



Civil Resolution Tribunal

Date Issued: January 28, 2021

Files: SC-2020-005421 and

SC-2020-005450

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *McNabb v. Air Canada*, 2021 BCCRT 100

B E T W E E N :

ROBERT MCNABB, ADRIANNE MCNABB, and JONATHAN MCNABB

APPLICANTS

A N D :

AIR CANADA

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Rama Sood

INTRODUCTION

1. These two disputes are about disrupted flights. The applicants, Robert McNabb, Adrienne McNabb, and Jonathan McNabb, booked roundtrip flights from Comox to Fort Lauderdale with the respondent airline, Air Canada.
2. In dispute SC-2020-005421, the McNabbs say that Air Canada cancelled their flight to Fort Lauderdale after they boarded the plane. The flight was rebooked for the next day. They seek \$1,000 per person for a total of \$3,000 under the federal *Canada Transportation Act, Air Passenger Protection Regulations* (APPR), which are discussed in further detail below. Air Canada says the cancellation was for safety purposes and so the McNabbs are not entitled to any compensation.
3. In dispute SC-2020-005450, the McNabbs say that while returning home, a delayed flight caused them to miss a connecting flight during the last leg of their trip. Again, they seek compensation of \$1,000 per person for a total of \$3,000.
4. The McNabbs are represented by Robert McNabb. Air Canada is represented by an employee.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.
6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate

that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.
9. The 2 disputes were linked and underwent facilitation with the same CRT case manager. Since the disputes are linked, and the parties are the same, I will address both in this decision. The McNabbs' combined claims are more than the CRT's small claims \$5,000 monetary limit. Whether an applicant can bring multiple claims against the same respondent was discussed *De Bayer v. Yang*, 2019 BCCRT 298, although I am not bound by it. I agree with the tribunal member's analysis that this is permissible so long as the claims are sufficiently distinct that they are different and separate claims. I find this applies since, although the flights were booked at the same time, the 2 disputes involve distinctly different travel dates and conduct of the respondent.

ISSUES

10. The issues in this dispute are:
 - a. Whether the McNabbs are entitled to compensation for their cancelled flight to Fort Lauderdale, and
 - b. Whether the McNabbs are entitled to compensation for missing their return flight to Comox.

EVIDENCE AND ANALYSIS

11. In a civil claim like this one, as the applicants the McNabbs must prove their claims on a balance of probabilities. This means I must find it is more likely than not that the McNabbs' positions are correct. I have only addressed the parties' evidence and submissions to the extent necessary to explain and give context to my decision.
12. In July 2019, the McNabbs booked roundtrip flights with Air Canada from Comox B.C. to Fort Lauderdale, Florida departing on December 31, 2019 and returning January 13, 2020. Their itinerary called for connecting flights in Vancouver, B.C. and Montreal Q.C. during both the flight out and the return flight.
13. I will first review the applicable laws related to an air carrier's obligations to its passengers.

Applicable laws

14. Since the McNabbs were travelling roundtrip from Comox to Florida, their flights were international, and may be subject to what is commonly known as the '*Montreal Convention*'. The *Montreal Convention* is an international treaty with the force of law in Canada, under the federal *Carriage by Air Act* (see *Wettlaufer v. Air Transat A.T. Inc.*, 2013 BCSC 1245).
15. The *Montreal Convention* limits the scope and type of claim that a person can make for disputes about international air travel. It permits claims for death or bodily injury, destruction, damage or loss of baggage and cargo and for delay: articles 17 to 19. It bars all other actions for damages, however founded, in the carriage of passengers, baggage and cargo (article 29).
16. The APPR also applies to air travel to Canada. It limits the airline carrier's liability for compensation for delayed or cancelled flights based on the cause of the delay or cancellation. The APPR came into force on July 15, 2019. Section 14 and section 19, which are discussed below and apply to these disputes, came into force on December 15, 2019. Since the McNabbs travelled after the APPR came into force, I find the

APPR applies to their flights. The applicable sections of the APPR to these disputes are as follows:

