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New Argument on Erroneously Filed Fares Finds Favour

There has been a series of passenger complaints brought before the Canadian Transportation Agency (the "Agency") over the last year that have given rise to a previously unused defence that air carriers can avail themselves of when erroneously low fares are offered for sale on the GDS.

The story begins with a case decided in June 2013 involving 15 complainants (including the named passenger, Brewer), where these passengers purchased 15 one-way, multi-segment tickets for travel from Yangon, Myanmar with Montreal as the final destination. The tickets each involved three to five segments, for the most part in business or first class. All were purchased through Expedia or Travelocity with the ticket prices ranging from ~ US$550 to US$850. The actual values of those tickets were several multiples of the actual prices paid.

Six days after the tickets were purchased, the passengers were notified that Swiss International Airlines ("Swiss") was going to cancel the tickets. Full refunds were subsequently provided.

The aggrieved passengers launched complaints with the Agency against Swiss, claiming various forms of redress such as: the reinstatement of the tickets for alternate travel dates or destinations and the reimbursement of monies paid to buy similar carriage from other airlines. The various complaints were consolidated by the Agency and heard as one process.

Swiss justified its actions by citing Rule 5(F) of its *International Rules and Fares Tariff, NTA(A) No. 496*, which provides:

> Swiss reserves the right to cancel reservations and/or tickets with an erroneously quoted fare *by reason of a* ***technical failure*** prior to said erroneous quote being detected and corrected. Swiss reserves the right to void the purchased ticket and refund the amount paid by the customer and/or offer the customer the ticket at a published fare that should have been available at the time of the booking.
>
> [***emphasis added***]

Four of the 15 complainants argued that this tariff provision was of no application to them because it was not posted on Swiss' website at the time that they purchased their tickets (although it was on file with the Agency).

On this point, the Agency held that "[a]ir carriers cannot rely on terms and conditions that are filed with the Agency but not disclosed to customers on the carrier's Web site or in other publicly-available tariffs. Swiss' failure to maintain a current tariff on its Web site represents a contravention of section 116.1 of the *Air Transportation Rules*, SOR/88-58" (the "*ATR*s").

In any event, even though the Agency seemed sympathetic to the complainants on this preliminary issue, it did not really play a role in the final decision, given the balance of the Agency's analysis.

Instead, to deal with this complaint, the Agency considered three issues, as follows:

1. Are Swiss' cancellation terms for erroneously quoted fares "clearly stated" in its tariffs?
2. Is Swiss' Tariff Rule 5(F) "just and reasonable"?
3. Did Swiss properly apply Tariff Rule 5 (F) in this circumstance?

On the first point, the Agency considered the arguments of the complainants that the tariff term "technical failure" is ambiguous and not easily discernible from the drafting. According to the Agency, Swiss did not address the issue of tariff clarity in its submissions.

As guidance, the Agency looked to *H. v. Air Canada*, Decision No. 2-C-A-2001, where the Agency ruled that:

> … the Agency is of the opinion that an air carrier's tariff meets the 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.

In analysing Tariff 5(F), the Agency noted that it did not include a definition of the term "technical failure", nor did it provide any examples. The Agency implied in its decision that it may be somewhat of a stretch to include "human error" as a technical failure — and, consequently, it found that the tariff was not clear and therefore in violation of section 110(4) of the *ATR*s.

The Agency then turned to the issue of whether the tariff was, in any event, "just and reasonable" as is required by s. 111(1) of the *ATR*s. On this point, Swiss argued that as soon as it discovered the error, it corrected the situation. It also immediately followed up with an investigation to determine the source of the error. To assess the reasonableness of the tariff, the Agency applied the reasoning from *Anderson v. Air Canada*, Decision No. 666-C-A-2001, which requires an inquiry into whether Swiss' response resulted in a balance being struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and Swiss' statutory, commercial and operational obligations.

