



DECISION NO. 319-C-A-2006

June 1, 2006

IN THE MATTER OF a complaint filed by Darren and Beth Jakubec respecting the death of their pet dog, Sila, while being transported by Air Canada from Smithers, British Columbia to Winnipeg, Manitoba, via Vancouver, British Columbia, on January 4, 2004.

File No. M4370/04-7454

APPLICATION

- [1] On December 13, 2004, Darren and Beth Jakubec (hereinafter the complainants) filed with the Canadian Transportation Agency (hereinafter the Agency) the complaint set out in the title.
- [2] In its Decision No. LET-C-A-64-2006 dated March 9, 2006, the Agency made certain preliminary findings respecting the subject noted matter, and provided Air Canada and the complainants with the opportunity by way of show cause to, within ten (10) days from the date of receipt of the Decision, address the Agency's preliminary findings. The Agency also provided Air Canada an opportunity to show cause why certain action should not be taken. In addition, the Agency provided the complainants and Air Canada with the opportunity to submit comments regarding the other party's submission, within ten (10) days from receipt of such submission.
- [3] On March 17, 2006, the complainants requested an extension until March 31, 2006 to file their submission. In its Decision No. LET-C-A-78-2006 dated March 20, 2006, the Agency granted this extension. On March 21, 2006, Air Canada requested an extension until April 9, 2006 to file its submission. In its Decision No. LET-C-A-84-2006 dated March 24, 2006, the Agency granted this extension. On March 31, 2006, the complainants and Air Canada filed their respective submissions. On April 10, 2006, the complainants filed comments regarding Air Canada's submission and on April 12, 2006, Air Canada filed its comments.
- [4] Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the CTA), the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. In this case, the parties have agreed to an extension of the deadline until June 1, 2006.

PRELIMINARY MATTER

- [5] Although Air Canada's submission of April 12, 2006 was filed after the prescribed deadline and addressed the complainants' submission of April 10, 2006, rather than the submission of March 31, 2006, as required by Decision No. LET-C-A-64-2006, the Agency, pursuant to section 5 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, accepts Air Canada's submission as being relevant and necessary to its consideration of this matter.

Canada

ISSUE

- [6] The issue to be addressed is whether certain provisions in Air Canada's tariff governing domestic travel, namely, the Canadian Domestic General Rules Tariff, Airline Tariff Publishing Company, Agent (hereinafter Air Canada's tariff), are unreasonable and/or unduly discriminatory within the meaning of subsection 67.2(1) of the CTA.

THE PRESENT CASE

- [7] The Agency, in this Decision, will provide its final determination on the preliminary findings set out in Decision No. LET-C-A-64-2006, based on the Agency's analysis of the evidence on file in conjunction with its findings from the previous Decision.
- [8] This Decision will be structured to describe the subject matter, the preliminary finding, submissions of parties in response to the Agency's show cause and the Agency's final findings and conclusion.

Air Canada's exclusions from liability for the carriage of animals

The Agency's preliminary finding

- [9] The Agency made a preliminary finding that exclusions from liability for the carriage of animals are not unreasonable given the inherent fragility of living creatures and the occasional hardships associated with carriage in the bellyhold of aircraft that may negatively impact on the welfare of these animals. In this regard, the Agency acknowledged Air Canada's arguments that an animal may injure itself or become ill while being transported in the bellyhold of aircraft, or may be adversely affected by items contained in the baggage of other passengers that may be noxious, events over which Air Canada has no control.

Positions of the parties

The complainants' position

- [10] The complainants submit that the national transportation policy, as set out in section 5 of the CTA, declares, in part, that carriers, as far as is practicable, carry traffic under conditions that do not constitute an unfair disadvantage, beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation conducted with the traffic, or the type of traffic or service involved. The complainants argue that there is nothing inherent in the carriage of animals that requires or renders reasonable a blanket exclusion from liability should harm befall an animal while being transported by an air carrier, and that it is not impracticable to have carriers accept some liability for such harm, particularly when there is evidence that the harm resulted from actions or omissions by a carrier, or conversely, there is no evidence that the harm resulted from anything else.
- [11] The complainants maintain that Air Canada's exclusions from liability are unreasonable because they are unconscionable. In this regard, the complainants assert that there is a clear inequality in bargaining power between consumers and air carriers because, for example, air travel is often the only viable means of travel over long distances or to certain destinations, such as remote communities. The complainants maintain that this inequality is more pronounced when a carrier is the sole provider of air transportation to a destination.