- a. If a flight is delayed more than 3 hours or cancelled, for reasons beyond the carrier's control, the carrier must provide alternate travel arrangements at no charge (section 10(3) and section 18),
 - b. If a flight is delayed or cancelled less than 12 hours before departure time, for reasons within the carrier's control but required for safety purposes, then a carrier must rebook the flight and provide a passenger with free meals, accommodations and transportation as applicable (section 11(3), section 11(4), section 14, and section 17),
 - c. For a delay or cancellation to be "required for safety purposes", it must be required by law in order to reduce risk to passenger safety. It includes safety decisions made by the pilot but does not include scheduled maintenance in compliance with legal requirements (section 1),
 - d. If a flight is delayed or cancelled less than 12 hours before departure time for reasons within the carrier's control, a carrier must rebook the flight and provide a passenger with free meals, accommodations and transportation (section 12(2) and section 12(3)). A passenger may also be entitled to up to \$1,000 if the flight's arrival is delayed between 3 hours to 9 nine hours (section 19(1)(a)), and
 - e. The carrier must inform the passenger of the reason for the delay or cancellation about any compensation they may be entitled to for the inconvenience (section 13(1)(a) and section 13(1)(b)).
17. Finally, the McNabbs are bound by the terms and conditions of their airline passenger tickets, including Air Canada's International Tariff (Tariff). Rule 80(2) of the Tariff states that a carrier is not responsible for connecting flights not included as part of the itinerary on the passenger's ticket. Otherwise, the APPR provisions about delays applies.

Flight to Fort Lauderdale (SC-2020-005421)

18. When the McNabbs booked their trip, the flight from Montreal to Fort Lauderdale (AC1608) was scheduled to depart Montreal at 20:00 on December 31, 2019.
19. On December 31, Air Canada delayed AC1608 twice “due to crew availability”. It notified the McNabbs about both delays by email. At 17:18 Air Canada emailed that AC1608 was delayed until 20:30. At 17:43 Air Canada sent another email that AC1608 was delayed until 20:50.
20. After the passengers boarded AC1608, Air Canada cancelled the flight. Air Canada rebooked the McNabbs for the next flight departing on January 1, 2021 at 08:05 at no additional charge. Air Canada also provided the McNabbs with overnight accommodations, roundtrip transportation to the hotel, and meals at no charge.
21. The McNabbs say under article 19 of the *Montreal Convention*, Air Canada is liable for damage caused by a flight delay, unless it proves that it took all reasonable measures to avoid the damage or it was impossible for Air Canada to take such measures. I find article 19 does not apply since the McNabbs did not claim there was injury or damage due to the delays or cancellation.
22. The McNabbs also say both the delays and the cancellation were caused by staffing issues, which was under Air Canada’s control and so they are entitled to compensation under section 12(3) of the APPR. The McNabbs say that after they boarded the plane, one of the flight attendants commented that she hoped a pilot showed up. Since the earlier flights were delayed due to staff availability, the McNabbs say that more likely than not, the flight was cancelled because there was no pilot.
23. Air Canada says while the cancellation was within its control, it was required for safety purposes and so APPR section 11(3) applies. Air Canada submitted a statement from AC1608’s pilot, Captain BM. According to Captain BM, he arrived late in Montreal due to a winter storm. Based on Captain BM’s statement, I accept that he was available and prepared to pilot AC1608.

24. Captain BM stated the flight plan showed the engine “anti ice was inoperative” and that he “could not take [the] aircraft with this maintenance issue under the current weather conditions”. He says the duty pilot and chief pilot both agreed he could not take the aircraft under these conditions.
25. The McNabbs say the problem with the airplane should have been addressed during scheduled maintenance and so the flight was not cancelled for safety purposes. They referred to *Corina van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, a 2015 decision from the Netherlands Ninth Chamber court (*KLM*) which addressed the interpretation of a regulation similar to the APPR. In *KLM*, a passenger sought compensation after her flight was delayed the court found that a technical problem that delayed a flight was an “extraordinary circumstance” if it occurred unexpectedly, was not attributed to poor maintenance, and also was not detected during routine maintenance checks. Since this decision was issued by a foreign court, it is not binding on me. In any event, I find *KLM* is not helpful. “Safety purposes” is a defined term in the APPR as discussed above and so the definition of extraordinary circumstances does not apply.
26. As mentioned above, the burden is on the McNabbs to prove their claims. I find airplane maintenance is a subject outside of ordinary knowledge that requires expert evidence to prove. The McNabbs did not provide any evidence to show that the problem with the airplane was part of scheduled maintenance and so I give little weight to their allegation.
27. I accept that Captain BM cancelled AC1608 for safety purposes and so I find APPR section 12(3) does not apply. However, section 11 and section 14 do apply to the cancelled flight. Since the McNabbs agree Air Canada provided them with meals, accommodations, and roundtrip transportation to the hotel, I find Air Canada complied with the APPR.
28. The McNabbs submitted a February 11, 2020 news article that stated Air Canada had a history of misleading passengers about the cause of delays or cancellations in order to avoid paying compensation under the APPR. The McNabbs say that Air Canada

misrepresented the reason AC1608 was cancelled, After returning from their vacation, the McNabbs made a claim for compensation under APPR section 12(3) for the cancelled AC1608 flight. In a January 24, 2020 email to the McNabbs, Air Canada stated that section 12(3) did not apply because “the delay was caused by safety related issues”. The McNabbs say Air Canada did not inform them of the actual reason for cancelling AC1608 until August 20, 2020 when it emailed that the cancellation was “caused by a mechanical issue that was beyond [their] control” that the pilot noticed.

