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DECISION NO. 10-C-A-2014

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January 17, 2014

**COMPLAINT by Gábor Lukács against British Airways Plc carrying  
on business as British Airways.**

**File No. M4120-3/13-00661**

**INTRODUCTION**

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) dated January 30, 2013 alleging that certain provisions relating to liability and denied boarding compensation appearing in the tariff applicable to British Airways Plc carrying on business as British Airways (British Airways), International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 (Tariff), are unclear and/or unreasonable. Specifically, Mr. Lukács submits that:

- The introductory text to Rule 55(C) is unclear, contrary to paragraph 122(c) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(7) is inconsistent with the Convention for the Unification of Certain Rules for International Carriage by Air - Montreal Convention (Montreal Convention), and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(6) contradicts Article 22(5) of the Montreal Convention, and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(8) is inconsistent with the Montreal Convention, and is therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 55(C)(10) and the portions of Rules 115(N) and 116(N) that govern liability are inconsistent with Articles 17(2) and 19 of the Montreal Convention, and with the *Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929* (Warsaw Convention), and are therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rules 85(A) and 85(B)(2) are inconsistent with Article 19 of the Montreal Convention, and are therefore unreasonable within the meaning of subsection 111(1) of the ATR;
- Rule 87(B)(3)(B) is unreasonable within the meaning of subsection 111(1) of the ATR; and,
- Rules 115(H) and 116 (H) misstate the liability caps under the Montreal Convention and are unreasonable within the meaning of subsection 111(1) of the ATR.

[2] Mr. Lukács requests the Agency to:

- Disallow Rule 55(C), and in particular, Rules 55(C)(1), 55(C)(4), 55(C)(6), 55(C)(7), 55(C)(8) and 55(C)(10);
- Direct British Airways to amend Rules 115(H) and 116(H) to reflect the updated liability caps under the Montreal Convention;
- Disallow portions of Rules 115(N) and 116(N) that concern liability;
- Disallow Rules 85(A) and 85(B)(2), in part, and direct British Airways to incorporate into its rules the obligation to notify passengers about schedule changes; and
- Disallow Rule 87(B)(3)(B), and direct British Airways to incorporate into its rules the obligations set out in Regulation (EC) No. 261/2004.

### **PRELIMINARY MATTERS**

[3] In his complaint, Mr. Lukács also alleges that Rule 55(C)(6) is misleading, contrary to paragraph 18(b) of the ATR; however, he did not make any arguments to that effect. British Airways did not address this matter in its answer. In the absence of any arguments respecting this issue, the Agency will not consider it.

[4] Further, in his complaint, Mr. Lukács requests the Agency to disallow Rule 55(C)(4). Mr. Lukács has neglected to file any submissions regarding this matter, and British Airways has not addressed it in its submissions. As such, the Agency will not consider the matter.

[5] Mr. Lukács' submissions of January 30, 2013 related to Rules 115 and 116 were based on information available to him at that time. The Agency notes that British Airways filed revisions to those Rules effective February 1, 2011 and January 13, 2012. Rule 116 was deleted and changes were made to Rule 115. However, British Airways did not, in its answer, advise Mr. Lukács that there had been revisions to its Tariff.

### **ISSUES**

1. Is the introductory text to Rule 55(C) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable within the meaning of subsection 111(1) of the ATR?
2. Is Rule 55(C)(6) inconsistent with Article 22(5) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
3. Is Rule 55(C)(7) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
4. Is Rule 55(C)(8) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
5. Are Rule 55(C)(10) and the portion of Rule 115(N) that governs liability inconsistent with the Montreal Convention, and with the Warsaw Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?

6. Is Rule 115(H) inconsistent with Article 22(2) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?
7. Are Rules 85(A) and 85(B)(2) inconsistent with Article 19 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR? and,
8. Is Rule 87(B)(3)(B) unreasonable within the meaning of subsection 111(1) of the ATR?

## **RELEVANT STATUTORY AND TARIFF EXTRACTS**

- [6] The legislation, Tariff provisions and provisions of the Montreal Convention relevant to this matter are set out in the Appendix.

## **CLARITY AND REASONABLENESS OF TARIFF PROVISIONS**

### **Clarity**

- [7] In Decision No. 2-C-A-2001 (*Mr. H. v. Air Canada*), the Agency formulated the test respecting the carrier's obligation of tariff clarity as follows:

[...] the Agency is of the opinion that an air carrier's tariff meets its obligations of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

### **Reasonableness**

- [8] To assess whether a term or condition of carriage is "unreasonable," the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).
- [9] The terms and conditions of carriage are set out by an air carrier unilaterally without input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its interests and commercial requirements.
- [10] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

**ISSUES****Issue 1: Is the introductory text to Rule 55(C) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable within the meaning of subsection 111(1) of the ATR?****Positions of the parties - Clarity of Rule 55(C)****Mr. Lukács**

