



February 9, 2021

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Re: WestJet Response to Case No. 20-01590

On November 5th, 2020, the Canadian Transportation Agency (the “**Agency**”) issued Letter Decision No. LET-C-A-72-2020 (the “**Letter Decision**”) regarding alleged air carrier non-compliance with communication requirements under the *Air Passenger Protection Regulations* SOR/2019-150 (the “**APPR**”). As noted in the Letter Decision, the Agency’s Chief Compliance Officer was appointed as Inquiry Officer with a mandate to obtain all relevant documents, records, and information relevant to the complaints, conduct interviews and take written statements, and to submit a summary report to the Agency. On October 1, 2020, the Inquiry Officer submitted his report to the Agency (the “**Report**”), a copy of which has been placed on the record of the above captioned case number.

The Letter Decision directs the air carrier respondents to review and provide comments on: (i) the Report, and (ii) eight questions of general interpretation related to certain APPR provisions.

As a preliminary matter, we want to thank the Agency for providing the opportunity to discuss these issues. WestJet is concerned with overly prescriptive regulations, specifically when one considers the complex and immensely variable nature of day-to-day airline operations. Consideration must be given to our complex operating environment with an understanding that there is no one-size-fits-all approach to the industry. As we will further explain below, overly prescriptive regulations are not in the best interest of air carriers, the Agency, or the travelling public.

Part I: Response to Report

WestJet has reviewed the Report and it should be noted that there are a few inconsistencies with flights listed in the Summary Table (as defined therein). We have attached these as Appendix “A” for your reference and ask that the Report be corrected to reflect these differences.



Furthermore, the Report mentions various guidance documents published by the CTA (individually a “Guide” or “Guidance”) but does not clarify that these are not legal documents. Specifically, we note that each Guidance document contains a clarification statement which reads:

“This is not a legal document. The explanations and definitions it provides are for general guidance purposes only... In case of differences between this guide and legislation or regulations, the legislation and regulations prevail.” [emphasis added]

There are numerous examples of such conflicts between the Guides and the APPR, some of which are replicated in the Report. These require clarification, two of which we will briefly highlight.

First, under the subject heading “Scheduled Maintenance”, the Report references the Guidance document entitled: “*Types and Categories of Flight Disruption: A Guide*”, which states that flight disruptions caused by “routine or scheduled maintenance, including any subsequent repairs or required activities, are within the carrier’s control.” The correct language from the APPR does not contemplate “routine maintenance”, only “scheduled maintenance” - an explanation of which is outlined under Part II, Question 7, below.

Second, under the subject heading “Knock-On Effects”, the Report references the Guidance document entitled: “*Types & Categories of Flight Disruptions: A Guide*”, which states that “in the absence of the carrier taking all possible measures to prevent or minimize the knock-on effects, the subsequent flight delays could be considered within the carrier’s control.” Again, this is inconsistent with the APPR which states “all reasonable measures”, not “all possible measures”. There is a significant legal distinction between these phrases. Please refer to our explanation of reasonable measures under Part II, Question 8, below.

Finally, although not a material issue, we note that the spelling of “WestJet” is incorrect in the Report. We request all references to “Westjet” be replaced with “WestJet”.

Part II: Response to Interpretation Questions

- 1. How much detail regarding the reason for a flight disruption should be provided by carriers to passengers pursuant to paragraph 13(1)(a) of the APPR, including in situations that evolve, resulting in multiple reasons for delay over time?***

As indicated in the Letter Decision, subsection 13(1)(a) of the APPR states that a carrier must provide guests affected by a delay, cancellation, or denial of boarding with the “reason” for the flight disruption (an irregular operation, or “IROP”). As noted above, WestJet provides air services in a complex operating environment, utilizing very complex aircraft. As such, there is no one-size-fits-all approach to these incidents, and we would caution against overly



prescriptive regulations. This is also problematic when considered in light of the time constraints imposed by subsection 13(2) of the APPR (i.e. communication updates every 30 minutes). There are many instances when this is simply not possible. Consider, for example, a mechanical issue that requires subsequent inspection by WestJet AME's, or further investigation by an OEM. Categorizing these events with anything beyond a plain-language explanation will only serve to complicate the understanding of each incident, and by extension, the application of the APPR. This issue is compounded when one considers the additional requirement in section 13(3) of the APPRs that the carrier must communicate to passengers any new information as soon as feasible.

