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**Via E-mail: [sylvie.giroux@otc-cta.gc.ca](mailto:sylvie.giroux@otc-cta.gc.ca)**

Canadian Transportation Agency  
Air and Accessible Transportation Branch  
Air & Marine Investigation Division  
Ottawa, Ontario  
K1A 0N9

Attention: Sylvie Giroux, Analyst

Dear Sirs/Mesdames:

**RE: File No. M4120-3/13-01696  
Complaint by the Nawrots Family against  
Sunwing Airlines  
Our File No. 213062**

**Submissions by Sunwing Airlines Inc.**

The Nawrots' Complaint involves two separate and distinct issues and seeks two separate and distinct remedies.

The first being the Nawrots' complaint challenging the determination that they failed to present for check-in prior to the stipulated cut-off time for check-in and that therefore, they were improperly denied boarding of Sunwing Airlines Flight WG201.

The second being a challenge to the clarity and reasonableness of Sunwing Airlines' International Tariff rules with respect to denied boarding compensation where a passenger is denied boarding for reasons of the carrier overselling its flight.

Sunwing Airlines will be responding directly and separately to that part of the Complaint challenging its International Tariff rules.

We have been retained by Sunwing Airlines to respond to the Nawrots' allegations with respect to their having been improperly denied boarding of Sunwing Flight WG201.

**Overview**

The circumstances of the Nawrots' Complaint arise from their contracting with Sunwing Airlines for a journey of international carriage by air, departing Toronto, Canada July 29, 2012 and returning to Toronto, Canada August 10, 2012 with an agreed

stopping place at London's Gatwick International Airport, UK. The Nawrots booked and purchased their carriage on line by way of the Sunwing website.

The return portion of the Nawrots' journey by air was originally scheduled to depart Gatwick at 12:20 local time August 10, 2012 on an aircraft operated as Sunwing Airlines Flight WG201. However, as a result of delays encountered by the inbound aircraft arriving from Pearson, the scheduled departure of Flight WG201 was delayed and ultimately rescheduled to depart Gatwick at 02:25 local time August 11, 2012.

The cut-off for passenger check-in for Flight WG201 was 01:25 local time August 11, 2012.

The essence of the Nawrots' Complaint is their allegation that they arrived for check-in prior to 01:25 local time August 11, 2012 and at which time they allege the check-in for Flight WG201 had already been closed.

A determination of the Nawrots' Complaint is solely dependent on whether, on a balance of probabilities, the Nawrots can prove they arrived for check-in prior to 01:25 local time August 11, 2012 *and* that the check-in counter was closed by Sunwing Airlines prior to the cut-off time of 01:25 local time August 11, 2012.

If the Nawrots simply failed to present for check-in prior to cut-off for check-in, they breached their contract for carriage and there is no entitlement to compensation.

**Were the Nawrots aware of the cut-off time for check in and the recommended time for arrival at check-in for Flight WG201?**

As the Nawrots booked and purchased their contracts of carriage on-line; in order to complete their booking, they were obligated to positively accept the terms and conditions of carriage, which incorporate Sunwing Airlines' International Tariff for Scheduled Service.

**Affidavit of Joanne Dhue, sworn April 17, 2013**

Subsequent to completing their booking, the Nawrots received by email from Sunwing Airlines an E-ticket which provided information for travel, the conditions of the contract and, by incorporation, the Tariff rules.

**Exhibit "A" to the Affidavit of Raymond Nawrot, sworn February 28, 2013**

**Exhibit "C" to the Affidavit of Joanne Dhue, sworn April 17, 2013**

In their submissions, the Nawrots admit, and the Tariff Rules and Terms and Conditions required, that check-in for Flight WG201 be left open until no later than 01:25 local time August 11, 2012. Alternatively worded, it was required that the Nawrots check-in for Flight WG201 no later than 01:25 local time August 11, 2012.

The Nawrots' E-ticket as well as Sunwing Airlines' Terms and Conditions stipulates that check-in for Flight WG201 was to be open at 22:25 local time August 10,

2012 (four (4) hours prior to its scheduled departure) and strongly recommended that the Nawrots arrive at Gatwick for check-in at 22:25 local time August 10, 2012.