- [11] Mr. Lukács submits that the preamble to Rule 55(C), which states “[e]xcept as the convention or other applicable law may require,” is unclear because it suggests that the provisions are the general rule and only in exceptional circumstances do they not apply. He notes that in Decision No. LET-C-A-29-2011 (*Lukács v. Air Canada*), the Agency considered the phrase “Subject to the Convention, where applicable,” stating that:

The substantive wording of Rule 55(C)(7), on its face, indicates that Air Canada has no liability for loss, damage or delay of baggage and only in exceptional situations (i.e.. “Subject to the Convention”) will some other provisions concerning Air Canada liability apply and provide compensation rights to passengers. In fact, it is the reverse which applies, namely Air Canada does have liability for loss, damage or delay of baggage and only in exceptional circumstances is Air Canada able to raise a defence to a claim for liability or invoke damage limitations. The wording of the existing and proposed Rule 55(C)(7) is more likely to confuse passengers, rather than clearly inform passengers, regarding the applicability of Air Canada’s limit of liability. Accordingly, the Agency finds that Rule 55(C)(7) in itself is unclear and that the phrase “Subject to the Convention where applicable” renders the application of Rule 55(C)(7) unclear.

- [12] Mr. Lukács also notes that in Decision No. 16-C-A-2013 (*Lukács v. Porter Airlines*), the Agency found that the phrase “[s]ubject to the Warsaw Convention or the Montreal Convention” was unclear and contrary to section 122 of the ATR.
- [13] Mr. Lukács asserts that the Agency’s findings in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013 equally apply to Rule 55(C).

**British Airways**

- [14] British Airways submits that the intent of the preamble is to make it clear that British Airways will comply with the Montreal Convention, otherwise the general provisions of common law apply, and that the wording of the Rule is clear.

Mr. Lukács

- [15] Mr. Lukács points out that at least 152 states are parties to the Warsaw Convention, and over 100 states are parties to the Montreal Convention. He submits that in Decision Nos. 328-C-A-2007 (*Balakrishnan v. Aeroflot*) and 434-C-A-2007 (*Thakkar v. Aeroflot*), among others, the Agency found that the Montreal Convention applied to round-trip travel originating and ending in Canada. Mr. Lukács therefore contends that the Warsaw Convention or the Montreal Convention applies to a vast majority of carriage by air to and from Canada. Mr. Lukács maintains that the wording in Rule 55(C) suggests that the provisions are the general rule and only in exceptional circumstances do they not apply.
- [16] Mr. Lukács submits that the substantive wording of the Rule is substantially different from the liability regime of the Montreal Convention or the Warsaw Convention, and therefore, the Rule is misleading and confusing. He notes that British Airways did not provide any arguments as to why the Agency's conclusions in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013 were incorrect.
- [17] Mr. Lukács submits that as per Decision No. 291-C-A-2011 (*Lukács v. Air Canada*), the Agency could address his concerns about clarity by replacing “[e]xcept as the convention or other applicable law may require” with “[f]or the exceptional international itineraries where no Convention applies.”

**Analysis and findings**

- [18] The Agency agrees with Mr. Lukács' submission that the wording at issue in Rule 55(C) provides a wrong impression that the application of the Warsaw Convention or the Montreal Convention to air travel is the exception, and that such wording is equivalent to that considered by the Agency in Decision Nos. LET-C-A-29-2011 and 16-C-A-2013. The Agency therefore concludes that the wording at issue “Except as the convention or other applicable law may otherwise require.” creates a reasonable doubt, ambiguity or uncertain meaning regarding the rights and obligations of both the carrier and the passengers, and that the introductory text to Rule 55(C) is unclear, contrary to paragraph 122(c) of the ATR.

**Positions of the parties - Reasonableness of Rule 55(C)**

Mr. Lukács

- [19] Mr. Lukács submits that in Decision No. 291-C-A-2011, which dealt, in part, with a tariff provision that stated: “[s]ubject to the Convention, where applicable, carrier is not liable for loss, damage to, or delay in delivery of [...],” the Agency held that passengers ought to be afforded the same protection against loss, damage or delay of baggage as in the Montreal Convention, regardless of whether the Montreal Convention applies, and disallowed the provisions as unreasonable.

- [20] Mr. Lukács points out that Article 17(2) of the Montreal Convention provides that the carrier is liable for destruction or loss of, or damage to, checked baggage in the charge of the carrier except to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. He notes that Article 19 of the Montreal Convention provides that a carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo, except when the carrier can prove that it took all reasonably required measures to avoid the damage or that it was impossible to take such measures. Mr. Lukács further notes that Article 20 of the Montreal Convention deals with the carrier's ability to exonerate itself in the case where the damage was caused, or contributed to, by the person claiming compensation; however, the burden of proof is on the carrier.
- [21] Mr. Lukács contends that Rule 55(C) results in British Airways being excluded from damages when the Montreal Convention does not apply, and that the Rule exonerates British Airways from liabilities, except in the case when the damage is due to British Airways' negligence or wilful misconduct. He also argues that the Rule appears to be placing the burden of proof on the passenger, which is contrary to Article 20.
- [22] Mr. Lukács therefore concludes that Rule 55(C) is inconsistent with the principles in the Montreal Convention, and therefore is unreasonable.