The Agency preferred the complainants' submissions in this respect over Swiss' plea that it could not be expected to carry passengers for a loss as it has obligations to its employees and stakeholders. The Agency noted that Swiss had not provided any specific evidence on how honouring the tickets in question would have impinged on its commercial obligations. In ruling in favour of the

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passengers, the Agency took notice that the tariff:

- does not provide any time limit for Swiss to cancel an erroneously priced ticket;
- does not provide any examples of situations that may lead to such an error; and
- imposes no obligations on Swiss to take reasonable steps to prevent the issuance of erroneously priced tickets.

As a result, the Agency made a "preliminary" finding that the tariff was not reasonable in accordance with the section 111(1) of the *ATR*s. The use of the term "preliminary" in this portion of the decision was not clearly explained in the decision.

Finally, the Agency dealt with the issue of whether Swiss properly applied its tariff in the matter at hand. On this issue, the Agency considered Swiss' explanation for the error. Swiss had asserted that the posting error was, in fact, committed by ATPCo after the correct "fare tape" was submitted to ATPCo by IATA. In support of its position, Swiss had filed a letter from ATPCo wherein that organization expressed its regret for the distribution of the "low fares" (note the reluctance to characterize them as "erroneous fares") and also indicated that it would put additional audit procedures in place to prevent "low fares" from being distributed again. The Agency focused on this choice of words by ATPCo and found that Swiss failed to adequately describe the precise technical failure that resulted in the error. It emphasized the lack of evidence that the failure was "technical in nature, as opposed to human."

Having come to these conclusions, compensation was awarded to the passengers, but of more significant note, Swiss was given 30 days to show cause as to why the Tariff 5(F) should not be disallowed.

Nearly a year later, the same issue arose — this time in the case of a first class, one-way, multi-segment ticket purchased on Travelocity by a single passenger, Paul Alberque. Mr. Alberque's itinerary was almost identical to that which was in issue in the *Swiss* case. Upon discovering the error, US Airways cancelled the ticket. Mr. Alberque brought a complaint before the Agency, asking it to order US Airways to provide the service requested in the same class for the fare originally quoted.

US Airways took a different tack to the complaint. It began by arguing that the Agency should not intervene in a dispute with only a "tangential connection" to Canada. It argued that Mr. Alberque was engaging in "hidden ticket pricing" — a strategy whereby a passenger does not fly the final leg of his/her journey but books that segment in order to obtain a preferable fare. In this case, US Airways argued that Mr. Alberque had already arranged alternate transportation to fly from Europe (the termination of the penultimate segment of his journey) to his home in Boston. Mr. Alberque strongly denied this suggestion.

In any event, the Agency summarily dismissed the argument, stating (correctly, we believe) that the only relevant factor to consider is whether the ticket as purchased included Canada as a destination.

Then came the important part of the decision. The Agency had to determine whether there was a valid contract for carriage at all between US Airways and Mr. Alberque. US Airways provided significantly more detail on the nature of the error that occurred than did Swiss in the previous case and this played a large role in the Agency coming to a different conclusion.

… [the doctrine of mistake arises when a party] knows or ought to have known of another's mistake in a fundamental term, remains silent and snaps at the offer, seeking to take advantage of the other's mistake.

In its submissions, US Airways explained that in November 2011, IATA electronically provided a package of Flex Fares to ATPCo that allowed passengers to book travel on routes that are not served by a single carrier. With this product, passengers were at liberty to build an itinerary using several carriers. Included in these itineraries were segments that could be combined to make an itinerary from Yangon to Montreal. At the time that these fares (which were quoted in Myanmar kyats) were filed, they were not yet approved by the foreign governments — so they were held in ATPCos system, pending such approval.

On April 2, 2012, the kyat was devalued such that it was then worth 0.7% of its former value. Several months later, IATA instructed ATPCo to release new economy and business class fares for Yangon to Montreal travel. The pricing was adjusted to account for the devaluation of the kyat. ATPCo carried out these instructions — but it also erroneously released the first class fares (which were not to be released — and had not been adjusted to account for the currency devaluation). This resulted in the availability of a fare of US$114 for an itinerary that should have been sold for US$14,570 before taxes.

