
DECISION NO. 313-C-A-2013

August 15, 2013

COMPLAINT by Gábor Lukács against Sunwing Airlines Inc.

File No. M4120-3/13-02395

INTRODUCTION

- [1] On April 22, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that Rules 3.4, 15, 18(c), 18(e), and 18(f) of Sunwing Airlines Inc.'s (Sunwing) International Tariff (Tariff) are unclear, contrary to paragraph 122(c) and unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). Those Rules concerns Sunwing's liability for schedule changes such as flight delay, advancement and cancellation.
- [2] In its answer, as amended on June 3, 2013, Sunwing states that it proposes to delete Tariff Rule 3.4 and certain provisions of Tariff Rule 18 as they were repetitive with Tariff Rule 15. Sunwing advised that it would be replacing its Tariff Rule 15 with Proposed Tariff Rules 15 and 15A, which are, in its opinion, compliant with the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention), the Code of Conduct of Canada's Airlines and Transport Canada's Flight Rights provisions, and reflect the Agency's jurisprudence.
- [3] In his reply, also dated June 3, 2013, Mr. Lukács states that the parties agree, among other things, that Sunwing's Proposed Tariff Rules 15 and 15A fully address the issues raised in his complaint.
- [4] Sunwing subsequently filed, in its Tariff with the Agency, Proposed Tariff Rules 15 and 15A for an effective date of June 14, 2013. In this case, only Proposed Tariff Rule 15 is relevant to the matter before the Agency. Given that the Previous Tariff Rules to which Mr. Lukács objected in his complaint are no longer in effect, it is not necessary for the Agency to address the clarity and reasonableness of those Rules.
- [5] The Agency therefore will only consider the clarity and reasonableness of Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3).

ISSUES

1. Is Existing Tariff Rule 15(1)(h) clear within the meaning of paragraph 122(c) of the ATR?
2. Are Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) reasonable within the meaning of subsection 111(1) of the ATR?

RELEVANT STATUTES AND TARIFF EXTRACTS

- [6] The relevant Tariff provisions and the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF THE PROPOSED TARIFF RULES

Test for clarity

- [7] In Decision No. 2-C-A-2001, the Agency formulated the test respecting the carrier's obligation of tariff clarity as follows:

[...] the Agency is of the opinion that an air carrier's tariff meets its obligations of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Test for reasonableness

- [8] 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 recently applied in Decision No. 227-C-A-2013 (*Lukács v. WestJet*).

ISSUE 1: IS EXISTING TARIFF RULE 15(1)(h) CLEAR WITHIN THE MEANING OF PARAGRAPH 122(c) OF THE ATR?

Analysis and findings

- [9] The Agency notes that Existing Tariff Rule 15(1)(h) states that the rights of a passenger vis-à-vis Sunwing are, in most cases of international carriage, governed by the Montreal Convention. The same Rule also provides that a carrier is liable for damage caused by delay in the carriage of the passenger and goods unless the carrier proves that it did everything that could reasonably be expected to avoid the damage.

- [10] As stated in the test for clarity set out earlier in this Decision, an air carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.
- [11] The Agency finds that Existing Tariff Rule 15(1)(h) clearly establishes that a carrier does have liability for loss, damage or delay of baggage and only in exceptional circumstances is a carrier able to raise a defence to a claim for liability or invoke damage limitations.
- [12] The Agency therefore finds that Existing Tariff Rule 15(1)(h) is clear within the meaning of paragraph 122(c) of the ATR.

ISSUE 2: ARE EXISTING TARIFF RULES 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) AND 15(3) REASONABLE WITHIN THE MEANING OF SUBSECTION 111(1) OF THE ATR?

Analysis and findings

- Existing Tariff Rule 15(1)(e) states, in part, that a passenger has a right to information on flight times and schedule changes;
 - Existing Tariff Rule 15(1)(f)(i) states, in part, that a passenger whose journey has been interrupted by an advance flight departure, a flight cancellation or overbooking, will be provided with remedial choices of whether they wish to continue to travel or receive a refund;
 - Existing Tariff Rule 15(1)(b) establishes that Sunwing shall not be liable for damage occasioned by overbooking or cancellation if it proves that it and its employees and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for the carrier and its employees or agents to take such measures;
 - Existing Tariff Rule 15(1)(f) states that a passenger whose journey is interrupted by an advance flight departure, a flight cancellation or overbooking will be provided with the option of accepting one or more of the following: reimbursement of the total price of the ticket for the parts of the journey not made, and/or transportation to the passenger's intended destination at the earliest opportunity at no additional cost.
- [13] With respect to a passengers' right to notice about schedule changes, the Agency noted in Decision No. 16-C-A-2013 that some Canadian carriers have tariff provisions stating that that passengers have a right to information on flight times and schedule changes and found such a tariff provision to be reasonable.
- [14] Concerning a carrier's liability for damage, the Agency stated in Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*) that Article 19 of the Convention imposes certain obligations upon the carrier, beyond those of payment of compensation:

A carrier, pursuant to Article 19 of the Convention, is liable for damage occasioned by delay in the carriage of, amongst other matters, passengers, but will 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 it was impossible for them to take such measures.

- [15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.
- [16] The Agency is of the opinion that all of the Agency's findings stated above are applicable to this complaint.
- [17] The Agency finds that Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) are reasonable in that they strike a balance between the right of passengers to be subject to reasonable terms and conditions of carriage and Sunwing's statutory, commercial and operational obligations. Furthermore, these provisions are consistent with previous Agency decisions.

CONCLUSION

Issue 1

- [18] The Agency has determined that Existing Tariff Rule 15(1)(h) is clear within the meaning of paragraph 122(c) of the ATR.

Issue 2

- [19] The Agency has determined that Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) are reasonable in that they strike a balance between the right of passengers to be subject to reasonable terms and conditions of carriage and Sunwing's statutory, commercial and operational obligations. Furthermore, these provisions are consistent with previous Agency decisions.

(signed)

J. Mark MacKeigan
Member

(signed)

Sam Barone
Member