British Airways

- [23] British Airways submits that the intent of the phrase at issue is to make it clear that British Airways will fully comply with the Montreal Convention, otherwise the general provisions of common law apply. British Airways maintains that the liability provisions of the Montreal Convention do not need to apply to all circumstances for the Rule to be reasonable, and that Parliament has not enacted that the provisions of the Montreal Convention be applicable to all international carriage by air.

Mr. Lukács

- [24] Mr. Lukács argues that Rule 55(C) does not set out the general provisions of common law, and that in fact, to a great extent, it is the Montreal Convention that does this. He submits that at common law, the carrier is responsible for the safety of the goods entrusted to it in all events, except for specific perils, such as acts of God and the Queen's enemies, and there does not need to be a contract for this to hold between the common carrier and the owner of goods.
- [25] Mr. Lukács notes that in Decision No. LET-C-A-29-2011, the Agency found that it is reasonable to apply the principles of the Montreal Convention to carriage where neither the Montreal Convention nor the Warsaw Convention applies, and that British Airways did not provide any arguments as to why the Agency's conclusions in that Decision were wrong. Mr. Lukács also submits that British Airways has not provided any arguments or evidence related to the commercial or operational factors that the Agency should take into account to offset the rights of passengers.

- [26] Mr. Lukács maintains that there is no reason why British Airways should not apply the liability principles of the Montreal Convention, even when it does not apply, and that British Airways does not need to apply the entire Montreal Convention on all international carriage; it should apply some of the principles related to liability.

### **Analysis and findings**

- [27] The Agency finds that the submissions by Mr. Lukács respecting this matter are more compelling than those by British Airways.
- [28] In Decision No. 291-C-A-2011, the Agency, in addressing the question of whether it was reasonable for Air Canada to exempt itself from liability on itineraries to which neither the Montreal Convention nor Warsaw Convention applies, found that “the right of all international passengers to have an accepted international standard for baggage liability protection is reasonable.” The Agency remains of the same opinion, and is also of the opinion that applying the principles of the Montreal Convention to carriage that is not subject to the Montreal Convention or the Warsaw Convention achieves a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage, and British Airways’ statutory, commercial and operational obligations. As such, the Agency concludes that the introductory text to Rule 55(C) is unreasonable within the meaning of subsection 111(1) of the ATR.

### **Issue 2: Is Rule 55(C)(6) inconsistent with Article 22(5) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

#### **Positions of the parties**

##### Mr. Lukács

- [29] Mr. Lukács submits that Rule 55(C)(6) states that British Airways’ liability shall not exceed the limitation set out in the Montreal Convention, and that this Rule contradicts and/or misrepresents British Airways’ obligations under Article 22(5) of the Montreal Convention, which allows for exceeding the limit in certain cases. He contends that, as such, the Rule is unreasonable and should be disallowed.

##### British Airways

- [30] British Airways submits that Rule 55(C)(6) is not intended to overrule Article 22(5) of the Montreal Convention; it is intended to clarify that the liability of the carrier for delay shall be the liability provided for under the Montreal Convention and no more.

##### Mr. Lukács

- [31] Mr. Lukács maintains that the wording of Rule 55(C)(6), when read with Rule 55(C), does not clearly reflect British Airways’ submitted intentions. He submits that the Rule does not specify to which convention the Rule is referring, and that the Montreal Convention and Warsaw Convention differ substantially on liability caps.

[32] Mr. Lukács concludes that Rule 55(C)(6) is not clear, and should be substituted with, “In any event, liability of Carrier for delay of passenger shall not exceed the limitation set forth in Article 22 of the *Montreal Convention*.”

**Analysis and findings**

[33] Article 22(5) of the Montreal Convention provides that:

The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

[34] The Agency notes that Articles 22(1) and (2) set out, respectively, the limit of liability for the delay in the carriage of passengers, and for the destruction, loss, damage or delay in the carriage of baggage.

[35] The Agency finds that the submissions respecting this matter by Mr. Lukács are more compelling than those by British Airways. The Agency agrees with Mr. Lukács’ submission that Rule 55(C)(6), when read in tandem with Rule 55(C), restricts British Airways’ liability in a manner that is inconsistent with Article 22(5) of the Montreal Convention. More particularly, the limits provided for in the Montreal Convention are not absolute as these can be excluded if it is proved that the damage resulted from an act or omission of the carrier, its servants and agents, with the intent to cause the damage or recklessly and with knowledge of what the result would be. As noted above, the Agency has determined in previous decisions that tariff provisions that relate to travel to which neither the Montreal Convention nor Warsaw Convention applies, and that are inconsistent with the principles of the Montreal Convention, are unreasonable.

