

SCCH 496739

IN THE SMALL CLAIMSCOURT OF NOVA SCOTIA

Geddes v. Air Canada, 2021 NSSM 27

BETWEEN

DARREL GEDDES

CLAIMANT

AND

AIR CANADA

DEFENDANT

Trial – April 29, 2021

Briefs Received – May 11, 2021

Decision – July 4, 2021

Appearances – For the Claimant – Gabor Lukacs, Agent

For the Defendant – Melissa Infusino, Counsel

DECISION

Introduction

1. What financial compensation is an airline passenger, whose flight is disrupted, entitled to? This has been a contentious issues in Canada for many years. In 2019, the Canadian Government directed the Canadian Transportation Agency to create a set of rules that govern passenger rights when a flight disruption occurs. These new rules have been enacted through the Air Passenger Protection Regulations ('APPR'). This case is the first time a Nova Scotia court has considered these new provisions.

2. When consumer protection is the intended outcome of a regulatory regime, it should be assumed the regime will be in plain language, easy to understand and supports a simple claims process. The APPR, which was intended to accomplish enhanced passenger rights, accomplishes none of these. The language is complex and legalistic; one needs detailed or specific knowledge to invoke the claims system; and the process to seek compensation, once invoked, does not lend itself to quick resolution. This case illustrates that complexity, as lengthy pre-hearing processes involved the issuance of subpoenas to obtain detailed records from the Defendant about aircraft fleet information, maintenance records and other matters to support the Claim.
3. Few individuals would undertake such efforts to seek a few hundred dollars in compensation. Even if they wanted to, fewer could undertake such a claim. Close to 1000 pages of paper were exchanged, in a \$400 claim.
4. As will be clear shortly, the case turns on interpreting the APPR and one word in it, namely 'controllable'. Was the event resulting in cancellation of the Claimant's flight 'controllable' by the Defendant? That is a factual issue, but to reach a conclusion on it consumed considerable time, effort and resources, which may have been essential, but clearly show that a consumer friendly environment has not been provided by the APPR.

The Framework for this Claim

5. The Claim is for compensation under s.19(1)(a)(i) of the APPR:

Compensation for delay or cancellation

19 (1) If paragraph 12(2)(d) or (3)(d) applies to a carrier, it must provide the following minimum compensation:

(a) in the case of a large carrier,

(i) \$400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by three hours or more, but less than six hours,

6. Relevant provisions of the APPR include:

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.

Obligations when required for safety purposes

11 (1) Subject to subsection 10(2), this section applies to a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control but is required for safety purposes.

Earlier flight disruption

(2) A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation **that is within that carrier's control** but is required for safety purposes, is considered to also be within that carrier's control but required for safety purposes if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

(4) In the case of a cancellation [within the carrier's control but required for safety reasons], the carrier must [...]

c) provide alternate travel arrangements or a refund, in the manner set out in section 17.

12(3) In the case of a cancellation, the carrier must

(d) if a passenger is informed 14 days or less before the original departure time that the arrival of their flight at the destination that is indicated on their ticket will be delayed, provide the minimum compensation for inconvenience in the manner set out in section 19.

17 (1) If paragraph 11(3)(c), (4)(c) or (5)(c) or 12(2)(c), (3)(c) or (4)(c) applies to a carrier, it must provide the following alternate travel

arrangements free of charge to ensure that passengers complete their itinerary as soon as feasible:

- (a) in the case of a large carrier,
 - (i) a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within nine hours of the departure time that is indicated on that original ticket,
 - (ii) a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within 48 hours of the departure time that is indicated on that original ticket if the carrier cannot provide a confirmed reservation that complies with subparagraph (i), or
 - (iii) transportation to another airport that is within a reasonable distance of the airport at which the passenger is located and a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from that other airport to the destination that is indicated on the passenger's original ticket, if the carrier cannot provide a confirmed reservation that complies with subparagraphs (i) or (ii); and [...]"