[12] With respect to the inherent risks associated with the carriage of animals, the complainants submit that Air Canada has not provided any evidence to suggest that animals are inherently fragile. The complainants further submit that, arguably, human beings are as fragile as other "living creatures" when travelling by air, but Air Canada has not chosen to exclude itself from liability should humans suffer illness, injury or death when being transported by air. The complainants maintain that should animals be considered at greater risk when being carried in the bellyhold of aircraft, as opposed to carriage in the aircraft cabin, the liability of Air Canada should increase, and certainly not be excluded, given that:

- the carrier only permits animals to travel in the bellyhold
- relative to any passenger, Air Canada exercises greater control over animals placed in the bellyhold of aircraft in terms of, for example, the other items that may be in the bellyhold, the placement of the animals, the air quality and temperature, and the monitoring of conditions
- exclusions from liability create a disincentive for Air Canada to ensure that animals are carried safely
- Air Canada does not exclude itself from liability in respect of baggage carried in the bellyhold

Air Canada's position

[13] Air Canada notes that Rule 95(F) of the carrier's domestic tariff provides that:

Carrier shall not be liable for consequential, special, punitive or exemplary damages arising from or connected in any way with any act or omission by the carrier (...) whether or not such act or omission was negligent.

[14] Air Canada submits that the exclusions set out in this tariff provision are widely used in consumer and commercial transactions, and that other domestic and international air carriers also have such exclusions. Air Canada maintains that:

(...) this provision does not limit the carrier's liability for direct damages but solely with respect to consequential, special, punitive and exemplary damages. Therefore, Air Canada is not limiting its liability with respect to direct damages nor in cases of gross negligence or intentional fault.

[15] Air Canada submits that provisions relating to cargo that appear in the *Carriage by Air Act*, R.S.C., 1985, c. C-26, which incorporates instruments governing limitations of liability applicable to international carriage, such as the Warsaw Convention and Montréal Convention, recognizes the principle of limitations of liability, even in cases of gross negligence.

Analysis and findings

[16] Air Canada expressed its opinion that animals are fragile, and that it is extremely difficult for an air carrier to maintain absolute control over the environment in which animals are placed while being transported by air, and to account for and address all of the situations to which an animal may be susceptible. The Agency acknowledges and accepts that Air Canada may want to limit its liability in situations involving the carriage of items that are more inherently fragile than other items.

- [17] The Agency notes that exclusion and limitation clauses are accepted by the Courts, provided that certain factors are respected, most notably that proper notice of such clauses is given, and that the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR) support the notion that these clauses can be included in a carrier's tariff. Subparagraph 107(1)(n)(x) of the ATR provides that every domestic tariff shall contain the terms and conditions of carriage, clearly stating the air carrier's policy governing the limits of liability respecting passengers and goods. Subparagraph 107(1)(n)(xi) of the ATR establishes the same requirement concerning exclusions from liability respecting passengers and goods.
- [18] The Agency also notes that Air Canada's exclusion from liability is not absolute. Air Canada stated that it does not limit its liability for direct damages, or in cases of gross negligence or intentional fault, but solely for consequential, special, punitive and exemplary damages. The Agency further notes that this type of liability regime is not unique to Air Canada.
- [19] In light of the foregoing, the Agency finds that Air Canada's tariff provisions that limit the carrier's liability with respect to the carriage of animals, is not unreasonable.