[36] Therefore, the Agency finds that Rule 55(C)(6) fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage, and British Airways’ statutory, commercial and operational obligations.

[37] The Agency finds that Rule 55(C)(6) is unreasonable within the meaning of subsection 111(1) of the ATR.



**Issue 3: Is Rule 55(C)(7) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**

Mr. Lukács

- [38] Mr. Lukács submits that Rule 55(C)(7) states that British Airways' limit of liability is \$20 per kg for checked baggage, and \$400 per passenger for unchecked baggage. He submits that these limits appear to reflect the limits set out in the Warsaw Convention, the predecessor of the Montreal Convention, and are inconsistent with the Montreal Convention because they are unreasonably low.

British Airways

- [39] British Airways submits that to the extent that Rule 55(C)(7) may no longer be applicable under the Montreal Convention, British Airways does not apply it in determining baggage claims under the Montreal Convention; however, it continues to apply it to international carriage governed by the Warsaw Convention. British Airways concludes that the Rule is clear and reasonable.

Mr. Lukács

- [40] Mr. Lukács argues that the liability caps, when applied to itineraries where neither the Montreal Convention nor Warsaw Convention applies, are unreasonably low. He notes that under Rule 55(C)(7), liability caps of CAD\$460 and \$640 would apply to baggage weighing 23 kg and 32 kg, respectively. Mr. Lukács submits that in Decision No. 483-C-A-2010 (*Lukács v. WestJet*), the Agency found that a liability cap of \$1,000 was unreasonable.
- [41] Mr. Lukács submits that British Airways has not justified why it applies these liability caps on carriage not subject to the Warsaw Convention, and did not provide evidence to demonstrate how altering this provision would impact its ability to meet its commercial obligations.
- [42] Mr. Lukács maintains that Rule 55(C)(7) is unreasonable, and should be disallowed and substituted with a rule that sets out liability caps identical to what is in the Montreal Convention on itineraries where no convention applies.

**Analysis and findings**

- [43] The Agency finds that Mr. Lukács' submissions respecting this matter are more compelling than those by British Airways. As correctly noted by Mr. Lukács, Rule 55(C)(7) sets out the limits of baggage liability established by the Warsaw Convention; however, for itineraries where neither the Warsaw Convention nor the Montreal Convention applies, this Rule is inconsistent with the Montreal Convention as it does not reflect the baggage liability under the Montreal Convention, and involves limits that are lower than those required under the Montreal Convention.

- [44] Rule 55(C)(7) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations.
- [45] The Agency finds that Rule 55(C)(7) is unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 4: Is Rule 55(C)(8) inconsistent with the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**

Mr. Lukács

- [46] Mr. Lukács notes that Rule 55(C)(8) states that in the event where a part, but not all, of a passenger's checked baggage is delivered, British Airways' liability will be reduced proportionally on the basis of weight, notwithstanding the value of any part of the baggage or its contents. He submits that British Airways may be confusing the Articles in the Montreal Convention that apply to baggage with those that apply to cargo. Mr. Lukács observes that the limits of liability for baggage under the Montreal Convention are no longer based on weight but rather on liability per passenger.
- [47] Mr. Lukács concludes that Rule 55(C)(8) is inconsistent with the Montreal Convention, and is unreasonable and should be disallowed.

British Airways

- [48] British Airways submits that to the extent that Rule 55(C)(8) may no longer apply under the Montreal Convention, it is not applied in the determination of baggage claims under that Convention; however, the Rule applies to international carriage governed by the Warsaw Convention.
- [49] British Airways maintains that Rule 55(C)(8) is reasonable and clear.

Mr. Lukács

- [50] Mr. Lukács argues that the liability caps, when applied to itineraries where neither the Montreal Convention nor Warsaw Convention applies, are unreasonably low. He submits that British Airways has not submitted any reasons for applying the over 80-year old regime on itineraries where it is not applicable given that the Montreal Convention is considered the current standard, and that the value or importance of items need not be proportionate to their weight, which is reflected in the Montreal Convention.
- [51] Mr. Lukács asserts that Rule 55(C)(8) is unreasonable in cases where it applies to non-Warsaw Convention itineraries, and should be disallowed and/or substituted.

