

Submission: Public consultation on requests for temporary adjustments to the Air Passenger Protection Regulations (APPR).

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21/01/21

Background

Air Canada seeks a revision from the Canadian Transportation Agency (the “Agency”) of Determination No. A-2020-122 (the “Determination”). Air Canada seeks to be exempt from APPR requirements to re- book passengers on other carriers and to pay compensation for inconvenience.

Implications of the Agency’s Determination

In the Determination, the Agency noted (<https://otc-cta.gc.ca/eng/ruling/a-2020-122>):

“... the APPR compensation requirement will not be triggered in the event of flight disruptions that result from matters beyond carriers’ control, such as new travel restrictions, even if they occur close to the departure date, nor by any cancellations made by passengers, but only in cases where flights are disrupted for reasons fully within carriers’ control and not required for safety, such as a commercial decision to consolidate flights due to low load factors.”

From the statistics provided on the Agency’s website, it is certain that the high number of cancelled flights is a direct consequence of airlines consolidating their scheduled flights. In the three months shown, the total number of passengers transported in 2020 was roughly a tenth (2.8 million) of the number transported in the same months the year before (24.2 million). Yet the number of scheduled flights in those months fell by only 6%, from 251,000 in 2019 to 235,000 in 2020. Note too, there is no evidence that airlines were adjusting to new market conditions during the second half of 2020. Over the three months July, August and September 2020, the percentage of flights cancelled relative to scheduled flights was static – 81%, 80% and 80% respectively. Over those three months, the percentage of flights with the same flight number cancelled multiple times relative to all cancelled flights was also static – 73%, 73% and 72% respectively. If airlines had been adjusting to current market conditions, both percentages would have declined. Airlines are not adjusting their schedules to reflect the drop in

passenger numbers.

The Determination is at odds with the position taken by the Agency in its Statement on Vouchers (<https://otc-cta.gc.ca/eng/statement-vouchers>). After criticism, the Agency clarified their statement adding: “The statement indicated that the use of vouchers could be a reasonable approach in the extraordinary circumstances resulting from the COVID-19 pandemic, when flights are cancelled for reasons outside airlines’ control and passengers have no prospect of completing their itineraries.”

It defies logic for this statement to remain the Agency’s position and for it to treat each complaint “on its merits” when a refund has been refused, and then to conclude in the Determination that consolidated flights are within an airline’s control. If cancellations due to consolidation are under an airline’s control, then passengers on most flights cancelled in June to September 2020 would be entitled to a refund and the Agency’s Statement on Vouchers is at best highly misleading. It should be removed or amended.

Air Canada’s response to the Determination

Air Canada is being just as illogical. “Contrary to the Agency’s statement, Air Canada submits that cancellations for low demand during COVID are fully outside carrier’s control.” It requests an exemption from the requirement to provide compensation for passengers on delayed or cancelled flights. But if such events are “fully outside the carrier’s control”, then there is no requirement to pay such compensation. Border closures clearly are fully outside Air Canada’s control – but this cannot be a reason to grant an exemption to paying compensation for inconvenience.

Air Canada then goes on to blame passengers: “A large number of passengers are cancelling 4-14 days prior to travel, or simply not showing up for flights, at levels previously unimaginable. On a route basis, the no-show factor is unpredictable.” But if passengers cancel flights, again there is no obligation for the carrier to pay them compensation or re-book them on another carrier. Again this cannot be a reason to grant the exemptions Air Canada seeks. The statistics provided by the Agency, although limited, are not consistent with the claim that these factors are unpredictable. Flights with the same flight number cancelled on multiple occasions make up a high percentage of all flights cancelled.

Air Canada notes “As per the Determination, the Agency’s refusal [to continue

exemptions] was made on the basis that Air Canada had not provided evidence that it is facing the same sorts of operational imperatives and the sudden, drastic changes that characterized the initial stages of the pandemic, and it has not shown why, after more than 3 months, it is not possible to adapt operations to new realities such as health and safety precautions.”

In its submission, Air Canada still does not provide evidence that it is facing sudden, drastic changes that necessitate the exemptions sought or that it is not possible for it to adapt. The statistics provided by the Agency are aggregated over five airlines, but as Air Canada is the largest of the five, these statistics strongly suggest that Air Canada has not made a concerted effort to “adapt operations to new realities”.

Conclusion

The Agency needs to make a clear ruling – or take a test case to court to get such a ruling – on the circumstances in which a cancelled flight is to be considered under an airline’s control. It is clear from the statistics on the Agency website that airlines are scheduling flights that have a very high probability of being cancelled, then cancelling those flights and not giving refunds. In another country, this would be called a rort (<https://en.wiktionary.org/wiki/rort>). I do not know what it is called in Canada.

Air Canada’s request for exemptions is illogical. Air Canada has given no explanation why it continues to schedule so many flights that then get cancelled when it is obvious there are not the passenger numbers to sustain such an extensive schedule. Air Canada is already not meeting its obligations under the APPR in order to offset on-going losses, rather than accept a federal bailout that might involve a transfer of equity. The Agency should not assist it to do so.