

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

Stephane Lynch
Third Party Complainant

v.

Air Transat A.T. Inc.

Docket DOT-OST-2020-0124

AIR TRANSAT A.T. INC. ANSWER TO COMPLAINT

Communications with respect to this document should be sent to:

Don H. Hainbach
Garofalo Goerlich Hainbach PC
1200 New Hampshire Avenue NW
Washington, DC 20036
Phone: 202-776-3970
dhainbach@ggh-airlaw.com

August 21, 2020

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

Stephane Lynch
Third Party Complainant

v.

Air Transat A.T. Inc.

Docket DOT-OST-2020-0124

AIR TRANSAT A.T. INC. ANSWER TO COMPLAINT

Air Transat A.T. Inc. (“Air Transat”) hereby answers the Complaint filed by Stephane Lynch (the “Complaint”). Except as otherwise stated below, Air Transat denies the allegations of the Complaint and respectfully requests that the Department of Transportation (“The Department”) dismiss the Complaint without further investigation or order pursuant to 14 C.F.R. § 302.406(a)(2). To the extent any factual statement or allegation made in the Complaint is not specifically admitted or denied herein, it should be deemed to have been denied.

Summary

Mr. Lynch does not assert he is either a citizen or resident of the United States. He purchased his tickets for Montreal-Orlando-Montreal transportation in Canada. Given that Air Transat is a Canadian carrier, and further given the absence of any apparent nexus between Mr. Lynch and the United States, it would have been more appropriate for him to have addressed his concerns to the appropriate Canadian regulatory authorities, and Air Transat respectfully submits that the Complaint should be dismissed.

Governments around the world have acknowledged that the pre-existing regulatory scheme may not be suitable to address the unprecedented consequences of the COVID-19 pandemic. For example, the United States Government has determined that the unprecedented economic fallout resulting from COVID-19 requires increased regulatory flexibility. Pursuant to Executive Order 13924, May 19, 2020:

Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility. They should also give businesses, especially small businesses, the confidence they need to re-open by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.¹

The directive to rescind, modify, waive or provide exemption from regulations and other requirements that may inhibit economic recovery supports dismissal of the complaint.

Air Transat's policy of issuing vouchers to passengers holding tickets on cancelled flights is consistent with Canadian Government policy implemented to address the COVID-19 fallout, and with applicable Canadian Government regulations.

On March 25, 2020, the Canadian Transportation Agency (CTA) issued the following statement regarding carrier refund requirements during the unprecedented circumstances created by COVID-19:²

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a

¹ "Regulatory Relief to Support Economic Recovery." Executive Order 13924. 85 FR 31353.

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

fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

In further recognition of those “unprecedented circumstances,” the CTA stated:

[G]enerally 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).

On May 29, 2020, Canadian Transport Minister Marc Garneau succinctly explained the rationale for the CTA policy:

[I]f 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.³

Similarly, Canadian Prime Minister Justin Trudeau stated that “while he knows Canadians want money back in their pockets, they also want to have an airline industry in the country when this is all over.”⁴

The stated concerns regarding viability of the Canadian aviation industry are real. The unprecedented operating restrictions imposed by COVID-19 have devastated the worldwide aviation industry. Established carriers such as LATAM, Avianca, South African Airways, Miami Air, Trans States Airlines and Virgin Australia have entered into restructuring procedures or have gone out of business entirely.

While sharing the common concern of ensuring that air transportation is able to resume when health conditions permit, different national governments around the world have adopted

³ “Canadian airlines could ‘fail’ if forced to refund passengers, says transport minister.” *CBC News*. May 29, 2020. <https://www.cbc.ca/news/politics/transport-minister-airlines-survival-versus-refunds-1.5590392>

⁴ “‘We care about these clients’: No easy answers even with vouchers, say agents.” *Travelweek*, June 1, 2020. <https://www.travelweek.ca/news/we-care-about-these-clients-no-easy-answers-even-with-vouchers-say-agents/>

different strategies for ensuring the survival of their respective aviation industries and air carriers. In the United States, the CARES Act provided almost \$60 billion in loans and grants to US airlines and related businesses. Many other countries throughout the world have also provided massive subsidies to their national carriers. However, Air Transat and other Canadian carriers have not received any comparable direct Canadian Government subsidies.

The United States and Canada effectively closed their common border this past March. Air Transat suspended scheduled flight operations on March 18 and then operated only repatriation flights until April 1, after which it grounded its entire fleet. Air Transat was forced to furlough approximately 96% of its administrative staff, pilots and cabin crew. Although Air Transat was able to resume limited scheduled service flight operations on July 23, 2020, it is currently operating only minimal service.