**Analysis and findings**

- [52] The Agency agrees with Mr. Lukács' submission that Rule 55(C)(8) does not set out the limits of baggage liability under the Montreal Convention, and that the limits established under the Rule are lower than those required by the Montreal Convention. With respect to the application of the principles of the Montreal Convention relating to baggage liability to itineraries to which the Warsaw Convention does not apply, the Agency has determined, as noted above, that passengers ought to be afforded the same protection against loss and damage or delay of baggage as in the Montreal Convention, regardless of whether that Convention applies.
- [53] The Agency finds that Mr. Lukács' submissions regarding this matter are more compelling than those by British Airways, and that Rule 55(C)(8) does not strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. As such, the Agency finds that Rule 55(C)(8) is unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 5: Are Rule 55(C)(10) and the portion of Rule 115(N) that governs liability inconsistent with the Montreal Convention, and the Warsaw Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**Mr. Lukács

- [54] Mr. Lukács submits that Rule 55(C)(10) states that British Airways is not liable for loss, damage or delay of items in the passenger's checked baggage. He notes that these items include: fragile or perishable items, money, jewelry, silverware, negotiable papers, securities or other valuables, business documents or samples. Mr. Lukács further notes that Rule 115(N) states that these types of items must not be included in checked baggage, and if they are, British Airways will not be liable for loss of or damage to them.

Loss

- [55] Mr. Lukács submits that Article 17(2) of the Montreal Convention does not relieve the carrier from liability, except in the case when damage results from the "inherent defect, quality or vice of the baggage." He also submits that Article 17(3) of the Montreal Convention provides that once the loss of baggage is established, the passenger is entitled to "enforce against the carrier the rights which flow from the contract of carriage."
- [56] Mr. Lukács maintains that the carrier's liability for loss of checked baggage is absolute, and the carrier cannot exonerate itself from that liability.

Destruction and damage

- [57] Mr. Lukács notes that Article 17(2) of the Montreal Convention also provides that in order for the carrier to exonerate itself from liability for damage, that carrier must prove that the baggage had a particular inherent defect, quality or vice, and that such defect was the cause of the damage.

Delay

- [58] Mr. Lukács submits that Article 19 of the Montreal Convention provides that the carrier is liable for damage due to delay except if the carrier can prove that it took all reasonably required measures to avoid the damages or that those measures were impossible. He asserts that the burden of proof resides with the carrier, and the fact that baggage contains excluded items is not relevant to the matter of liability due to delay; what is relevant is if the carrier took all reasonably required measures to avoid the delay.
- [59] Mr. Lukács submits that in Decision No. 227-C-A-2008 (*McCabe v. Air Canada*), the Agency found that if a carrier accepts checked baggage, and that baggage is under the care and control of the carrier, then the carrier assumes liability for that baggage in the event of loss and damage, notwithstanding the baggage contains items the carrier has not agreed to carry. He notes that in Decision No. 208-C-A-2009 (*Lukács v. Air Canada*), the Agency found that, to exempt a carrier for damage under Article 17(2) of the Montreal Convention, there must be a causal relationship between the damage and an inherent defect, quality or vice of the baggage. Mr. Lukács submits that this principle was reaffirmed in Decision Nos. 309-C-A-2010 (*Kipper v. WestJet*), 477-C-A-2010 (*Lukács v. WestJet*) and 99-C-A-2011 (*Kouznetchik v. American Airlines*).
- [60] Mr. Lukács argues that Rules 55(C)(10), 115(N) and 116(N) are blanket exclusions from liability based solely on whether the baggage contains excluded items, and not based on any causal relationship between the damage and any inherent defects, quality or vice of the baggage. He submits that these Rules are inconsistent with the Montreal Convention, are therefore unreasonable, and should be disallowed.

British Airways

- [61] British Airways submits that Rules 55(C)(10) and 115(N) apply to non-Montreal Convention international carriage, and are clear and reasonable.

Mr. Lukács

- [62] Mr. Lukács submits that the legal principles related to baggage liability in the Montreal Convention are the same as those in the Warsaw Convention. Therefore, Rules 55(C)(10) and 115(N) are also unreasonable when applied to itineraries subject to the Warsaw Convention. He further notes that, in Decision Nos. LET-C-A-29-2011 and 291-C-A-2011, the Agency found that tariff provisions like Rules 55(C)(10) and 115(N) on itineraries where no convention applies do not provide passengers with reasonable liability coverage.

- [63] Mr. Lukács submits that British Airways has not provided arguments as to why the same conclusions should not be made in the present case, and further, that as British Airways' primary competitor, Air Canada, was ordered to substitute its rule with language that reflects the principles of the Montreal Convention, British Airways will not suffer a competitive disadvantage if required to do the same.
- [64] Mr. Lukács concludes that Rule 55(C)(10), and the portion of Rule 115(N) that governs liability should be disallowed and substituted, as in the case with Air Canada.

**Analysis and findings**

- [65] The Agency agrees with Mr. Lukács' submission that Rule 55(C)(10) is inconsistent with Articles 17(2) and 19 of the Montreal Convention because that Rule excludes British Airways from liability, irrespective of whether the damage to baggage was related to the inherent defect, quality or vice of that baggage, or in respect of delay, all reasonable measures were taken to avoid that delay.
- [66] The Agency notes that Rule 115(N) was revised effective January 13, 2012, prior to Mr. Lukács' complaint dated January 30, 2013, to provide, in part:

In accordance with the British Airways conditions of carriage, items that are fragile, perishable or of special value must not be included in checked baggage. If any of these items, or any other items forbidden under the British Airways conditions of carriage, are included in checked baggage, British Airways will not be liable for any loss or damage to them except as provided for by the Montreal Convention. [...]

