

BEFORE THE DEPARTMENT OF TRANSPORTATION  
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS  
WASHINGTON, D.C.

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Charles Cervinka	)	
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v.	)	Docket DOT-OST-2020-0055
	)	
Air Canada	)	
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**REPLY OF CHARLES CERVINKA**

Comments with respect to this document should be addressed to:

Charles Cervinka

Dated: June 29, 2020

BEFORE THE DEPARTMENT OF TRANSPORTATION  
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS  
WASHINGTON, D.C.

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Air Canada	)	
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**REPLY OF CHARLES CERVINKA**

1. Air Canada's incorrectly asserts that its practices are consistent with its own contracts of carriage and tariffs.
  - a. Air Canada incorrectly cites in Note 5 its International Tariff issued on May 19, 2020, which is not only after the transaction date for the flight purchase (February 7 2020) but also after the travel date (May 10-13 2020). We have attached the correct International Tariff version (dated January 6 2020), applicable to this transaction in Attachment 1.

- b. We draw the Department's attention to Rule 100, Section D (page 104) titled "Involuntary Refunds"

**D. Involuntary Refund**

- (1) For the purpose of this paragraph, the term "Involuntary Refund" shall mean any refund:

- a) that is made if, due to reasons within Air Canada's control or required for safety purposes, the passenger experiences a delay of three hours or more, a denial of boarding or cancellation, and refuses alternate travel arrangements offered because they do not accommodate their travel needs. If the delay of three hours or more or cancellation is within Air Canada's control, the passenger will also be compensated in accordance with APPR, if passenger submits a claim within one year from the date on which the flight delay or flight cancellation occurred.

- c. We argue that the cancellation of Mr Cervinka's ticket was "due to reasons within Air Canada's control or required for safety purposes"

- (1) Air Canada does not provide compelling evidence that a law or regulation prohibited trans-border flights on May 10-13 2020. In fact, by its own admission, other flights operated during those dates.
- (2) By its own admission, Air Canada offered refunds to customers for cancelled flights until March 19, 2020. The change in policy is entirely under Air Canada's control.
- (3) Since Air Canada cannot demonstrate the cancellation was due to reasons beyond its control, the cancellation is subject to the "Involuntary Refund" clause of the tariff.
- (4) Should Air Canada refute the above arguments, we present the alternative conclusion that the cancellations were "*required for*

*safety purposes*” to prevent the spread of COVID-19<sup>1</sup> and therefore subject to the “Involuntary Refund” clause of the tariff.

(5) Both arguments above lead to the same conclusion, namely that the “Involuntary Refund” clause applies.

d. Mr Cervinka “refused alternate travel arrangements”

e. Therefore, the “Involuntary Refund” clause applies and a refund was due to Mr Cervinka. The amount of said refund is determined as follows under section D.(2), page 104:

*“Air Canada will refund the unused portion of the ticket”*

2. Air Canada’s incorrectly asserts that its practices are compliant with Canadian law, which is both irrelevant and disputed. Even if Air Canada’s practices complied with Canadian law, that fact would not suffice to dispose of the complaint because the complaint’s allegation is non-compliance with US law. Nevertheless, even Air Canada’s compliance with Canadian law is very much in doubt and certainly in dispute.

a. Air Canada cites a Canada Transport Agency (“CTA”) statement dated March 25, 2020 but fails to mention the clarifying statement<sup>2</sup> issued on April 22, 2020 which stated

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<sup>1</sup> Answer of Air Canada, Section III.a.ii, “*With the mounting concerns relating to the spread of COVID-19 and pursuant to a number of government directives (both of which were outside of Air Canada’s control), Air Canada was forced to cancel many international flights between the United States and Canada and to focus its operations on repatriation flights.*”

<sup>2</sup> <https://otc-cta.gc.ca/eng/faqs-statement-vouchers>

(1) *“The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic”*

(2) *“The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but doesn’t affect airlines’ obligations or passengers’ rights.”*

- b. The Canadian Federal Court of Appeal in its dismissal of an interlocutory injunction against the CTA (see Attachment 2), paragraphs 26, 27 and 35 confirm that the Statement on Vouchers has no legal authority.
  - c. Subsections 17(2) and 17(7) of the Canadian Air Passenger Protection Regulations mandate refunds to the original form of payment when alternate travel arrangement are refused by the passenger<sup>34</sup>
  - d. Based on the two preceding facts presented, we conclude that the decision to issue vouchers is solely a business decision on Air Canada’s part and has no basis in Canadian laws and regulations.
3. Air Canada’s compliance with Canadian law, which is disputed, is irrelevant to its commercial conduct in the United States.
4. Mr Cervinka’s place of residence (Bermuda) and citizenship (Canadian) is irrelevant to the laws and regulations governing Air Canada’s conduct in the United States.
- a. The Department widely and properly protects non-US citizens who buy travel to and from the United States. Certainly, the United States has an important

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<sup>3</sup> <https://www.canlii.org/en/ca/laws/regu/sor-2019-150/latest/sor-2019-150.html#sec17subsec2>

<sup>4</sup> <https://www.canlii.org/en/ca/laws/regu/sor-2019-150/latest/sor-2019-150.html#sec17subsec7>

interest in the business practices pertaining to sale of travel to and from the United States.