29. I find Air Canada did not misrepresent the reason the flight was cancelled. The evidence before me is consistent with Air Canada’s explanation that the delay (not cancellation) was caused by staffing issues, while the cancellation was caused by safety related issues.
30. Regarding when the McNabbs were notified about why AC1608 was cancelled, Air Canada says that its standard practice is for flight attendants to notify boarded passengers about the reason for the cancellation before they disembark. It did not state whether the McNabbs were in fact notified while on board AC1608. Air Canada also stated the McNabbs were notified on January 24, 2020 at the earliest due to a computer “glitch”.
31. I find that Air Canada did not notify the McNabbs that AC1608 was cancelled for safety purposes until August 2020 and so did not comply with APPR section 13. However, a carrier’s obligation to provide information to its passengers is enforced by the Canada Transportation Agency and does not come under the CRT’s jurisdiction. And so I cannot award any damages for this contravention.
32. The McNabbs say that after AC1608 was cancelled, they spent an additional 4 hours waiting to rebook their flight to Fort Lauderdale. I acknowledge that the McNabbs had been travelling for most of the day and I accept they were likely tired and frustrated by the time their flight was rebooked. However, I find Air Canada met their obligations to compensate the McNabbs for their inconvenience under section 12(3) of the APPR by providing accommodations, meals, and transportation on January 1, 2020.

33. The parties agree Air Canada offered the McNabbs a \$200 e-coupon as a goodwill gesture, which they declined. I find any such offers were made by Air Canada for the purposes of settlement and are no longer enforceable.
34. Since AC1608 was cancelled for safety-related issues and given my conclusions above, I dismiss the McNabbs' claims under SC-2020-005421. I now turn to the second dispute.

Return flight to Comox (SC-2020-005450)

35. On January 13, 2020, the McNabbs were scheduled to travel with Air Canada from Fort Lauderdale to Comox via Montreal and Vancouver.
36. The McNabbs' connecting flight from Montreal to Vancouver (AC309) was originally scheduled to depart at 16:05 on January 13, 2020 arriving at 18:50, and their connecting flight to Comox (AC8311) was scheduled to depart at 21:45.
37. The McNabbs say they deliberately scheduled a 2 hour gap between AC309 and AC8311 when they booked the trip in July 2019 to allow for delays. They say Air Canada changed AC309's departure time on October 15, 2019 from 16:05 to 18:20 and arrival time in Vancouver to 20:52. Although this shortened the window before AC8311, the McNabbs still had approximately 30 minutes between flights (assuming boarding is 30 minutes before departure).
38. On January 13, 2020, Air Canada delayed AC309 twice "due to additional flight preparation time". It notified the McNabbs about both delays by email. At 06:49 Air Canada emailed that AC309 was delayed until 18:50. At 14:35 Air Canada sent another email that AC309 was delayed until 19:30 and would arrive in Vancouver at 21:14.
39. AC309 departed Montreal at 19:30 and arrived in Vancouver at 22:26. This caused the McNabbs to miss flight AC8311. Since AC8311 was the last flight of the day to Comox, the McNabbs say they stayed overnight in Vancouver and flew out the next day. Air Canada did not pay for their accommodations, meals, or transportation. Air

Canada did not explain the 1 hour difference between its estimated arrival time in its email and the actual arrival time. However, I find nothing turns on this since the McNabbs would have missed AC8311 in any event.