- [67] The Agency finds that Rule 115(N), as currently filed, is consistent with Articles 17(2) and 19 of the Montreal Convention.
- [68] With respect to travel to which the Warsaw Convention applies, the Agency agrees with Mr. Lukács' submission that Rules 55(C)(10) and 115(N) are inconsistent with that Convention.
- [69] Concerning the application of the principles of Articles 17(2) and 19 to carriage where neither the Montreal Convention nor Warsaw Convention applies, in Decision Nos. LET-C-A-29-2011 and 291-C-A-2011, the Agency found that tariff provisions similar to Rules 55(C)(10) and 115(N) on itineraries where no convention applies do not provide passengers with reasonable liability coverage, and that it is reasonable for the principles related to baggage liability established by the Montreal Convention for international carriage to be applied to an itinerary where neither the Montreal Convention nor the Warsaw Convention applies.

- [70] The Agency finds that Mr. Lukács' submissions regarding this matter are more compelling than those by British Airways, and that Rules 55(C)(10) and 115(N) fail to strike a balance between the passenger's rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. The Agency therefore finds that Rule 55(C)(10), and the portion of Rules 115(N) that governs liability are unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 6: Is Rule 115(H) inconsistent with Article 22(2) of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR)?**

**Positions of the parties**

Mr. Lukács

- [71] Mr. Lukács submits that Rule 115(H) provides that British Airways' liability limit is set at 1,000 Special Drawing Rights (SDR) for destruction, loss, damage or delay of baggage. He notes that the current limit of liability is actually 1,131 SDR, and that Rule 115(H) therefore misstates British Airways' obligation under the Montreal Convention.

British Airways

- [72] British Airways submits that Rule 115(H) sets out the original limit of liability of 1,000 SDR for baggage under the Montreal Convention, and that British Airways complies with the current applicable limit.

Mr. Lukács

- [73] Mr. Lukács maintains that there is no reason for retaining an outdated liability limit, and that British Airways should be directed to revise the Rules to reflect the current baggage liability limit set out in the Montreal Convention.

**Analysis and findings**

- [74] Mr. Lukács argues that Rule 115(H) does not reflect the current limit of baggage liability established by the Montreal Convention.
- [75] British Airways submits that it complies with the liability limit set by the Montreal Convention.
- [76] The Agency notes that British Airways revised Rule 115(H) prior to Mr. Lukács' complaint dated January 30, 2013, to provide, in part, that "[t]he Montreal Convention limits British Airways' liability for lost, damaged or delayed baggage to 1,131 Special Drawing Rights (SDRS)." The Agency finds, therefore, that Rule 115(H) is consistent with Article 22(2) of the Montreal Convention, and is reasonable within the meaning of subsection 111(1) of the ATR.

**Issue 7: Are Rules 85(A) and 85(B)(2) inconsistent with Article 19 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR?**

**Positions of the parties**

Mr. Lukács

- [77] Mr. Lukács notes that Rules 85(A) and 85(B)(2) state, among other things, that schedules are subject to change without notice. British Airways assumes no responsibility for making connections, and the carrier is not liable except to refund, in accordance with British Airways' Tariff, the fare and baggage charges for any unused portion of the ticket when a passenger is delayed.

Notice of schedule change

- [78] Mr. Lukács submits that in Decision No. 16-C-A-2013, the Agency found that it is reasonable for carriers to have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes and the reasons for them.
- [79] Mr. Lukács argues that the words "without notice" should be removed from Rule 85(A), and substituted with a provision requiring British Airways to provide passengers with notice about schedule changes.

Liability for delay

- [80] Mr. Lukács points out that in Decision No. 16-C-A-2013, the Agency provided its interpretation of Article 19 of the Montreal Convention, which was that the carrier is liable for delay, and that the liability can be avoided when the carrier has proved that all reasonably required measures were taken to avoid damages or that it was impossible to take such measures. He further notes that the Agency stated that, in terms of avoiding liability for delay, the issue is not who caused the delay but how the carrier reacts to the delay, that is, did the carrier take all reasonable required measures.
- [81] Mr. Lukács maintains that by limiting liability to a refund of the unused portion of the ticket in certain cases, regardless of the manner in which British Airways reacts to the delay caused, and whether British Airways took all measures that could be reasonably required to avoid the damage, Rule 85(B)(2) lowers British Airways' liability or exonerates British Airways of its liability under Article 19 of the Montreal Convention.
- [82] Mr. Lukács concludes that Rule 85(B)(2) is therefore unreasonable, and should be disallowed.