As Mr. Nawrot has further admitted, the Nawrots were aware as of 14:30 local time August 10, 2012 (the time and date of the last email notification of schedule changes Mr. Nawrot received from Sunwing Airlines) that the recommended time that they arrive at Gatwick for check-in was 22:25 local time August 10, 2012 and that the cut-off time for check-in was 01:25 local time August 11, 2012.

**Exhibit "E" to the Affidavit of Raymond Nawrot, sworn February 28, 2013**

**When did the Nawrots present for Check-in?**

***Evidence of Sunwing Airlines***

All of the reports generated pursuant to standard operating procedures record that the scheduled departure time for Flight WG201 was 02:25 local time/01:25 UTC August 11, 2012.

**Exhibit "H" to the Affidavit of Joanne Dhue, sworn April 17, 2013**

**Exhibit "K" to the Affidavit of Joanne Dhue, sworn April 17, 2013**

The Nawrots admit in their submissions, and the Tariff Rules and Terms and Conditions required, that the cut-off for check-in for Flight WG201 was 60 minutes prior to the scheduled time of departure or 01:25 local time/00:25 UTC August 11, 2012.

**Complaint of the Nawrots, Argument, page 8, paragraph 3**

The Passenger Services Supervisor for Swissport, Sunwing Airlines' ground handling agent at Gatwick International Airport (Gatwick) completed the Shift Report at the time of Flight WG201. This report states that check-in was in fact closed at 01:25 local time, one hour prior to the scheduled departure of Flight WG201. Further, it specifically states that four passengers turned up fifteen (15) minutes after check-in had closed and that the Supervisor checked with the dispatcher at that time who denied them travel.

**Exhibit "I" to the Affidavit of Joanne Dhue, sworn April 17, 2013**

Vic Tydeman, the Passenger Services Supervisor who completed the Shift Report, recalls this incident and confirms that three (3) passengers arrived at check-in at 01:45 August 11, 2012 and that a fourth passenger arrived approximately 5 minutes after they did.

We are awaiting receipt of a signed Declaration from Mr. Tydeman but will not receive it until the morning of April 18, 2013. At which time we will immediately forward it to the Agency and the parties. In the meantime, we attach to these submissions a copy of the unsigned Declaration of Vic Tydeman. We are also awaiting receipt of a sworn Affidavit from Mr. Tydeman. We understand that Mr. Tydeman has been off shift for some time only returning to work recently. This and the time difference between

Toronto and London, UK have caused the late arrival of the signed Declaration and Affidavit.

**Unsigned Declaration of Vic Tydeman**

The airline industry in general and Sunwing Airlines in particular, follows strict policies and procedures with respect to all aspects of its operations. Following those policies and procedures is not left to the whim of individuals. Prior to the Nawrots' complaint, never in the history of Sunwing Airlines has there been any report or complaint of check-in for a flight being closed prior to 60 minutes before the scheduled departure of the flight in question.

**Affidavit of Mark Williams, sworn April 17, 2013**

***Evidence of the Nawrots***

Contrary to the submissions of the Nawrots, they have not provided consistent evidence of when they presented for check-in nor have they provided any independent or objective evidence to support their claim that they arrived at check-in prior to 01:25 local time August 11, 2012. Where there is such independent or objective evidence readily available, they have chosen not to proffer this evidence.

The Nawrots contend that they presented for check-in at 01:10 local time August 11, 2012. In order to support this they have attempted to establish a timeline based on assumptions derived from two documents; a redacted credit card payment summary showing the purchase of a single train ticket from Victoria Station to Gatwick and a pre-authorization for their hotel at Gatwick dated 02:05:23 August 11, 2012.

The Nawrots' evidence that they presented for check-in at 01:10 August 11, 2012 has not been consistent.

Raymond Nawrot's sworn Affidavit simply states his recollection that they "*arrived at the London Gatwick Airport on August 11, 2012 shortly after 1:00 am.*" and subsequently arrived "*at the check-in area at London Gatwick Airport (North Terminal) at approximately 1:10 am*". Importantly, it establishes that it took the Nawrots some time (approximately 10 minutes by Mr. Nawrot's recollection) to get from the train to the Sunwing Airlines check-in counter.