The Facts

7. There is no factual dispute except relating to nature of or categorization of the delay.
8. On January 19, 2020, the Claimant purchased a round-trip Halifax-Orlando-Halifax itinerary, scheduled to depart from Halifax, NS at 07:55 on January 31, 2020 and to arrive in Orlando, FL, USA at 14:52 that day.
9. The first leg of the itinerary was a flight from Halifax to Boston on Air Canada Flight AC8893.
10. Flight AC8893 is operated by Jazz Aviation LLP under a contract with Air Canada. There was discussion about the role of Jazz, but the Defendant acknowledged responsibility and no determination needs to be made about the operator of the aircraft.
11. The Claimant checked in to his flights from Halifax to Orlando and arrived at the Halifax Airport well before departure, checked in at the Air Canada

counter, received boarding passes and proceeded through US Immigration. He proceeded to the departures area around 6:15 am. Flight AC8893 was the only flight departing from that area that morning.

12. At approximately 6:50, the Claimant received a notification through his Air Canada App that Flight AC8893 was cancelled and an Air Canada agent led passengers waiting to board Flight AC8893 to the main departures area of the airport.
13. Air Canada's customer service staff could not or were not willing to rebook the Claimant on an alternative flight, but advised the Claimant to phone Air Canada's customer relations department, for alternate travel plans to get to Orlando. The Claimant spent 48 minutes on the phone with Air Canada's customer relations staff. The line disconnected, and he was called back at 07:44.
14. The Claimant testified he relied on Air Canada to rebook him on the fastest possible alternative itinerary to Orlando. At or around 07:46, Air Canada rebooked the Claimant from Halifax to Orlando, via Ottawa and Toronto.
15. The Claimant arrived in Orlando at 19:54 (local time) on January 31, 2020, five hours and two minutes later than the arrival time of 14:52 on his original ticket.
16. Air Canada personnel provided no explanation or reason for the cancellation of AC8893. He was provided a meal voucher which contained what might appear to be a partial explanation. It contained: Flt/Date/Vol/Date - QK8893/31JAN[...]Reason/Motif *REROUTE CONTROLLABLE*. It became clear from the evidence of Defendant witnesses that no representation was intended by this message.
17. On February 7, 2020, the Claimant submitted two separate requests under the *APPR* for standard compensation for the delay caused by the cancellation of Flight AC8893.
18. On February 9, 2020, Air Canada responded to his request for compensation with a confirmation of receipt email about **flight AC8633**, and on February 14, 2020 denied his claim because "the delay was caused by events outside our control."
19. On February 16, 2020, because of the apparent confusion relating to the flight number, the Claimant submitted a second request for compensation of **flight AC8893**. He was seeking compensation of \$400 as provided for in

para. 19(1)(a)(i) of the APPR.

20. On February 18, 2020, Air Canada denied the claim and stated “the delay was caused by an event outside our control.” This was the Defendant’s position, but it did not explain the reason for the delay. (I note that for the APPR to truly achieve its intended purpose, one would think a passenger would be entitled to receive a full explanation from an airline.)
21. Flight AC8893 on January 31, 2020 from Halifax to Boston was to be operated by a DASH-8 aircraft bearing fleet identification number 422 [FIN 422], owned and operated for Air Canada by Jazz under a long-term agreement.
22. To understand Air Canada’s explanation for cancellation of AC8893 and its position the reason was not ‘within its control’ the history for FIN 422 in the previous period is outlined.
23. FIN 422 arrived in Halifax on January 30 at 22:45. It was then grounded because of a defect similar to one noted on several occasions in the previous few days. There was and had been a ‘powerplant’ fault message that caused the plane to be taken from service.
24. As a result its next flight later that night to Gander, NL, together with its scheduled return in the morning to service scheduled AC8893, were cancelled.
25. The Defendant’s witnesses introduced the maintenance logs for FIN 422 and explained what various entries meant.
26. On January 25, 2020, defect no. 1466999, relating to “Powerplant” message, was reported. The fault codes relating to the left engine included 160 CH,A (Channel A) and 160 CH,B (Channel B). The fault was cleared from the aircraft’s on-board computer, and no repair was made.
27. On January 26, 2020, defect no. 1467069, relating to the “Powerplant” message was noted. The log confirms the left propeller’s assy pick up [probe] was inspected, but no fault was found. No repair was made.
28. On January 26, 2020, defect no. 1467120, relating to the “Powerplant” message was reported again. No fault codes were found. The fault was cleared from the computer (“reset”). While work order no. 677266 was issued, no repair was performed. The fault message was cleared from the on-board computer.