40. The McNabbs say AC309's delay was within Air Canada's control since it was due to staffing issues. They say they saw AC309's pilot arrive at 18:50, which delayed the departure to 19:30. They say this increased the delay to 2 hours 10 minutes (I infer this is a typographical error and the McNabbs meant 1 hour 10 minutes). The McNabbs say they are entitled to compensation under section 12(2) of the APPR.
41. Air Canada denies AC309 was delayed for staffing issues. It says AC309 was delayed 1 hour 13 minutes due to situations outside of its control. It says the plane used for AC309, FIN645, was used for an earlier roundtrip flight from Montreal to Sao Paulo, Brazil (a 10 hour 29 minute flight one way). It says the outbound flight to Sao Paulo was delayed in Montreal due to deicing, which resulted in a 40 minute delay for AC309. It says AC309's crew arrived from another inbound flight that was delayed due to a "mechanical issue" and this caused the additional 33 minute delay.
42. Air Canada relies on APPR section 10(2). Section 10(2) applies to situations where a delay is directly caused by an earlier flight that was delayed or cancelled due to reasons beyond the carrier's control. In that case, the cause of the earlier delay also applies to the later flight if the carrier took all reasonable measures to mitigate the impact of the earlier flight delay on the later flight. If the delay is more than 3 hours, or the flight is cancelled, the carrier must rebook the flight at no charge (see section 10(3)(b) and section 18).
43. Air Canada says since FIN645 and the crew's earlier flight were delayed for reasons beyond its control, it was only obligated to rebook the McNabbs' flight to Comox, which it did. Air Canada says it also offered the McNabbs a 15% promotional code as a goodwill gesture, which they declined.

44. The McNabbs say that Air Canada misrepresented the cause of the delays and breached its contract to transport them to Vancouver in time to meet their connecting flight to Comox.
45. I find FIN645 was delayed by 40 minutes due to circumstances beyond Air Canada's control, namely deicing FIN645 for the outbound flight to Sao Paulo. Based on section 10(2), I accept that AC309's scheduled departure time was delayed to 18:50, also due to circumstances beyond Air Canada's control.
46. However, I do not accept that AC309's additional 33 minute delay to 19:30 was also beyond Air Canada's control. Air Canada's reasons for the second delay were vague. On January 13, it stated the delay was "due to additional preparation time", and then on January 20 it stated the delay was "due to scheduling issues". It now says the delay was due to the crew's flight to Montreal arriving late due to mechanical failure. Air Canada did not explain what the mechanical failure was and so I find it has not proved the delay was beyond its control, or within its control but due to safety purposes. In the absence of any evidence to the contrary, I find the second delay was within Air Canada's control.
47. According to Air Canada's January 20 email, AC8311 to Comox was also delayed due to de-icing, although it did not state the delay's length. I find more likely than not, that if AC309 had not been delayed by the crew and had departed at 18:50, the McNabbs would have arrived in Vancouver in time to board AC8311.
48. Since Air Canada is responsible for the McNabbs missing AC8311, and AC309 was a connecting flight that was part of their itinerary on their tickets, I find rule 80 of the Tariff applies. According to rule 80(2), the APPR provisions for delays applies to the missed connection. I find the McNabbs' flight to Comox was delayed by over 9 hours due to AC309's delay, and so the McNabbs are entitled to receive compensation of \$1,000 each under section 19(1)(a) of the APPR.
49. Further, since the McNabbs had to wait overnight for the next flight to Comox, I find Air Canada was also obligated to provide them with meals, accommodations and

transportation under section 12(2)(b) and section 14(2) of the APPR. Air Canada admitted it did not provide these amenities to the McNabbs. However, the McNabbs did not seek reimbursement for any expenses they may have incurred and so I do not award any compensation.

CRT FEES, INTEREST, AND DISPUTE-RELATED EXPENSES

50. The *Court Order Interest Act* (COIA) applies to the CRT. The McNabbs are entitled to pre-judgment interest on the \$3,000 award for damages from the date they claimed compensation from Air Canada to the date of this decision. The McNabbs did not state the date they requested compensation from Air Canada. However, I find it was January 19, 2020 since Air Canada acknowledged their request on that date. The COIA interest is \$34.
51. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Since the McNabbs were successful in only 1 of their 2 disputes, I find they are entitled to reimbursement of CRT fees for SC-2020-005450, which is \$125. Air Canada did not seek dispute-related expenses for SC-2020-005421. I dismiss the McNabbs' fee claim for SC-2020-005421.

ORDERS

52. Within 14 days of the date of this order, I order Air Canada to pay Robert McNabb, Adrienne McNabb, and Jonathan McNabb a total of \$3,159, broken down as follows:
- a. \$3,000 in damages,
 - b. \$34 in pre-judgment interest under the *Court Order Interest Act*, and
 - c. \$125 in CRT fees.
53. The McNabbs are entitled to post-judgment interest, as applicable.

54. I dismiss the McNabbs' claims and dispute for SC-2020-005421.
55. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.
56. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Rama Sood, Tribunal Member