The unsworn Declaration of Karolyn Theresa Nawrot, who was 15 years old at the time, states that she "*distinctly remember that we arrived at the North Terminal of Gatwick Airport a few minutes past 1 o'clock in the morning, and we found all check-in counters closed.*"

The unsworn Declaration of Kristina Marie Nawrot, who was 17 ½ years old at the time, states "*I was very tired, and I do not remember the time that we arrived at the airport.*"

Each of these statements fail to acknowledge that all trains from Victoria Station to Gatwick arrive at the South Terminal. Accordingly, the Nawrots had at least three options to get to the Sunwing Airlines check-in counter located at the North Terminal; a

shuttle bus, walk or taxi. We have no evidence of what mode the Nawrots chose. Only Raymond Nawrot's Affidavit identifies that in his recollection it took approximately 10 minutes to get from the South Terminal to the check-in counter at the North Terminal.

#### **Appendix "A" to the Submissions of Sunwing Airlines**

In his email to Sunwing Airlines immediately following the incident and dated August 11, 2012 at 4:21 a.m. Mr. Nawrot states that he "*arrived at the airport at 0115.*" and "*On arrival the checkin (sic) counter was closed...*" This suggests that his immediate and contemporaneous recollection, which is to be preferred, was that he arrived at the South Terminal at 01:15 and then had to make his way to the North Terminal. Even if Mr. Nawrot's sworn testimony is accepted on this point, this would have taken approximately 10 minutes and placed the Nawrots at the check-in counter at approximately 01:25 local time, the time for cut-off.

#### ***The Train to Gatwick from Victoria Station***

The Nawrots have attempted to establish that their arrival at check-in at 01:10 makes sense based on their time of arrival by train at Gatwick. However, they have not provided the train ticket. Rather, they have assumed that it must have been the Southern Railway train marked SN scheduled to depart Victoria Station at 00:14 and arrive at Gatwick at 00:59 August 11, 2012. Further, they have assumed that the trains run exactly on schedule. These assumptions are based a) on their position that they arrived at check-in at approximately 01:10 August 11, 2012 and b) the credit card payment summary.

There are several problems with the Nawrots assumptions.

They must make these assumptions in order to establish they made the time for check-in and to that extent they are self serving.

The Nawrots have provided no evidence that the British rail system runs on time. In fact, in the absence of any such evidence, it is submitted the British rail system is notorious for not running on time. In any event, any times set out in the train schedule can only be approximate.

#### **Appendix "B" to the Submissions of Sunwing Airlines**

The Southern Railway owns and operates the Gatwick Express (GX). Accordingly, the schedule for all SN and GX trains is relevant. Without proof to the contrary, the submission that the credit card was processed by Southern Railway does not exclude tickets purchased for the Gatwick Express trains.

#### **Appendix "C" to the Submissions of Sunwing Airlines**

The redacted credit card payment summary reveals at most that only one ticket was purchased. There is no record of for which train (SN or GX/time of departure) the ticket was purchased nor is there any record of a ticket being purchased for two adults and one child. Further, there is no record of when or where the ticket was purchased. That is, was it purchased on-line prior to arriving at Victoria Station or once they arrived at Victoria Station?

There is a real issue as to when the Nawrots arrived at Victoria Station and therefore, when they departed for and arrived at Gatwick.

The Nawrots proposed timeline begins with when they checked out of their hotel. And yet, they have failed to provide any documentary evidence of when they checked out; notwithstanding that it should be easily obtainable from the hotel. Instead, we have:

- Raymond Nawrot's affidavit evidence that they "*departed from the Holiday Inn Express in North Acton to London Gatwick Airport between 10:00 pm and 11:00 pm in the evening. We first travelled by the Underground, and then by train.*"
- Karolyn Theresa Nawrot's declaration that "*we departed from the Holiday Inn to the London Gatwick Airport at approximately 11:00 pm... We first took the Underground, and then we transferred at a station called "Victoria". The trip from the hotel to the airport took a little over an hour and a half.*"
- Kristina Marie Nawrot's declaration that "*We left the Holiday Inn Express a few hours later, although I do not remember the exact time, and we headed to the London Gatwick Airport. We first took the Underground, we transferred once, and then took a train to the airport. The train ride took a little less than an hour.*"

Sunwing Airlines submits that the Underground station closest to the Nawrots' hotel was North Acton Station located immediately behind their hotel and, according to the Transport for London website, 24 minutes is the average journey time from North Acton to Victoria station. Based on Raymond Nawrot's evidence this would place the Nawrots at Victoria Station between 22:30 and 23:30 August 10, 2012.