The notice provided by Air Canada respecting its exclusions from liability

The Agency's preliminary finding

- [20] The Agency made a preliminary finding that a general reference on tickets or Air Canada's Internet Web site to tariffs or conditions as governing the services offered by the carrier fails to provide adequate notice of Air Canada's exclusion from liability for the carriage of animals. Also, such notice is of particular importance in situations where an air carrier disclaims any liability, and is essential in allowing persons to make informed choices respecting the carriage of animals.

Positions of the parties

Air Canada's position

- [21] Air Canada submits that a decision rendered by Quebec's Court of Appeal in *Ocean Accident & Guarantee Corporation Ltd and Reliance Insurance Company of Philadelphia v. Air Canada*, [1975] R.P. 193 (hereinafter the Ocean Accident decision), held that for a tariff to apply, the carrier must warn the passenger of such tariff's existence, and make the tariff available for inspection. Air Canada maintains that the principle of having tariffs incorporated by reference and to be referred to as a whole is recognized by the Agency and the Courts, and that the carrier should not be compelled to highlight and draw the attention of a passenger to a specific tariff provision. Air Canada asserts that it has fulfilled its legal obligation by advising persons booking on Air Canada's Web site that carriage is subject to applicable tariffs, and by including the same notice on Air Canada's paper tickets and itineraries/receipts. Air Canada notes that its itineraries/receipts include provisions that indicate that Air Canada does not assume liability for perishable or fragile articles, among other items, and that "special rules" may apply to such articles. Air Canada maintains that live animals qualify as being perishable or fragile. Air Canada submits that, in the interest of further disclosing conditions of carriage, it has amended its Web site to include a provision stating that "Air Canada will not be liable in the event of loss, delay, injury, sickness or death of any pet or animal accepted for transportation".

The complainants' position

- [22] The complainants maintain that the legislative regime that existed at the time of the Ocean Accident decision did not impose on air carriers an obligation for notice and disclosure, as is the case now under subsection 67(1) of the CTA. The complainants submit that this provision requires an air carrier to both publish or display a tariff, and make such tariff available for public inspection. With respect to the availability of Air Canada's tariff for public inspection, the complainants maintain that their requests to Air Canada for a copy of relevant tariff rules, after the passing of Sila, were not answered, and that only after legal counsel representing the complainants approached Air Canada's legal department, were the rules provided.
- [23] The complainants assert that this situation cannot be construed as "making available" tariffs, and that Air Canada neither published nor displayed its tariff, as required to do so. As to Air Canada's argument that provisions appearing on the carrier's Web site and receipts/itineraries, disclaiming liability for fragile or perishable articles, furnish notice of the carrier's limitations of liability in respect of animals, the complainants submit that it is not reasonable to assume that, based on a reading of these provisions, a person will understand that the term fragile or perishable encompasses animals. The complainants also note that animals are not reasonably thought of as objects or things, and therefore should not be considered as articles.
- [24] The complainants reiterate that case law dictates that onerous provisions of standard form contracts be drawn to the attention of consumers, which Air Canada failed to do.

Air Canada's further position

- [25] With reference to the complainants' assertion that the Ocean Accident decision was made in the context of different legislation, Air Canada maintains that the decision continues to be applicable because neither the legislation that existed at the time of issuance of the Ocean Accident decision nor the legislation that applies now, requires that an air carrier provide a copy of its tariff to each of the carrier's passengers. Air Canada reiterates that it has fulfilled its obligations under the CTA by: publishing its tariffs, via the Airline Tariff Publishing Company; making these tariffs available at the carrier's business office, namely, Air Canada's Law Branch located at the carrier's head office in Montréal; providing notice on Air Canada's Web site and tickets that the contract of carriage is subject to the carrier's tariffs, and that such tariffs are available for public inspection upon application at Air Canada's office; and actually making the tariffs available.
- [26] Air Canada also points out that prior to Sila's passing, the complainants had used the carrier's services on several occasions, and had received the aforementioned notice on those occasions.
- [27] With respect to the matter of whether animals qualify as being perishable, Air Canada submits that the term, as used in the carrier's notice, encompasses every item that is "subject to perish", which includes animals. Concerning the notion that animals are "articles", Air Canada maintains that the *Carriage by Air Act*, which incorporates instruments relating to limitations of liability governing international air carriage, including the *Warsaw Convention* and *Montreal Convention*, creates three fields of activities respecting air carriage, namely, the carriage of passengers, baggage and cargo. Air Canada submits that given these three fields, a pet can only be considered to be baggage or cargo, and that, as such, in the context of air carriage, an "article" must encompass animals.