- b. Many Department regulations carefully delineate their international application, for example applying to all flights to/from the US (such as the Department's longstanding rules as to refund incidental to flight cancellation<sup>5</sup>), applying only to US airports but all carriers (for example, tarmac delays<sup>6</sup>)
  - c. Ultimately, Air Canada does not like and does not wish to comply with the Department's rules about refund after cancellation. Air Canada's preference and convenience offer nothing to invalidate the rules.
5. Mr Cervinka's fare type is irrelevant to the applicability of the guidance issued by the Department. In addition to the Department's enforcement notices, which speak for themselves regarding airlines' refund obligations, we draw attention to the following guidance available on the Department's website<sup>7</sup>, which states:
- a. *"Cancelled Flight – A passenger is entitled to a refund if the airline cancelled a flight, regardless of the reason, and the passenger chooses not to travel."*
  - b. *"Non-refundable tickets - Passengers who purchase non-refundable tickets are not entitled to a refund unless the airline makes a promise to provide a*

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<sup>5</sup> 14 CFR Part 374, [https://www.ecfr.gov/cgi-bin/text-idx?SID=010480e8bd2d92f674758ab8b46dac7d&mc=true&node=pt14.4.374&rgn=div5#se14.4.374\\_12](https://www.ecfr.gov/cgi-bin/text-idx?SID=010480e8bd2d92f674758ab8b46dac7d&mc=true&node=pt14.4.374&rgn=div5#se14.4.374_12) "This part is applicable to all air carriers and foreign air carriers engaging in consumer credit transactions"

<sup>6</sup> <https://www.transportation.gov/individuals/aviation-consumer-protection/tarmac-delays> "The Department's tarmac delay rule applies only to tarmac delays that occur at U.S. airports. Additionally, DOT requires only "covered carriers" to comply with the tarmac delay rule."

<sup>7</sup> <https://www.transportation.gov/individuals/aviation-consumer-protection/refunds>

***refund or the airline cancels a flight or makes a significant schedule change.***<sup>8910111213</sup>

- c. Air Canada offers nothing to counter the Department’s longstanding enforcement notices, which are plain as can be, and should speak for themselves.<sup>8910111213</sup>
- d. The department explained in no uncertain terms “*Since at least the time of an Industry Letter of July 15, 1996 the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.*”<sup>14</sup> Reference to this quote was used in the Department’s enforcement notice, dated April 3, 2020. Air Canada never challenged this assertion in the 24 years since it was made public. Indeed, Air Canada could not have credibly raised any such challenge because the logic of the Department’s longstanding position was compelling and would have been upheld in any reasonable evaluation. Now, Air Canada seeks to upend settled requirements. Their effort is as untimely as it is unwise.

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<sup>8</sup> Boston-Maine Airways Corp. 2006-7-7, <https://cms7.dot.gov/airconsumer/eo-2006-7-7>

<sup>9</sup> Paragon Air, Inc. 2009-7-17, <https://cms7.dot.gov/airconsumer/eo-2009-7-17>

<sup>10</sup> United Airlines, Inc. 2013-8-27, <https://cms7.dot.gov/airconsumer/eo-2013-8-27>

<sup>11</sup> Silver Airways LLC - Consent Order 2016-9-18, <https://cms7.dot.gov/airconsumer/eo-2016-9-18>

<sup>12</sup> Dynamic International Airways, LLC Consent Order 2017-4-12, <https://cms7.dot.gov/airconsumer/eo-2017-4-12>

<sup>13</sup> Allegiant Air Order 2018-4-8, <https://cms7.dot.gov/individuals/aviation-consumer-protection/Allegiant-Order-2018-4-8>

<sup>14</sup> Federal Register Volume 76, Number 79 (Monday, April 25, 2011)  
<https://www.govinfo.gov/content/pkg/FR-2011-04-25/html/2011-9736.htm>

6. Air Canada’s assertion that Mr Cervinka “*has not suffered any harm*” is egregious considering the purchase price of the ticket amounted to C\$437.70 and demonstrates the contempt it holds towards its customers (American or otherwise) and the financial ramifications of its refusal to issue refunds for services not provided.

Respectfully submitted,  
/s/

Charles Cervinka



**Certificate of Service**

I hereby certify that I have, this 29th day of June 2020 caused a copy of the foregoing  
Reply to be served by electronic mail on the following persons:

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/s/

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Charles Cervinka