#### **Appendix "D" to the Submissions of Sunwing Airlines**

The train schedule for all Southern Railway trains to Gatwick discloses that there were 17 trains departing Victoria Station from 22:30 August 10, 2012, and 10 trains departing from 23:30 August 10, 2012, up to and including the 00:14 August 11, 2012 train the Nawrots have assumed was actually taken.

#### **Annex "A" to the Complaint of the Nawrots, page 39 and 40.**

The Nawrots have failed to proffer any objective documentary evidence of which train they actually took from Victoria Station. However, on any reading of the evidence that has been proffered, it is submitted that the Nawrots have failed to explain why it is they chose to wait until 00:14 to take the train to Gatwick. Assuming that they did leave the hotel between 22:00 and 23:00 August 11, 2012, there is no explanation for not having taken an earlier train from Victoria Station. Rather, it begs the question, given that time was known to be of the essence to the Nawrots with the fast approaching cut-off time for check-in, why they would not take the earliest train available.

We can see that there are purchases on the credit card payment summary between the time of the purchase of a railway ticket and the hotel at Gatwick which have been redacted. These are relevant and should be revealed and disclosed as well as any supporting invoices/receipts.

**Exhibit “G” to the Affidavit of Raymond Nawrot, sworn February 28, 2013**

On the Nawrots theory of their case, they went directly from their hotel to Victoria Station and then directly from Victoria Station to Gatwick Airport and the Sunwing Airlines check-in. They have suggested that the purchase of the train ticket occurred at Victoria Station. This does not leave any time for the redacted purchases to have been made.

Taken as a whole, the many gaps in the Nawrots timeline suggest alternative and equally viable explanations for the Nawrots arriving at the check-in counter after 01:25 August 11, 2012. Which include, they simply took a later train; they purchased a railway ticket for a specific train but for some reason failed to make that train resulting in purchasing another train ticket; or, they simply arrived at Victoria Station much later than they submit and purchased tickets on a train that arrived at Gatwick too late for them to make the time for cut-off of check-in. Even this assumes all purchases were made by credit card.

According to the train schedule, there is a Gatwick Express (GX) train scheduled to depart Victoria Station at 00:30 and arrive at Gatwick at 01:20 August 11, 2012, as well as a Southern (SN) train scheduled to depart at 01:00 and arrive at Gatwick at 01:47. Each of these trains was scheduled to take approximately 50 minutes to arrive at Gatwick.

***The 4<sup>th</sup> passenger “denied boarding” of WG201***

In his correspondence to Sunwing Airlines dated August 11, 2012; August 27, 2012; October 19, 2012 and January 21, 2013, Mr. Nawrot repeatedly refers to another passenger who was denied boarding of Flight WG201 for the same reasons the Nawrots allege they were denied boarding; presenting for check-in prior to the 60 minute cut-off only to find the check-in counter closed.

**Exhibits “I”, “P”, “R” and “X” to the Affidavit of Raymond Nawrot, sworn February 28, 2013**

In his January 21, 2013 letter, Mr. Nawrot states that he has *“been in touch with this traveller since the beginning of our ordeal.”*

The Swissport Shift Report states that four (4) passengers “turned up 15 minutes after closure time checked with dispatcher who advised most pax boarded so denied them travel.” The Supervisor and report’s author, Vic Tydeman, has declared that a fourth passenger arrived at the check-in counter approximately 5 minutes after the first three passengers who had arrived at the check-in counter at 01:45 local time August 11, 2012.

**Exhibit “I” to the Affidavit of Joanne Dhue, sworn April 17, 2013**

**Unsigned Declaration of Vic Tydeman**

Sunwing Airlines subsequently investigated each and every one of the passengers that did not show up for Flight WG201 (“no-shows”) to determine whether the “4<sup>th</sup> passenger” was indeed denied boarding for failing to present for check-in. The result of that investigation ruled out any such passenger.

**Affidavit of Joanne Dhue, sworn April 17, 2013**

Logically, if a passenger was indeed denied boarding as alleged by the Nawrots, a claim or at least a complaint would be expected. However, there has been no complaint or report by or of any such passenger.