ATPCo learned of the mistake on September 28, 2012. It advised IATA in early October and US Airways was advised by IATA on October 4, 2012. US Airways then went about cancelling the tickets. In support of taking this step, US Airways invoked the common law doctrine of "mistake". This doctrine provides that when a party enters into a contract and knows that a material contractual term is erroneously expressed, then that party should not be entitled to take advantage of that error, Rather, the Court will view this as a flaw in the formation of the contract and the contract will be void *ab initio*.

US Airways went further to argue that it did not have to show that Mr. Alberque subjectively knew of the error — just that a reasonable person would have recognized it. In this respect, it relied on a ruling made by a Chief Justice of the Supreme Court of Canada, albeit when she was sitting as a trial judge, where she held that:

> It is not necessary to prove actual knowledge on the part of the non-mistaken party in order to ground relief, as in this context one is taken to have known what would have been obvious to a reasonable person in light of the surrounding circumstances.

Even without this jurisprudential authority, there was ample evidence to demonstrate that Mr. Alberque was aware of the error. For example:

- three hours before purchasing his ticket, he made an online posting stating that he had found a mistaken price that "will probably get cancelled"; and
- two hours before the purchase, he made another posting on another website ruminating how the US DOT would treat the situation, if a complaint were made.

US Airways also argued that a person seeking fare information for this itinerary online would easily determine that the price was an error, especially given that the price for the same journey in economy or business class was many times more than the first class fare.

The Agency accepted US Airways submissions in this respect and rejected Mr. Alberque's claim that the fare was not so unreasonable — as he had obtained other extremely advantageous fares on other trips by using unusual routings. His complaint was dismissed — but the Agency did identify what it felt was a reasonable procedure to take when erroneous fares are filed. It stated that in these situations, air carriers should, at a minimum:

1. Notify the passenger:

(a) no later than 72 hours after the carrier becomes aware of the publishing of an erroneous fare, that all or any portion of their ticketed itinerary has been cancelled, or

(b) At least 24 hours prior to the passenger's scheduled departure from the point of origin

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Erroneous Fares *(cont'd)*

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> issued on the ticket, that all or any portion of their ticketed itinerary has been cancelled, if the ticket was purchased less than 72 hours before their scheduled departure from the point of origin; and,
>
> 2. Provide a refund of the total cost of the ticket.

With respect to interline itineraries, participating carriers are expected to co-ordinate among themselves and decide which of the interline carriers will notify the passenger and provide the refund in the event that the passenger's ticketed itinerary is cancelled.

The final case in the trilogy brought the matter to a full circle — ending up, once again, on the lap of Swiss. This time, the complaint was brought by an additional 83 passengers who booked similar itineraries, under the same circumstances that had occurred in the previous Swiss case and the US Airways case. In this complaint, Swiss adopted US Airways' approach and provided a similarly, detailed description of what had been provided by US Airways in its complaint.

As would be expected, the Agency used the same analysis as it did in the US Airways case and came to the same conclusion — dismissing all 83 complaints. One difference in this case was that Swiss did not advance evidence as to the subjective knowledge of each of the complainants as to whether they knew that the quoted prices were in error. Rather, the Agency accepted that "a reasonable person ought to have known that a total cost of approximately US$1,000 for first and business class travel from Yangon to Eastern Canada is not simply a low ticket price, but a mistake.

The Agency held that, even though Swiss offered, as a gesture of good will, to carry *en route* passengers in economy class, it was under no obligation to do so.

In its closing remarks, the Agency reiterated the process that it found reasonable for air carriers to take when an erroneously priced ticket is sold.

Brewer et al v. Swiss International Airlines
CTA Decision No. 239-C-A-2013;
Alberque v. US Airways
CTA Decision No. 177-C-A-2014;
83 Complainants vs. Swiss International Airlines,
CTA Decision No. 202-C-A-2014

Security Screening *(cont'd)*

2007 to December 2013 is arguably relevant and ordered it produced.