WestJet has a dedicated team that reviews each IROP incident, considers all factors, then determines which IROP remark fits the situation. WestJet previously provided a list of delay and cancel codes to members of the Agency ("IROP Remarks") along with examples of how these are utilized. The (applicable) IROP Remark is what is communicated to our front-line employees and guests. We note, however, that there are many factors that must be considered with each IROP such as weather, mechanical issues, ground and airport limitations, and above all, safety.

In determining the categorization of an IROP Remark, WestJet utilizes the main contributing factor. Providing multiple reasons as a situation evolves can lead to confusion. Examples of this were highlighted in the Report as reasons were changed by carriers in order to try to provide the most accurate information. Due to the potential number of causal factors, coupled with the technical language utilized in our industry, we feel that our approach of utilizing plain-language explanations with the main contributing factor properly serves our guests. As seen in the Report, passengers can feel misled as a result of the current simultaneous pressing obligation to communicate a reason for an IROP incident, fluidity of IROP situations, and quick decisions required to deal with and minimize the effect of IROP situations.

Accordingly, we are of the opinion that WestJet's current communications meet (and exceed) the requirements under the APPR and would caution against imposing further detail requirements.

- 2. If a carrier refuses to pay compensation on the basis that a flight disruption was required for safety or was outside its control, how much detail regarding the reason for the flight disruption should be included in the explanation given to the passenger pursuant to subsection 19(4) of the APPR? Should carriers have to explain multiple reasons for a delay when more than one exists?***

As indicated in the Letter Decision, subsection 19(4) of the APPR states that a carrier must, within 30 days of receiving a request, provide compensation or an explanation as to why compensation is not payable.

Following receipt of an APPR compensation claim, WestJet reviews the applicable flight and IROP Remark to ensure the correct classification was made. During this process WestJet considers additional information that may not have been available at the time of travel, and, at



times, will revise the determination. Each factor of an IROP is categorized into controllable but for safety, controllable, and uncontrollable with the minutes tabulated for each category. Once complete, the minutes are reviewed and a decision regarding the main causal factor is made.

Similar to question 1, above, requiring carriers to explain multiple reasons for a delay places an unnecessary burden on carriers and will only increase confusion amongst the travelling public. WestJet takes great care in ensuring guest satisfaction and utilizes a specialized team to interpret IROP data prior to communicating an explanation to a guest. Opening this requirement to anything beyond the main causal factor will only lead to increased confusion.

3. What criteria should be applied to determine the appropriate categorization of a flight disruption with multiple reasons for delay?

As stated above, WestJet has taken the approach that the main contributing category of delay by time will be used as the reason communicated to our guests. This considers the primary driver of the guest's overall delay. We submit this approach meets the requirements of the APPR and the expectations of our guests.

4. What criteria should be applied to determine the appropriate categorization of a flight disruption caused by a crew shortage? When, if ever, would a crew shortage be considered a safety-related reason for a flight disruption, rather than a matter within the carrier's control?

Unfortunately, the drafting of this question presupposes that crew shortages are almost always within a carrier's control and not due to safety related concerns (e.g. "When, **if ever**..."). As we will highlight below, crew issues require consideration of a number of factors, many of which a carrier has no control over, and all of which relate to safety.