Analysis and findings

- [28] Air Canada argued that it has satisfied its legal obligations by publishing its tariffs, via the Airline Tariff Publishing Company, advising persons by various means that transportation is subject to the terms and conditions set out in the carrier's tariffs, and by making these tariffs available for public inspection at Air Canada's business office, namely, Air Canada's Law Branch located at the carrier's head office in Montréal. Air Canada also argued that it provided notice of exclusions from liability related to the carriage of animals by including provisions in Air Canada's itineraries/receipts that indicate that Air Canada does not assume liability for perishable or fragile articles, among other items, and that "special rules" may apply to such articles.
- [29] The complainants maintained that given the difficulty in accessing Air Canada's tariffs, it cannot be said that these tariffs have been made available for public inspection. The complainants also maintained that it is not reasonable to argue that the provisions that appear on Air Canada's Web site and on receipts/itineraries, which disclaim liability for perishable or fragile articles, should be understood to encompass animals.
- [30] With respect to the matter of notice relating to Air Canada's exclusion from liability for the carriage of animals, the Agency is of the opinion that, although some responsibility resides with consumers to acquaint themselves, generally, with terms and conditions of carriage, and particularly, with terms and conditions that may be of special interest, prior to entering into a contract, there is an obligation imposed on a party that wishes to apply an onerous term or condition to bring such term or condition to the attention of the consumer. In this regard, the common law requires that onerous terms or conditions, such as the limitations of liability that are currently at issue, be properly brought to the attention of the other party before or at the time at which the contract is entered into, and that clauses relating thereto be in clear and unambiguous language.
- [31] The Agency is of the opinion that a reference to tariffs, as governing carriage, on Air Canada's Web site and on documents that are provided to passengers, does not constitute sufficient notice of Air Canada's limitations of liability for the carriage of animals. The Agency is also of the opinion that the respective texts concerning Air Canada's liability for fragile or perishable articles, appearing on Air Canada's Web site and receipts/itineraries, is unclear and ambiguous. As such, the applicable provisions do not represent adequate notice of Air Canada's limitations of liability for the carriage of animals. The Agency notes that Air Canada has amended its Web site to now include a statement that the carrier assumes no liability for the "loss, delay, injury, sickness or death of any pet or animal accepted for transportation". This statement appears to be inconsistent with Air Canada's assertion in a submission filed by the carrier in respect of this matter that "Air Canada is not limiting its liability with respect to direct damages nor in cases of gross negligence or intentional fault".
- [32] With respect to the availability of Air Canada's tariffs, paragraph 67(1)(a) of the CTA provides that:
- The holder of a domestic licence shall
- (a) publish or display and make available for public inspection at the business offices of the licensee all the tariffs for the domestic service offered by the licensee.

[33] This provision imposes two requirements on the carrier regarding domestic tariffs:

- 1) to publish or display the tariffs, and
- 2) to make the tariffs available for public inspection at the business offices of the licensee

[34] Section 2 of the ATR defines “business office” as:

With respect to an air carrier, includes any place in Canada where the air carrier receives goods for transportation or offers passenger tickets for sale, but does not include an office of a travel agent.

[35] The Agency is of the opinion that Air Canada’s position that it has respected paragraph 67(1)(a) of the CTA by making the carrier’s tariffs available for public inspection at Air Canada’s business office, namely, Air Canada’s Law Branch located at the carrier’s head office in Montréal, is not reasonable, and does not satisfy the intent of the said paragraph.