**Affidavit of Joanne Dhue, sworn April 17, 2013**

**Affidavit of Mark Williams, sworn April 17, 2013**

While Mr. Nawrot contended that he had spoken to this “4<sup>th</sup> passenger”, the Nawrots have failed to proffer any affidavit or statement from this passenger in support of their Complaint.

Interestingly, despite his repeated allegations, Mr. Nawrot’s sworn Affidavit makes no reference to a “4<sup>th</sup> passenger” that was denied boarding for the same reasons the Nawrots allege. Rather, there is only reference to a passenger complaining with respect to being delayed on the inbound Sunwing Airlines flight from Toronto to Gatwick and to a passerby.

**Affidavit of Raymond Nawrot, sworn February 28, 2013**

In light of Mr. Nawrot’s own Affidavit, the Nawrots’ failure to proffer any evidence from the “4<sup>th</sup> passenger”, and the investigation by Sunwing Airlines, we submit there is little if any merit to there having been any passenger other than the Nawrots denied boarding for failing to present for check-in within the time for cut-off of Flight WG201.

***Other credibility issues***

Mr. Nawrot states in his Affidavit that he spoke on the telephone with a member of Gatwick Airport staff and that this person contacted the Captain of Flight WG201. We submit that this is not credible. Such action is not within the standard procedures of carriers or airport authorities and it would only be the rarest of cases where the airport authority would contact the Captain directly to discuss the denied boarding of a passenger. Further, in the event of such a rare case, there would be a record of the communication reported in the Captain’s Report. There is no such record.

**Affidavit of Joanne Dhue, sworn April 17, 2013**

It is our submission, the airport never contacted the Captain of Flight WG201.

Mr. Nawrot in his Affidavit and elsewhere has relied on his allegedly having spoken to a janitor. Obviously, we do not have this janitor’s evidence and any such



evidence is therefore merely hearsay not to mention lacking any credibility. Without such evidence, it is more than difficult to give any credence to a janitorial staff member's knowledge of flight departures generally and for Flight WG201 in particular.

### **Summary**

Essentially and overarching this entire complaint is the Nawrots' suggestion that Sunwing Airlines would randomly and capriciously close its check-in counters early for no other reason than its agents were working the night shift.

Such a suggestion is illogical and runs counter to Sunwing Airlines' very business of carrying its passengers to destination.

### **Affidavit of Mark Williams, sworn April 17, 2013**

The airline industry generally and Sunwing Airlines in particular is a highly regulated industry that follows strict procedures and policy in order to operate safely and efficiently. Accordingly, Sunwing Airlines relies on complete and accurate reporting in all areas of its operations. The evidence of Sunwing Airlines reflects and confirms this reporting exists in the circumstances of this matter.

Further, given its reporting procedures and the nature of its business, it was reasonable for Sunwing Airlines to rely on its reports throughout the history of the Nawrots' complaint.

Another fact that colours the entirety of the Nawrots' Complaint is that by their own admission the Nawrots were fully aware as of 14:30 August 10, 2012 (the time of the final rescheduling notification received from Sunwing Airlines) that the recommended time for arrival for check in was 22:25 local time August 10, 2012, four (4) hours prior to the 02:25 local time scheduled departure of Flight WG201. And yet, the Nawrots submit that they did not actually leave their hotel until between 22:00 and 23:00 August 10, 2012 and did not board a train to Gatwick until 00:14 August 11, 2012.

There can be no doubt that the Nawrots alone chose to allow very little room to arrive in time for check-in for Flight WG201 and this should be a factor in determining the credibility of and weighing the evidence.

This case would benefit from cross-examination on the evidence as credibility is squarely in issue. Unfortunately, cross-examination is not available in this forum. However, without clear, strong and uncontroverted evidence on the part of the Nawrots, it is submitted the evidence of Sunwing Airlines should be preferred.

The evidence proffered by the Nawrots is comprised solely of their own recollection and derivative assumptions and is essentially self serving. Where there has been opportunity to provide objective, independent evidence, they have failed to provide it.

## The Law

### *Denied Boarding*

All of the Nawrots submissions with respect to the law assume that they arrived in time for check-in. Sunwing Airlines submits on a balance of probabilities the available evidence establishes the Nawrots were late for check-in for Flight WG201.