Making connections

- [83] Mr. Lukács submits that the most obvious and immediate result of missing a connection is delay, for which British Airways is liable under Article 19 of the Montreal Convention. He notes that in Decision No.16-C-A-2013, the Agency found that a similar provision was unreasonable because it was silent on the carrier's liability when the carrier is unable to provide the proof required under Article 19 of the Montreal Convention to relieve the carrier of liability for delay.
- [84] Mr. Lukács argues that the same reasons apply to Rule 85(A), and that although British Airways may exonerate itself from liability under Article 19 of the Montreal Convention, it does not mean that British Airways can exonerate itself from liability for delay due to missing a connection in every case. He further submits that the question is about whether passengers suffered a delay, whereas a missed connection is just a possible cause of a delay.
- [85] Mr. Lukács submits that the words, "carrier assumes no responsibility for making connections," appearing in Rule 85(A), should be disallowed.

British Airways

- [86] British Airways maintains that Rules 85(A) and 85(B)(2) are clear and reasonable, and are virtually the same wording that is in Air Canada's Rules 85(A) and 85(B)(2).

Mr. Lukács

- [87] Mr. Lukács submits that Air Canada's Rules have not been challenged before the Agency and deemed reasonable, and that in fact, Air Canada's Rules are equally unreasonable.
- [88] He asserts that based on Decision Nos. 16-C-A-2013 and 344-C-A-2013 (*Lukács v. Porter*), where the Agency found, respectively, that the words "without notice" and "carrier assumes no responsibility for making connections" should be disallowed in Rule 85(A) and the phrase "without liability except to refund" should be disallowed in Rule 85(B)(2).

**Analysis and findings**

- [89] With respect to the provision in Rule 85(A) that British Airways' schedules may be changed without notice, in Decision No. 16-C-A-2013, the Agency noted that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that reasonable efforts must be made to inform passengers of delays and schedule changes, and the reasons for them. The Agency found that such provisions are reasonable, and that, in this matter, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh the carrier's statutory, commercial or operational obligations. This finding was affirmed in Decision No. 344-C-A-2013. The Agency is of the opinion that the same reasoning applies here.



- [90] As for the provision in Rule 85(A) that provides that British Airways assumes no responsibility for the passenger making connections, the Agency agrees with Mr. Lukács' submission that that provision is inconsistent with Article 19 of the Montreal Convention to the extent that the Rule does not set out British Airways' liability when British Airways is unable to provide the proof required under Article 19 to escape liability for delay.
- [91] Rule 85(B)(2) provides, in part, that British Airways may, without notice, delay any flight without any liability except to refund the fare and baggage charges for any unused portion(s) of the ticket, in accordance with British Airways' Tariff. Article 19 of the Montreal Convention states that the carrier is liable for damage due to delay unless the carrier can prove that it took all reasonable measures to avoid the damage or that those measures were impossible to take.
- [92] In Decision No. 16-C-A-2013, the Agency considered a provision appearing in Porter Airlines' international scheduled service tariff, which stated that subject to the Montreal Convention and Warsaw Convention, Porter Airlines will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights. The Agency found that, consistent with its finding in Decision No. 291-C-A-2011 on baggage liability, the provision created a blanket exclusion of liability and therefore the provision was inconsistent with the principles of the Montreal Convention; thus the Rule was unreasonable within the meaning of subsection 111(1) of the ATR.
- [93] Similarly, the Agency finds that Rule 85(B)(2) represents a blanket exclusion of liability and is inconsistent with Article 19 of the Montreal Convention.
- [94] The Agency finds that the submissions by Mr. Lukács respecting this matter are more compelling than those by British Airways, and that Rules 85(A) and 85(B)(2) fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. The Agency therefore finds that Rules 85(A) and 85(B)(2) are unreasonable within the meaning of subsection 111(1) of the ATR.

**Issue 8: Is Rule 87(B)(3)(B) unreasonable within the meaning of subsection 111(1) of the ATR?**

Regulation (EC) No. 261/2004

Mr. Lukács

- [95] Mr. Lukács argues that British Airways' Tariff should reflect British Airways' legal obligation under Regulation (EC) No. 261/2004.
- [96] Mr. Lukács submits that one of the three factors in the balancing test used by the Agency to determine if a tariff provision is reasonable is the carrier's ability to meet its commercial obligations. As such, he claims that the policies of British Airways' competitors "may be of some relevance."

- [97] Mr. Lukács notes that Regulation (EC) No. 261/2004 applies to every flight departing from an airport in the United Kingdom, and every flight operated by European Union carriers with a destination in the United Kingdom. He further notes that Société Air France carrying on business as Air France, and Deutsche Lufthansa Aktiengesellschaft's tariff rules are consistent with the regulation, and that both carriers remain profitable.
- [98] Mr. Lukács argues that Rule 87(B)(3)(B) should be replaced with a provision similar to Air France and Lufthansa's, which therefore would not adversely affect British Airways' ability to meet its commercial obligations.