Air Transat recognizes that the US Department of Transportation has encouraged carriers to process refund requests made by passengers holding tickets on flights that have been cancelled. That policy may be reasonable with respect to US carriers given the massive government subsidies provided to those carriers. However, it is far less reasonable with respect to Canadian carriers such as Air Transat which have not received comparable subsidies.

In pertinent part, the Complaint is based on the allegation that Air Transat is not complying with the Department's *Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel*⁵ and the subsequent *Frequently Asked Questions Regarding Airline Ticket Refunds Given the*

⁵ https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020_0.pdf

*Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel.*⁶ However, both the Notice and FAQs are guidance documents, not regulations. As stated in the FAQs:

To the extent this notice includes guidance on how regulated entities may comply with existing regulations, it does not have the force and effect of law and is not meant to bind the regulated entities in any way.⁷

Although Air Transat understandably considers the CTA to be its primary regulator, and as demonstrated above fully complies with applicable CTA refund policies, it also recognizes the Department's oversight role with respect to the transborder service. In that context Air Transat is attempting to refund passengers having purchased tickets for transborder transportation from US points of sale to the extent its financial resources permit.

Answer

Air Transat answers the allegations and statements contained in the Complaint as follows:

1. Air Transat denies that it has violated any applicable legal requirement.
2. Air Transat denies it engaged in any unfair or deceptive practices.
3. Air Transat admits that Mr. Lynch purchased tickets on Air Transat on April 3, 2020.
4. Air Transat is without knowledge sufficient to respond to the assertion regarding when Mr. Lynch learned his flight was cancelled.

⁶ <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds-%20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf>

⁷ See also Executive Order 13891 (84 FR 55235, October 9, 2019):

Americans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures. Therefore, it is the policy of the executive branch, to the extent consistent with applicable law, to require that agencies treat guidance documents as non-binding both in law and in practice, except as incorporated into a contract, take public input into account when appropriate in formulating guidance documents, and make guidance documents readily available to the public. Agencies may impose legally binding requirements on the public only through regulations and on parties on a case-by-case basis through adjudications, and only after appropriate process, except as authorized by law or as incorporated into a contract.

5. Air Transat denies that Mr. Lynch requested a refund on August 27, 2020.
6. Air Transat admits that Mr. Lynch purchased a ticket on Air Transat for himself and the three other named passengers.
7. Air Transat states that the referenced policy on its website speaks for itself. To the extent Paragraph 7 is inconsistent with the policy stated on Air Transat's website, Paragraph 7 is denied.
8. Air Transat admits that it is a foreign air carrier authorized to operate flights from and to the United States. The remainder of Paragraph 8 asserts a conclusion of law to which no denial or admission is required.
9. Regarding Paragraph 9, Air Transat states that the Enforcement Notice speaks for itself.
10. Regarding Paragraph 10, Air Transat states that the Enforcement Notice speaks for itself.
11. Regarding Paragraph 11, Air Transat states that the Department's *Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* speaks for itself.
12. Paragraph 12 asserts a conclusion of law to which no denial or admission is required.
13. Paragraph 13 asserts a conclusion of law to which no denial or admission is required.
14. Paragraph 14 asserts a conclusion of law to which no denial or admission is required. Air Transat denies that it has engaged in any unfair or deceptive practice.
15. Air Transat denies it is a ticket agent. Air Transat denies it has engaged in any unfair or deceptive practice. The regulatory language cited in Paragraph 15 speaks for itself.
16. Air Transat is without knowledge sufficient to respond to the assertion regarding practices employed by other carriers. Air Transat denies the remainder of Paragraph 16.
17. Paragraph 17 is a request to the Department, not an allegation.

Affirmative Defenses

Air Transat makes the following affirmative defenses:

1. The Complaint fails to state a claim upon which relief may be granted.
2. The Complainant lacks a private right of action under 49 U.S.C. § 41712.
3. The Complainant lacks standing.

WHEREFORE, for the reasons stated above, Air Transat respectfully requests that the Department dismiss the Complaint pursuant to 14 C.F.R. § 302.406(a)(2).

Respectfully submitted,




Don H. Hainbach
Garofalo Goerlich Hainbach PC
1200 New Hampshire Avenue NW
Washington, DC 20036
Tel: 202-776-3970
dhainbach@ggh-airlaw.com

Counsel for Air Transat A.T. Inc.

CERTIFICATE OF SERVICE

I certify that on August 21, 2020, I served the foregoing answer by electronic mail upon:

lynchpod@gmail.com
Blane.workie@dot.gov
Kimberly.graber@dot.gov
Robert.gorman@dot.gov
Alexa.strong@dot.gov



Vanessa C. Krasniewicz