

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

TRACEY CUMMINGS,
Third-Party Complainant

v.

SUNWING AIRLINES INC.,
Respondent

Docket DOT-OST-2020-0122

**ANSWER OF SUNWING AIRLINES INC.
TO THIRD-PARTY COMPLAINT**

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August 20, 2020

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Sunwing Airlines Inc. (Sunwing) submits the following answer to the complaint of Tracey Cummings dated August 6, 2020 (the Complaint).

Sunwing denies all allegations of the Complaint except those (a) contained in Paragraphs 3 through 6, which Sunwing admits, and (b) that quote or paraphrase other documents, which speak for themselves. Sunwing's affirmative defenses are set forth in Attachment A to this answer.

On August 12, 2020, Sunwing issued a cash refund of the full amount paid for the tickets purchased by Ms. Cummings by crediting the credit card account used to purchase them. See Attachment B.

Given the above, Sunwing submits that further recitation of information has been rendered moot, as has the Complaint. Sunwing therefore requests that the Assistant General Counsel for Aviation Enforcement and Proceedings dismiss the Complaint as moot in accordance with Rule 406(a)(2).

Respectfully submitted,



Aaron A. Goerlich
Garofalo Goerlich Hainbach PC

Counsel for Sunwing Airlines Inc.

August 20, 2020

CERTIFICATE OF SERVICE

I certify that on August 20, 2020, I served the foregoing answer (including Attachments A and B) by electronic mail upon:

Kimberly Graber, Esq.	kimberly.graber@dot.gov
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Ms. Tracey Cummings	turkee@eastlink.ca



Aaron A. Goerlich

Affirmative Defenses

1. The complainant, Tracey Cummings, asks the Department, a U.S. regulatory agency, to apply its policies extraterritorially; i.e., to a purchase in Canadian currency of Canadian-originating transportation by a Canadian resident from a Canadian carrier using a Canadian website. But extraterritorial application of DOT consumer-protection rules, regulations or policies is unacceptable from a variety of perspectives.¹

Chief among them in the present circumstances is that the Government of Canada is best suited to address the interests of Canadian consumers and air carriers – and it has done so. On March 25, 2020, the Canadian Transportation Agency (CTA) – Canada’s DOT equivalent – issued a *Statement on Vouchers* (available at <https://otc-cta.gc.ca/eng/statement-vouchers>) providing in pertinent part as follows:

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

* * *

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

Even more to the point is the *FAQs: Statement on Vouchers* issued by the CTA on April 22, 2020 (available at <https://otc-cta.gc.ca/eng/faqs-statement-vouchers>). The FAQs include the following:

Why did the CTA talk about vouchers when US and EU regulators have said that airlines should give refunds?

The American and European legislative frameworks set a minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside their control. Canada's doesn't. That's the reason for the difference in the statements. Some jurisdictions have relaxed the application or enforcement of requirements related to refunds in light of the

¹ See, e.g., *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), in which the Supreme Court held that U.S. law against securities fraud does not apply to investment transactions occurring outside the United States, even if they have a domestic impact or effect. “When a statute gives no clear indication of an extraterritorial application, it has none.” 561 U.S. at 255.

impacts of the COVID-19 pandemic, including European countries that have approved the issuance of vouchers instead of refunds.

These CTA statements directly reflect Canada's Air Passenger Protection Regulations (APPR), available at <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-150/page-1.html#docCont>. Sections 10 and 18 of the APPR establish that where a flight cancellation results from a situation outside a carrier's control, alternate travel arrangements may be provided rather than a refund – hence the CTA statements.²

An attempt by the Department to assert jurisdiction over transactions governed by foreign consumer-protection rules, regulations or policies would create an impossible compliance situation, forcing carriers to choose, at their peril, whose rules to follow. DOT does not regulate aspects of air transport whose center of gravity is foreign.³ Moreover, the Department's authority to regulate abroad is limited by 49 USC § 40120(b), which requires an international agreement and the active approval of the president for such regulation to occur. Neither condition has been met.