29. On January 26, 2020, defect no. 1467149, relating to the “Powerplant” message was reported, with a notation “3rd time today.” Work order no. 677272 was issued, and the Propeller Electronic Controller for the left (“LH”) propeller was replaced. The aircraft returned to service on January 27, 2020.
30. On January 30, 2020, defect no. 1467738, relating to the “Powerplant” message was reported again. Work order no. 677800 was issued. The fault codes for #1 engine [left engine] included 160 Channel A & B, the same fault as the one reported in defect no. 1466999 on January 25, 2020. The left (“LH”) propeller’s “probe assy, dual pulse” was replaced. This was the part that was reported as inspected on January 26, 2020.
31. FIN 422 returned to service at 8:22 AT on January 31, 2020, after AC8893 had been cancelled. It had been out of service from 22:45 on the 30th to 8:22 on the 31st, for a total of 9 hours and 37 minutes.
32. The work to complete the repairs involved three steps: Task NR-00001, being the replacement of the left (“LH”) propeller’s “probe assy, dual pulse,” required 1 person, and took 2.00 labour hours; the aircraft’s return to service control required 1 person and 0.2 labour hours; and completion of the post maintenance checklist required 1 person and 0.25 labour hours.
33. Randolph Sharp, the In-service Technical Manager for the Dash 8 fleet testified for the Defendant. When speaking about the issues necessitating the grounding, he said they were not identified in regular maintenance or in pre-departure checks. They only produce a warning light when an incident occurs. When asked if the issue was foreseeable on June 30, given the earlier incidents, he noted the prior incidents were satisfactorily resolved or the faults were cleared under Transport Canada requirements. To allow the aircraft to fly, the issue found on the 30th, had to be satisfactorily resolved.
34. He also noted the problem resulting in the grounding was resolved by replacement of a part, as noted in para. 32.
35. Mr. Sharp was asked about the total time FIN 422 was grounded when the repairs took only 2:45. He did not directly know of the sequence of work; who did what and why the work took as long as it did. Based on his experience, he suggested over 2:45 hours was involved in making the required repairs.

36. On cross-examination. Mr. Sharp was asked about the fact the problem on the 30th was similar to those that had been identified in the previous few days. He stated though similar, there was no direct link between the issues in the previous week and the grounding. Because each issue was satisfactorily addressed, they were no longer concerns. He noted the previous problems were ‘intermittent’ with each being satisfactorily addressed and resolved and so no issues would be apparent when checking the aircraft. He described intermittent problems as the hardest to find because they are not there all the time.
37. The second witness for the Defendant was Phil Majerle, Director of Systems Operations. He described the arrangements between Jazz and the Defendant and how the cancellation was handled vis-à-vis rescheduling the Claimant. He addressed why an alternate aircraft was not flown to Halifax to service the morning flight to Boston.
38. Had the Operations Centre known when the plane was initially grounded at 22:45 it would not be available for AC8893, another aircraft might have been flown in from Montreal or Toronto. However, once maintenance started its work, they did not know how long it would take and the first update was due at 3:00. When the plane was not ready it was too late to get another aircraft.
39. He also spoke about the process to protect the Claimant on other flights to his final destination that day and how that was the Defendant’s obligation.
40. While FIN 422 was under maintenance, a second aircraft was also being serviced. According to the Defendant’s witnesses, this was unusual.

Issues

The issues for determination are:

- a. Whether the mechanical event affecting FIN 422, was within the carrier’s control, or within the carrier’s control but required for safety? More specifically, whether the maintenance event was unscheduled or if it was identified during scheduled maintenance under the definitions of “mechanical malfunction” and “required for safety purposes” under section 1 (1) of the *APPR*.
- b. Whether the “carrier took all reasonable measures to mitigate the impact of the earlier flight [...] cancellation” within the meaning of s. 11(2) of the *APPR*.