Consider, for example, that carriers may utilize vastly different network models. A carrier operating under a 'hub and spoke' model may have a higher likelihood of recovery if a crew incident occurred at a hub airport. A similar incident at a 'spoke' airport, however, may drastically hinder the recoverability. On the other hand, a carrier operating a 'point to point' network may have challenges at both ends. Given the nature of the industry, it is not practical (and at times, not possible) to require stand-by crew staffing at all locations a carrier serves.

Additionally, consideration must be given to the time of day an incident occurs, the amount of notice given to resolve the issue, the remoteness of an airport, Transport Canada flight and duty time regulations (discussed further below), additional operational events that impact a carriers crew reserve (e.g. large scale IROP events, COVID-19), and specific training requirements or equipment type personnel (e.g. widebody vs. narrow-body aircraft).

As briefly referenced above, carriers continue to face challenges with the impending amendments to flight and duty time regulations (specifically subsections 700.63 and 700.63(2) of the *Canadian Aviation Regulations* SOR/96-433 ("**CAR's**")). For example, these amendments



will significantly alter the definition of unforeseen operational circumstances for the purposes of allowing an extension to duty days, which is critical for maintaining operations during winter weather events, de-icing delays, airport constraints, airspace or routing constraints. Currently, unforeseen events are tied to a planning cycle, and what can reasonably be foreseen as a schedule is built 30-45 days ahead. Beginning December 12, 2020, unforeseen events will move to an unforeseen operational circumstance that occurs within 60 minutes of the beginning of the flight duty period, which is almost impossible to plan effectively against. Similarly, the changes to subsection 700.63(2) include reference to “after take-off” and does not capture events during aircraft taxiing prior to take-off. This will potentially necessitate the offloading of passengers after departing from the gate should the block time appear to exceed the allowable extension time. At airports with significant traffic and congestion, should the crew effectively run out of time to take-off and have to return to the gate, the availability of gate space and ground crews may be problematic. This may lead to potentially extended tarmac delays and late-stage flight cancellations.

While the above considerations are not exhaustive, they serve to highlight the challenges carriers face with crew issues – the majority of which are outside a carrier’s control, and all of which are required for safety.

5. What criteria should be applied to determine the appropriate categorization of a flight disruption caused by a computer issue or network outage?

The Agency must consider two key points for technological issues: (i) the degree of control a carrier maintains, and (ii) whether a carrier took all reasonable measures to prevent the issue.

Similar to question 1, above, consideration must be given to the complex operating environment carriers operate in, and the number of potential issues a carrier has no control over (i.e. third parties such as airport authorities, NAV Canada, etc.). Issues related to a common use platform at an airport, satellite issues affecting GPS, cables cut during road maintenance, are just a few (non-exhaustive) examples of matters a carrier cannot prevent.

In the event a technological issue is not captured under section 10(1) of the APPR, then, in instances where a carrier maintains a direct contractual relationship with a third party, the Agency should ask whether the carrier took all reasonable measures to prevent (or minimize) the issue. WestJet submits this must be the first step to assess whether an issue is within, or outside of, a carrier’s control.

6. How should flight disruptions be categorized when a passenger experiences flight disruptions on multiple flights on their way to their ticketed destination? Should events affecting replacement flights affect the categorization of a flight disruption? For example, should the flight disruption be categorized based on the reason for the initial flight disruption or the reason for the longest delay?



The main consideration should be the main contributing cause of a delay. For example if a weather delay causes a guest to be rebooked for a flight an hour later, and the second flight experiences a 3 hour delay due to unscheduled maintenance but for safety, the main contributing cause of delay to the guests final destination would be the 3 hour delay, not the 1 hour delay caused by missing the initial connection.

7. What should or should not be considered to be “further to scheduled maintenance” as defined in subsection 1(1) of the APPR? Should a new issue identified during the repair of another issue be considered to be found further to scheduled maintenance? Do post-flight maintenance or pre-flight maintenance checks constitute scheduled maintenance?