Income Tax Returns

Mr. Yaffa's income tax returns and notices of assessment were not found to be arguably relevant to the complaint. In support of its argument that these records should be disclosed, Air Canada noted that Mr. Yaffa stated that he had "cancelled and or missed many opportunities to travel...and therefore suffered serious losses to my wellbeing..."

The Tribunal agreed with Mr. Yaffa and the Commission: because the complaint did not request any compensation for lost wages or lost income, tax returns need not be produced. The only damages Mr. Yaffa seeks are those relating to pain and suffering and willful and reckless discrimination.

Complaint against CATSA

According to Air Canada, the documents that Mr. Yaffa had so far disclosed made frequent reference to a separate complaint he made to the Commission against CATSA, which related to the check-in and security processes on at least two of the six dates raised by the complaint against Air Canada. Further, Mr. Yaffa's disclosure package included a memorandum to file that indicated that CATSA had provided particulars or documentation implicating Air Canada in the alleged incidents.

Air Canada had obtained CATSA's consent regarding disclosure of the file, provided it could review the documents first for any security-sensitive information.

The Commission took the position that the CATSA file is not relevant to the complaint against Air Canada. That said, the Commission informed the Tribunal that it would provide the file if both CATSA and Mr. Yaffa consented to its disclosure.

Mr. Yaffa objected to the disclosure but did not provide any rationale for his position. In any event, the Tribunal determined that the CATSA file is arguably relevant because the security procedures at the airport are sequential and linked and because the information in the CATSA file may provide a better understanding of the factual circumstances of Mr. Yaffa's complaint against Air Canada.

Mr. Yaffa's Requests for Disclosure

Mr. Yaffa requested that Air Canada produce documents relating to training provided to its agents on diversity, cultural sensitivity and human rights. The Commission's motion made a similar request.

Air Canada took the position that neither Mr. Yaffa nor the Commission had established that differential treatment on the basis of race or religion had occurred and, as such, the information requested is not relevant.

This argument was not accepted:

> … at the disclosure stage, it is not necessary for the Complainant or the Commission to prove or substantiate their allegations in order to be entitled to disclosure from the Respondent. The only requirement for disclosure...is that the information be arguably relevant.

The Tribunal therefore ordered Air Canada to confirm whether or not it provides training to its employees on complaints from passengers subject to enhanced screening and on human rights and/or cultural sensitivity. If it does provide such training, Air Canada must disclose the related training materials.

Mr. Yaffa also requested information regarding complaints made against Air Canada "from September 11, 2001 to 2013, inclusive, and a similar period in length before September 11, 2001" that were similar in nature to his. The Commission made a similar request, arguing that it views Mr. Yaffa's complaint "as one raising a number of indicators that systemic matters are very likely at issue."

The Tribunal agreed that these documents were arguably relevant.

Canada and the United States entered into a bilateral Air Transport Agreement in 2007 which addresses, in part, aviation security. In addition, the Canadian government established its own list of persons of interest under the Passenger Protect Plan in 2007. On this basis, the Tribunal ordered Air Canada to disclose "past passenger complaints made against it, from March 2007, alleging discrimination on race, national or ethnic origin, colour and/or religion, and emanating from the Respondent's application of government-imposed security lists."

Mr. Yaffa and the Commission also made requests that did not succeed. The Tribunal was not clear as to what Mr. Yaffa was requesting in seeking documents "showing the respondent's stance on Human Rights or 'serious' expression of concern about Human Rights violations." It also rejected the Commission's requests for American and Canadian legislative and/or regulatory sources related to No Fly Lists.

Several media outlets reported on this procedural ruling. It is very likely that the full hearing will be closely watched as well. The balance between anti-discrimination laws and government-imposed security requirements, and how air carriers and their passengers must navigate the tension between them, is obviously a topic of interest to many.