Analysis

41. The APPR does not define ‘a cancellation that would be in the carrier’s control’. The APPR creates a scheme that does not require passenger compensation if their flight is delayed or cancelled by events outside the control of the airline. Section 10(2) lists several events considered outside the airline’s control. Each is connected to a cause emanating from the act or decision of a third party or a weather event. Matters that fall within the responsibility of the airline, such as aircraft maintenance, do not fall within the range of events falling outside the carrier’s control. Therefore a cancellation resulting from maintenance is compensable under APPR. This interpretation is supported by the definition of ‘mechanical malfunction’ which means a mechanical problem that reduces the safety of passengers but does not include a problem identified further to scheduled maintenance undertaken in compliance with legal requirements.
42. For the Claimant to succeed, the Court must find the maintenance on FIN 422, that removed it from service on January 30 and 31, was within Air Canada’s control and not required for safety reasons. The party’s agree this requires an assessment of the knock-on effect, as the repairs involved the cancellation of flights scheduled before AC 8893. If the repairs were discretionary or part of scheduled maintenance, Air Canada would not be justified in cancelling AC8893 and under the APPR compensation would be due.
43. Proceedings in this Court are governed by the civil standard of proof. Here, it is a Federal regulation, the APPR that is subject to interpretation and the burden is on the Claimant to prove, on the balance of probabilities that the Claimant is entitled to compensation under APPR 19(1). In doing so, the Claimant must prove there is a delay of over 3 hours resulting from a cancellation. Once the Claimant does so, it is then for the Defendant to show the cancellation is because of a circumstance not in the carrier’s control.
44. The APPR does not set out a procedural framework for matters to be adjudicated under it, but because the only party with knowledge of the reasons for and circumstances surrounding a cancellation is the

Defendant, fairness requires the burden to shift to the Defendant to demonstrate, through evidence, that it was justified in cancelling the flight and denying compensation under the APPR. It would not be fair, especially in interpreting legislation that is designed to provide consumer protection for airline passengers, for a claimant to be required prove anything about the reasons for a cancellation.

45. The Claimant has proven the cancellation and is entitled to compensation unless the Defendant proves on the balance of probabilities, the reason for the cancellation was outside its control. The evidence is clear FIN 422 was taken out of service because of a 'mechanical malfunction' relating to the 'Powerplant'. Such a malfunction, required the plane to be grounded 'for safety purposes'. The Defendant would have been in breach of Transport Canada requirements if it allowed that aircraft to fly without the matter being resolved.
46. Though the Claimant does not dispute there was a mechanical problem, he argues the time taken for repair or the option of obtaining another aircraft resulted in the cancellation itself being within the control of the Defendant. The Claimant asserts another aircraft should have been dispatched to Halifax to service AC8893 on the morning of the 31st. Though it was an option that might have been exercised if the initial diagnosis of the problem, indicated it would take over eight hours to resolve. The Defendant asserts, and I accept, the time needed for repairs was not known. When a report on progress was issued at 3:00, it was too late to procure an alternate plane. I therefore conclude there was no option available but to await the completion of the repairs. On that basis the reason for cancellation was not within the control of the Defendant.
47. The Claimant also asserts the timing of the repairs was not done efficiently or promptly. This argument suggests had more technical resources been applied to the repairs, they would have been completed earlier and their timing was within the sole control of the Defendant. Thus the cancellation was the result, not of the mechanical malfunction, but the Defendant's failure to repair it quickly enough.
48. The Claimant asserted this conclusion through its cross examination of the Defendant's witnesses and analysis of the Defendant's documents. There was no viva voce evidence to support this conclusion. Randolph Sharp did not agree the required resources were not applied to the repair task as they were required. Though there was a second airplane

undergoing maintenance that night, there is no evidence to show what effect that had on the repairs to FIN 422. For a court to conclude the maintenance could have been done faster, the Claimant, though not having an obligation to disprove the Defendant's position, must produce sufficient evidence to raise the issue to a level where the Defendant then must demonstrate the repair was carried out in a business-like manner and no delays were within the control of the Defendant. The evidence did not do that. Merely asserting that repairs could have been done sooner, does not constitute evidence of that fact.

49. I cannot find the repairs were not done promptly or that there was anything done by the Defendant that prevented them from being completed sooner.

50. The cancellation of AC8893 resulted from a mechanical malfunction not within the Defendant's control and the cancellation was necessitated for safety reasons.

51. Once the flight was cancelled, the Defendant met its obligations under the APPR to rebook the Claimant on an alternative flight to get him to his destination as soon as possible. By doing so it met its obligations under s. 11(2) of the APPR to take all reasonable measures to mitigate the impact of the...cancellation.

52. The claim is dismissed.

Dated at Halifax, Nova Scotia, July 4, 2021.

Darrel Pink
Small Claims Court Adjudicator