Three issues have been posed in this question, each of which will be addressed in turn:

What should or should not be considered to be “further to scheduled maintenance” as defined in subsection 1(1) of the APPR?

We note that “further to scheduled maintenance” is not a defined term in subsection 1(1) of the APPR. Rather, this phrase is only utilized in the definition of “*mechanical malfunction*”. As WestJet has previously advised the Agency, although defined, the term “*mechanical malfunction*” is not used anywhere in the APPR – that is, the operative provisions of the APPR do not reference this term anywhere. Rather, perhaps more confounding, is that this definition is for the purposes of the enabling act (i.e. 1(1) opens with: “the following definitions apply in Part II of the Act”). For reference, subsection 1(1) and (2) of the APPR read as follows:

“Definitions and Interpretation

Definitions — Part II of Act

1(1) The following definitions apply in Part II of the Act.

mechanical malfunction means a mechanical problem that reduces the safety of passengers but does not include a problem that is identified **further to scheduled maintenance** undertaken in compliance with legal requirements.

required for safety purposes means required by law in order to reduce risk to passenger safety and includes required by safety decisions made within the authority of the pilot of the aircraft or any decision made in accordance with a safety management system as defined in subsection 101.01(1) of the Canadian Aviation Regulations but does not include **scheduled maintenance** in compliance with legal requirements.

(2) The following definitions apply in these Regulations.

Act means the Canada Transportation Act.



arrival means the time when one of the doors of an aircraft is opened after it lands to allow passengers to leave the aircraft.

large carrier means a carrier that has transported a worldwide total of two million passengers or more during each of the two preceding calendar years.

small carrier means any carrier that is not a large carrier.”

In a submission to the Agency dated February 29, 2019, WestJet provided drafting suggestions to address the above concerns, which, to date, have not been undertaken. As currently drafted, the Agency is seeking input on the usage of a phrase (“further to scheduled maintenance”) that is only used in one defined term, which term is then not used in the APPR. Thus, even if suggestions were provided, their application would be futile.

Rather, the APPR’s contemplate “scheduled maintenance in compliance with legal requirements” (not “scheduled maintenance” on its own). As quoted above, this language is used as an exclusion from the definition of “required for safety purposes”. The effect of this serves to prevent a carrier from relying on scheduled maintenance as a safety concern. Thus, a carrier may not claim that a flight cancellation was “required for safety purposes” if the sole cause was due to scheduled maintenance on an aircraft (e.g. a heavy check).

Scheduled maintenance is based on the tasks and intervals captured within an air carrier’s Maintenance Schedule Approval (“**MSA**”). For clarity, each aircraft manufacturer provides a Maintenance Planning Document (“**MPD**”) specific to an aircraft type. An air carrier uses the MPD in preparing an MSA which is sent to Transport Canada for review and approval. The MSA incorporates a schedule of tasks to be completed by aircraft mechanics (“**AME’s**”) based on prescribed intervals. These tasks are very specific on what to inspect, and how thoroughly to inspect (e.g. whether it’s only visual, requires a system test or specific task/action). An AME will follow a generated work order and, once the task is complete, will write compliance (e.g. a log book entry and computer entry).

Accordingly, scheduled maintenance performed in compliance with legal requirements refers to these foreseeable maintenance checks that a carrier will plan (and schedule) for. We understand this to be both the intention of Parliament and the Agency in drafting the APPR.

Should a new issue identified during the repair of another issue be considered to be found further to scheduled maintenance?

Please refer to the analysis above on the usage of this phrase.

Irrespective, an air carrier should not be held responsible for unforeseen maintenance events, regardless of where or when they are identified. As an aircraft does not make revenue on the ground, a carrier has every financial incentive to keep it operating. If a new issue is identified during planned scheduled maintenance, and this subsequently delays the maintenance release of the aircraft, we would expect the Agency to agree that the aircraft should be properly



repaired, without time pressure, and without the unnecessary threat of additional financial penalties (beyond those already being incurred by the operator). Surely the interests of safety should remain at the forefront, not the imposition of compensation entitlements. As an air carrier can only plan for known events (e.g. “scheduled maintenance”), issues that are not foreseeable must not be compensable.

