases of schedule change and uncontrollable irregular operations (IROP), the policies contain limitations and/or exclusions of liability by indicating that all compensation is goodwill and should never exceed certain amounts. The applicants argue that this cause-and-fault terminology is inconsistent with the Montreal Convention, which requires the carrier to compensate passengers, unless the carrier can demonstrate that its personnel took all measures that could reasonably be required to avoid the damage incurred by the delay.

[68] The applicants maintain that the cause of the delay does not determine liability even if the delay was caused by uncontrollable events, because it falls short of what is necessary in order to establish a defence under Article 19. In this regard, the applicants submit that they adopt the Agency's analysis in paragraphs 104 and 105 of Decision No. 16-C-A-2013,which states in part that:

> [104] [...] In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier's servants and agents into play in terms of avoidance of liability when it has proved that these personnel 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.
>
> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[69] The applicants submit that the policies provide that in the case of a delay of passengers caused by a schedule change, all compensation is goodwill and the amount of compensation should never exceed the amounts set out in the policies. The applicants argue that Air Canada cannot avoid liability for damages to passengers who were delayed on the basis that the delay was caused by events that occurred prior to the passengers' original scheduled departure.

ANALYSIS AND FINDINGS

[70] Subparagraph 122(c)(x) of the ATR states that every tariff shall contain the terms and conditions of carriage, clearly stating the air carrier's policy in respect of limits of liability respecting passengers and goods. As recently stated by the Agency in Decision No. 31-C-A-2015 (*Khan v. Sunwing*), a carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

[71] The issue raised in the application is whether Air Canada is applying a policy that purports to limit its liability for delay, contrary to the provisions set out in its Tariff (which incorporates the Montreal Convention by reference). Air Canada's position is that the policies do not constitute its actual policy for passenger claims and it denies having a policy that limits the reimbursement of passenger expenses for delays that are within its control.

[72] With respect to Mr. Johnson's travel, the delay occurred as a result of a mechanical failure, and Air Canada asked for volunteers to remain overnight in London. Transportation, meal vouchers, and accommodation were made available to Mr. Johnson. Additional compensation was provided but for reasons that are more fully explained above, the financial compensation offered to Mr. Johnson was in the nature of goodwill and not required by the Montreal Convention. As such, this evidence does not support the applicants' claim that Air Canada is applying a policy that limits its liability.

[73] The e-mails provided by the applicants that describe the complaints of other passengers who were delayed also do not support the applicants' claim. Firstly, these emails constitute hearsay and therefore we would not consider them. However, even if they were admissible, in order to conclude in these cases that Air Canada is applying a policy that purports to limit its liability with respect to delay, the Agency would have to be in the position to conclude that there was an obligation to compensate these passengers for the expenses claimed, and that Air Canada applied a policy to limit its liability in this regard. In both cases, it is not known whether Air Canada or its agents did everything that could reasonably be required to avoid the damage incurred as a result of the delay. In one instance, there appears to be some suggestion that the delay was due to weather, which the passenger disputes. In any event, in these cases there may have been nothing that Air Canada could have done to avoid the damages incurred.

[74] Of course, it remains open for those passengers referenced in these emails to file a separate application should they wish to have their complaint adjudicated by the Agency.

[75] In the circumstances of this case, the Agency finds that the applicants have failed to establish, on a balance of probabilities, that Air Canada is applying a policy that limits its liability to compensate passengers for damage occasioned by delay, contrary to its Tariff or the Montreal Convention. The Agency is not satisfied that, in the case of Mr. Johnson or the other situations to which the applicants have referred, Air Canada was obligated to compensate the passenger for delay, and yet limited its liability in this regard by application of a policy.

[76] In situations such as the one before the Agency, where an airline is not legally required to undertake an action, whether pursuant to its Tariffs or International Conventions, the airline will often voluntarily apply goodwill policies to go beyond its legal requirements. Documents A-1 and A-2 are examples of such "goodwill" policies and, as such, there is no requirement that their contents be included in Air Canada's Tariff. The Agency therefore finds that, in the circumstances of this case, those documents do not constitute a limitation of the airline's liability under its Tariff or the Montreal Convention.

[77] Given the Agency's finding that the applicants have failed to establish that Air Canada is applying a policy as alleged, it follows that the applicants have not met their burden to show that Air Canada has failed to clearly state, in its Tariff, its policy regarding its limits of liability respecting passengers and goods.

[78] Nevertheless, in situations where Air Canada would be legally liable pursuant to Article 19 of the Montreal Convention to undertake an action, any policy that would limit liability would be considered null and void pursuant to Article 26, as Article 26 makes null and void any provision that would relieve an airline of its liability or set a lower limit than that which is laid down by the Montreal Convention.

[79] Based on these findings, it is not necessary to consider whether the policy is just and reasonable within the meaning of subsection 111(1) of the ATR, whether Air Canada has failed to apply its Tariff systemically by applying the policy instead of its Tariff, and what remedies should be provided.

CONCLUSIONS

Issue 1

[80] The Agency finds that, on a balance of probabilities, Air Canada has properly applied the terms and conditions set out in its Tariff with respect to Mr. Johnson's travel, as required by subsection 110(4) of the ATR.

Issue 2

[81] The Agency finds that Air Canada has not contravened subparagraph122(c)(x) of the ATR, by failing to clearly state its policies regarding limitations of liability with respect to delay of passengers in its Tariff.

[82] For the above reasons, the Agency dismisses the application.

(signed)

William G. McMurray
Member

(signed)

Sam Barone
Member

(signed)

P. Paul Fitzgerald
Member