2. The DOT Enforcement Notice and related FAQ document cited in the Complaint are statements of policy or guidance and do not have the force or effect of law. Whether non-compliance with the Enforcement Notice and FAQ would constitute a violation of 49 USC § 41712, as the Department asserts, has not been adjudicated; as such, the outcome of a neutral assessment of the issue is unknown.⁴ Nor were the Enforcement Notice and FAQ subjected to public comment or other Administrative Procedure Act requirements prior to their issuance.⁵

² Confirming Canada's policy a few weeks after the CTA's issuance of *FAQs: Statement on Vouchers*, Transport Minister Marc Garneau stated: "I have said many times that I have enormous sympathy for those who would have preferred to have a cash refund in these difficult circumstances. It is far from being an ideal situation. At the same time, if airlines had to immediately reimburse all cancelled tickets, it would have a devastating effect on the air sector, which has been reeling since the COVID 19 pandemic started." Source: <https://www.cbc.ca/news/politics/transport-minister-airlines-survival-versus-refunds-1.5590392> (May 29, 2020). Note that Canadian carriers have received nothing comparable to the federal grants and loans their U.S. counterparts have received under the CARES Act.

³ Prominent examples include inapplicability of DOT's denied boarding compensation, tarmac delay and public charter rules to foreign-originating U.S.-bound travel; see 14 CFR §§ 250.2, 259.4(a) and 380.3(c).

⁴ Indeed, the Department itself has recently acknowledged the existence of ambiguity in this respect: "[T]he standards for unfairness and deception [under § 41712] should be specified and an explanation of how any prohibited or required actions meet those standards should be provided for clarity and to ensure consistency with the statute." *Notice of Proposed Rulemaking - Defining Unfair or Deceptive Practices*, 85 Fed. Reg. 11881, 11883 col. 1 (Feb. 28, 2020).

⁵ It is a well-established principle of administrative law that policy statements and guidance do not have the force and effect of law. *Perez v. Mortgage Bankers Association*, 575 U.S. ___, 135 S.Ct. 1199, 1208 (2015). Similarly, see the DOT General Counsel's February 2019 *Memorandum for Secretarial Officers and Heads of Operating Administrations* confirming that DOT will follow the Department of Justice's advice stating, in pertinent part, that "prosecuting attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law. The Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation." *Memorandum from Associate Attorney General, U.S. Department of Justice, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (January 25, 2018), available at <http://src.bna.com/vY4>.

Thus, even if the Enforcement Notice and FAQ were somehow deemed to affect the subject matter of the Complaint, any noncompliance with those pronouncements would not be probative of, much less establish a violation.

Transaction Search Results

Chain Number: [REDACTED]
SUNWING - GATEWAY

Search Criteria:

All Merchants
Transaction Date Range - From: 2020/08/12 To: 2020/08/13
Cardholder Number: [REDACTED]
All Transaction Amounts
All Batches
All Authorization Codes
All Tier IDs
All Transaction Categories
All Card Types
All Rate Types
All Rate %
All Fee Programs

Search Menu

CSV Download

CSV Help

Total Number of Transactions: 2 Found and Displayed

Merchant Number	Store Number	Transaction Date	Trans Time	Settlement Date	Device Number	Batch Number	Card Type	Capture Method	Cardholder Number	POI CD	Trans Type	Merchant Settled Tran. Amount	Cardholder Transaction Amount	CC ID	Auth Code	Trans Response	Merchant Reference Number	More Detail
[REDACTED]		2020/08/12	13.27.45	2020/08/12	66468642	599	M/C	Online	[REDACTED]	O	Refund	-1,250.00 CAD	-1,250.00 CAD	02372Z	Approved			Detail
		2020/08/12	13.28.02	2020/08/12	66468641	596	M/C	Online	[REDACTED]	O	Refund	-755.75 CAD	-755.75 CAD	04086Z	Approved			Detail