Do post-flight maintenance or pre-flight maintenance checks constitute scheduled maintenance?

No. WestJet previously discussed this matter during our bilateral meetings with the CTA and were advised the APPR do not extend to these checks. The understanding was that this would place an impossible obligation on air carriers. While time is always allotted for these checks (e.g. a pre-flight check during an aircraft turn), mechanical defects discovered during these checks cannot be predicted. That is, the time allotment to conduct a check is foreseeable, but the time allotment for (any) subsequent repairs cannot be predicted. Again, the APPR were drafted to address scheduled (that is, planned and forecasted) maintenance, not items a carrier cannot contemplate.

8. In situations where a flight disruption is the result of a knock-on effect from a previous flight disruption, what factors should the Agency consider when considering whether the carrier took all reasonable measures to mitigate the impact of the initial disruption as required by subsections 10(2) and 11(2) of the APPR? For example, should the Agency consider:

- a. remoteness of the location;***
- b. the location being outside Canada;***
- c. other factors that may affect the carrier’s ability to locate timely replacement aircraft; and***
- d. if the original flight disruption occurred more than one flight earlier in a chain of flight disruptions.***

What constitutes “reasonable measures” must be determined based on the circumstances of the particular case. A carrier is not required to explore and exhaust every available option to prevent a delay and avoid/mitigate the damage, and must only be held to measures reasonably available to the airline and reasonably calculated, in cumulation, to prevent the subject loss.

A holistic and factual determination is necessary, and all of the factors noted above may be worthy of consideration in particular circumstances, in addition to a plethora of additional factors.

As a starting point, it is important to note that the standard is not perfection. A consideration



of whether an airline took “all reasonable measures” must be made in light of the realities of complex air travel systems and the numerous intrinsic and extrinsic factors that may lead to a delay. The complexities are compounded by the fact that one aircraft may be scheduled to make multiple trips in one day, hence the necessity for the knock-on provisions.

In consideration of whether an airline took all reasonable measures to avoid a delay, it will be necessary to consider all potentially relevant factors in light of commercial realities. This standard ought to be appropriately balanced between the rights of passengers and the difficulties faced by a carrier in order to avoid setting an unduly high bar that would disproportionately affect air carriers. This analysis must necessarily involve a consideration of meteorological conditions and weather to an area or region, the geographic location and remoteness of the departure airport and the arrival airport, any unscheduled maintenance issues, airport operations, a carrier’s ability to find replacement crew or aircraft, specific routing requirements or aircraft limitations, etc. Consideration should also be taken when analyzing the reasonableness of a response to a delay, including the size of the fleet of the carrier, the business model of the carrier, and the location where the carrier is based out of. For instance, it is much more difficult to obtain a replacement aircraft or crew in international or remote locations, especially for an ultra-low cost carrier.

Ultimately, setting out a list of factors for interpretation, as requested by the CTA, may be a difficult exercise, as the facts of each individual case will require the consideration of different factors.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert McCulloch". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping underline.

Robert McCulloch
Director, Legal
WestJet



Schedule "A" Report Inconsistencies

#43 FLT 2310 YYCCUN on Jan 25

This flight struck another aircraft tail and required a maintenance swap. The Report states: "Carrier decided to replace aircraft" – this is misleading as WestJet didn't "decide" to replace it; replacing the aircraft was required as it was unserviceable.

#44 FLT 3324 YVRYLW on Jan 29

The Report discusses FLT 3324 YVRYLW, but there was no delay or impact on this flight. The guest in question was on FLT 657 YYZYYC which had unscheduled maintenance and was cancelled. The guest was rebooked to travel via YVR. This flight should be taken out of the investigation as there were no communication issues or impacts.