Yaffa v. Air Canada,
2014 CHRT 22

Extra Disclosure Ordered in Security Screening Case

A procedural ruling of the Canadian Human Rights Tribunal (the "Tribunal") in a complaint made against Air Canada made news across the country. The complainant, Mohamed Yaffa, is a Muslim Canadian of African descent who describes himself as having brown skin colour. According to the decision of the Tribunal issued on August 8, 2014, Mr. Yaffa complains that Air Canada "subjected him to enhanced security screening, because of his race, national or ethnic origin, colour and religion, on six different occasions from March to June 2010." Air Canada says that no discrimination occurred; it was merely following the security requirements of the Canadian and US governments, including the "No Fly List" of each country.

At issue before the Tribunal were requests by Air Canada, Mr. Yaffa and the Canadian Human Rights Commission (the "Commission"), for disclosure of particular documents prior to the hearing. Both Air Canada and Mr. Yaffa had already produced documents, but each brought a motion seeking further records and information.

Under the Tribunal's Rules, the parties to a complaint must serve on all other parties (including the Commission, which is a party to all complaints) all documents "that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties." This requirement has been interpreted as including all information that is "arguably relevant" to the issues raised by the complaint. While any request for disclosure "must not be speculative or amount to a 'fishing expedition'," so long as there is a "rational connection" between a document and the facts and issues identified by the parties to the complaint, it should be produced.

Air Canada succeeded in obtaining an order that Mr. Yaffa produce his medical records and human resources file and that the Commission's file on a separate related human rights complaint Mr. Yaffa had made be disclosed. Mr. Yaffa and the Commission obtained an order that Air Canada provide information and documents relating to any training it provides its employees on human rights complaints and/or cultural sensitivity and relating to complaints brought by passengers that were similar to Mr. Yaffa's.

Air Canada's Requests for Disclosure

Air Canada sought disclosure of four types of documents : (1) Mr. Yaffa's medical records; (2) his human resources file from his employer; (3) his income tax returns; and (4) information contained in the Commission's file pertaining to Mr. Yaffa's complaint against the Canadian Air Transport Security Authority ("CATSA"). CATSA is a Crown corporation responsible for security screening at airports in Canada. It was formed after September 11, 2001, when the government took responsibility for airport screening.

Medical Records

Noting that Mr. Yaffa alleges that he has suffered from personal injuries such as depression, anxiety, insomnia and diminished self-esteem as a result of the alleged discrimination, Air Canada contended that he had directly called into issue his medical history. Mr. Yaffa and the Commission argued that Air Canada's request was overly broad and that it infringed on Mr. Yaffa's privacy rights. The Commission also argued that because the complaint does not allege that the alleged discrimination exacerbated existing conditions, but that it caused the distress, anxiety and depression, any medical records dating from prior to the alleged incidents are irrelevant.

The Tribunal ruled in favour of Air Canada, though it limited its order to the production of medical records relating to treatment for depression, anxiety, insomnia or diminished self-esteem dating to 2008 instead of 2006, as had been requested. In addition, in line with other similar orders and in order to protect Mr. Yaffa's privacy, the order states that the documents shall be disclosed only to counsel for Air Canada and the Commission and may not be used beyond the complaint.

Human Resources File

On the issue of Mr. Yaffa's human resources file, the Tribunal again granted Air Canada's request. In his Statement of Particulars, Mr. Yaffa stated:

> I have been affected in my work and among my colleagues as I am often anxious about perceptions and stigma
>
> I have used my vacation days from my work to pursue healing. I have taken more than average sick days at my work since this ordeal started...

The arguments mirrored those made in relation to the medical records. The Tribunal ruled that Mr. Yaffa's entire human resources file, including an account of his sick leave and vacation days, for the period of January

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Our transportation law group represents the interests of carriers in litigation of personal injury, property loss and commercial disputes. We also advise on insurance and regulatory issues and represent clients before the courts, agencies, tribunals and authorities with important jurisdiction over transportation undertakings.

We welcome your comments and suggestions.