Sunwing Airlines submits in the circumstances of this case the denial of boarding of the Nawrots was a result of their own conduct and not that of the carrier. Accordingly, this is not a case where the Nawrots were “bumped” or denied boarding by the carrier’s overselling of the flight or delay on the part of the carrier.

The *Montreal Convention, 1999*, incorporated into the laws of Canada by the *Carriage by Air Act, R.S.C. 1985, Chapter C-26* as amended (the “*Convention*”) does not apply in the case of complete non-performance of the contract for carriage. Rather, where there is non-performance as opposed to delay, the contract governs.

*Carriage by Air Act, R.S.C. 1985, c. C-26, Schedule VI*

*Khan v. KLM Royal Dutch Airlines et al.*, unreported, Court File No. 07-CV-339072 PD3, September 30, 2009 (Ont. Sup. Ct.)

*Ratnaswamy v. Air Afrique*, 1998 U.S. Dist. LEXIS 2683 (N.D. Ill, 1998)

*Paradis v. Ghana Airways Ltd.*, 30 Avi 15,806 (S.D.N.Y., 2004)

In these circumstances, the Nawrots have accepted that the terms of the contract of carriage apply (both in their submissions and as a matter of law by positively accepting them in order to complete their online booking). In particular, they were obligated to present themselves for check-in 60 minutes prior to the scheduled departure of Flight WG201.

Accordingly, pursuant to the terms of the contract, Sunwing Airlines’ Tariff rules, and fundamental principles of contract, the Nawrots failed to present themselves in time for check-in and thereby breached the contract of carriage. Accordingly, Sunwing Airlines was justified in refusing to carry the Nawrots and they are precluded in law from any recovery.

### *Delay*

With respect to the approximate 14 hour delay in departure of Flight WG201, Sunwing Airlines acknowledges that the *Convention* applies and Sunwing Airlines would be liable pursuant to Article 19 for the proven out of pocket expenses incurred by the Nawrots caused by that delay. In which case, the Nawrots are relegated to compensation for the expense of their hotel accommodation August 10, 2012 in the amount of \$157.99 as well as a reasonable amount for food expense. For which, in the absence of proof, Sunwing Airlines takes no exception to calculating at \$20 per person, per meal but only for the two meals affected by the 14 hour delay – lunch and dinner; or, \$120.00 total.

*Lukacs v. United Airlines Inc.*, 2009 MBQB 29 affirmed 2009 MBCA 111

*Chau v. Delta Airlines Inc.* (2003), 67 O.R. (3d) 108 (S.C.J.)

### **Subsequent Conduct of Sunwing Airlines/Settlement Discussions/Costs**

As with their submissions with respect to the law, the Nawrots' submissions on the subsequent conduct of Sunwing Airlines assume that the Nawrots' arrived in time for check-in. It is Sunwing Airlines' submission the Nawrots did not.

It is improper and there is no basis for any offers to settle this matter being relied upon by the Nawrots to establish liability on the part of Sunwing Airlines simply because they were made. Settlement discussions, whether or not they specifically state they are made on a without prejudice basis, are not properly part of the determination of liability and should not be placed before the Agency at this time.

Their disclosure and the fact that they have not been taken up are properly considered when it comes time to speak to costs.

Nonetheless, the correspondence of Sunwing Airlines attempting to resolve the Nawrots' complaint, which should not properly be before the Agency, speaks for itself and makes no mention of any admission of liability on the part of Sunwing Airlines.

In fact, the position of Sunwing Airlines has been consistent throughout the history of the Nawrots' complaint. At no point in time has Sunwing Airlines ever admitted that the Nawrots' were improperly denied boarding of Flight WG201.

Rather, any and all offers by Sunwing Airlines to resolve this matter were made on the basis of good will and compassionate grounds alone.

Any discussion with respect to costs should follow the determination of the Nawrots' complaint and, accordingly, Sunwing Airlines requests that it be permitted to make costs submissions at that time.

All of which is respectfully submitted.

Yours truly,

Clay S. Hunter

CSH  
Enclosures

cc The Nawrots Family c/o Louis Béliveau  
(by email: [lbeliveau@loogol.ca](mailto:lbeliveau@loogol.ca))