[36] The Agency notes that the submissions filed by Air Canada suggest that its tariffs are only available at the aforementioned office. The Agency further notes that based on the complainants’ experience, it is difficult for a person to obtain a copy of the tariff. Given the intent of paragraph 67(1)(a) of the CTA, which is to ensure that a person can obtain a copy of the tariff should such person wish to consider the applicable terms and conditions of carriage, it follows that tariffs should be reasonably accessible. The Agency is of the opinion that this does not appear to be currently the case.

[37] Air Canada is to take the necessary steps to ensure that the carrier conforms with the requirements of paragraph 67(1)(a) of the CTA.

Whether Air Canada’s provisions concerning limitations of liability for the carriage of animals is unduly discriminatory

The Agency’s preliminary finding

[38] The Agency made a preliminary finding that, in this case, given that Air Canada’s tariff provisions relating to the limitations of liability for the carriage of animals apply equally to all such carriage, there is no evidence before the Agency to suggest that such provisions are discriminatory or that the provisions have been applied in a discriminatory manner.

Positions of the parties

The complainants’ position

[39] The complainants maintain that the Agency’s determination should be based on a comparison of the conditions that apply to persons travelling with animals relative to those that apply to persons who are not travelling with animals. Such a comparison suggests that persons travelling with animals are subject to discrimination because Air Canada excludes itself from liability for the carriage of animals, while assuming liability for baggage.

- [40] The complainants assert that Air Canada's limitations of liability for the carriage of animals are unduly discriminatory because these limitations do not allow animal owners any recourse for loss, injury, illness or death of an animal while being transported by air. The complainants also assert that it would be appropriate that a compensation scheme be in place that reflects the value of animals to their owners or caregivers.

Air Canada's position

- [41] Air Canada did not file any comments with respect to this matter.

Analysis and findings

- [42] The Agency has carefully considered the complainants' position respecting this matter, and remains of the opinion that the Agency's determination should be based on the terms and conditions of carriage to which all persons travelling with animals are subject. The Agency finds that Air Canada's limitations of liability for the carriage of animals apply equally to all such carriage, and that there is no evidence before the Agency to suggest that such provisions are discriminatory or that the provisions have been applied in a discriminatory manner.

CONCLUSION

- [43] In light of the foregoing, the Agency, pursuant to subsection 67.2(1) of the CTA, hereby disallows Rule 230(B)(1) of Air Canada's tariff, because of the absence of a provision that requires Air Canada to give adequate notice in a timely fashion to persons regarding the carrier's limitations of liability for the carriage of animals. The Agency hereby requires Air Canada to, within thirty (30) days from the date of this Decision, revise its tariff so as to clearly set out that adequate and timely notice of Air Canada's limitations of liability for the carriage of animals shall be provided, and the means by which Air Canada shall provide such notice, including the carrier's Web site, advertisements and information relating to the carriage of animals, and in documents provided to passengers that may also set out the carrier's liability in respect of baggage, such as itineraries and electronic tickets. This notice must accurately reflect Air Canada's limitations of liability, and be set out in clear and unambiguous language.
- [44] Pursuant to subsection 28(1) of the CTA, the disallowance referred to above will come into effect thirty (30) days from the date of this Decision or such shorter time coincident with the effectiveness of a revised Rule 230(B)(1) that is acceptable to the Agency.

[45] The remainder of the complaint is hereby dismissed.

AWARDING OF COSTS

[46] It has been well documented by the Agency and its predecessors that costs are not awarded as a matter of course even in situations where a party has been substantially successful in its recourse. Rather, the Agency's practice has been to review each application for costs on its own merit and to award costs only in special or exceptional circumstances. The Agency finds that the present case does not meet those special or exceptional circumstances. Accordingly, the Agency hereby dismisses the complainants' request that they be awarded costs of this application on a solicitor and client basis, including the Goods and Services Tax.

(signed)

George Proud
Member

(signed)

Guy Delisle
Member

(signed)

Beaton Tulk
Member