#### British Airways

- [99] British Airways asserts that it is inappropriate for the Agency to enforce foreign laws, either directly or indirectly, by requiring carriers to include provisions of a European regulation in the carriers' Canadian contract of carriage. British Airways submits that by requiring the incorporation of the rights in Regulation (EC) No. 261/2004 as terms in British Airways' contract of carriage, it changes the very nature of the effect of the regulation by creating contractual rights, and therefore contractual remedies that can be exercised before the courts. British Airways maintains that this would, in a way, change the effect of foreign law in a manner that does not respect the European Parliament, and that if it had intended the rights set out in Regulation (EC) No. 261/2004 to be contractual rights, it would have so legislated.
- [100] British Airways maintains that the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), does not grant the Agency power to enforce foreign laws, and that it is a general principle of law that what is not permissible directly cannot be done indirectly. British Airways argues that the Agency therefore cannot enforce foreign statutes by requiring carriers to incorporate the statutes into their tariffs based on the Agency's jurisdiction to receive and decide on consumers' complaints, and does not have jurisdiction to require a carrier to include any reference, directly or indirectly, to the regulation in the carrier's tariff rules.
- [101] British Airways submits that member states of the European Union are responsible for the enforcement of Regulation (EC) No. 261/2004, and that the regulation does not provide passengers with any contractual rights and does not provide for the enforcement of those rights under the regulation by legal proceedings before the general courts of law.
- [102] British Airways notes that it complies with Regulation (EC) No. 261/2004.

#### Mr. Lukács

- [103] With respect to British Airways' submission that Air Canada is British Airways' main competitor on Canada – United Kingdom routes, Mr. Lukács notes that, during proceedings relating to Decision No. 264-C-A-2013 (*Azar v. Air Canada*), Air Canada indicated that it intends to adopt denied boarding compensation amounts similar to what it is in Regulation (EC) No. 261/2004. He submits, therefore, that any competitive disadvantage will disappear when the Agency renders its decision on that case.

- [104] Mr. Lukács also argues that there is no evidence to support the claim that Air Canada is British Airways' primary competitor. He maintains that British Airways' competitors are Lufthansa and Air France (via their hubs), both of which pay denied boarding compensation for passengers departing from Canada and arriving in Europe according to Regulation (EC) No. 261/2004. Mr. Lukács submits that British Airways has not argued that it would suffer a competitive disadvantage in relation to Lufthansa and Air France if it substituted its Rule to match the amounts in Regulation (EC) No. 261/2004.
- [105] Mr. Lukács also contends that based on information submitted by British Airways relating to denied boarding compensation actually tendered to passengers by British Airways, it will not suffer any disadvantage if it were to amend Rule 87(B)(3)(B) to reflect Regulation (EC) No. 261/2004.
- [106] With regard to the Agency's jurisdiction, Mr. Lukács points out that section 113 of the ATR empowers the Agency to disallow and/or establish and substitute any tariff provision that the Agency finds to be contrary to subsection 111(1) of the ATR. He adds that the Agency's power to substitute and establish tariff provisions is broad and unrestricted, and that the Agency can impose any provision it finds appropriate.
- [107] Mr. Lukács submits that among the matters listed in paragraph 122(c) of the ATR that a carrier must set out in its tariff is compensation for denial of boarding. He therefore maintains that the Agency has jurisdiction over denied boarding compensation with respect to section 110 and subsections 111(1) and 113 of the ATR, and that denied boarding compensation is subject to the Agency's review, disallowance, and substitution powers.
- [108] Mr. Lukács asserts that in determining if a provision is reasonable and what is an appropriate substitute provision, the Agency may consider not only Canadian legislation but foreign legislation and international instruments. He observes that the Agency has done so in the past, such as in Decision No. 483-C-A-2010, where the Agency applied the Montreal Convention to domestic carriage, and Decision No. 204-C-A-2013, where the Agency considered the denied boarding compensation regime in the European Union and the United States. Mr. Lukács submits that the Agency's consideration of foreign legislation does not result in enforcing that legislation, but only using it as a source of inspiration with respect to what is reasonable.
- [109] Mr. Lukács provided submissions related to judgments of foreign courts in support of his position.
- [110] Mr. Lukács acknowledges that British Airways is complying with section 1(a) of Article 3 of Regulation (EC) No. 261/2004 relating to denied boarding compensation that must be tendered to passengers travelling from the United Kingdom to Canada, but notes that British Airways did not comment on its failure to comply with section 1(b) of Article 3 respecting compensation provided to passengers carried from Canada to the United Kingdom. He maintains that British Airways has failed to comply with its obligation, as a European Union carrier, to pay denied boarding compensation to passengers departing from Canada and arriving in the United Kingdom, according to Regulation (EC) No. 261/2004.

- [111] Mr. Lukács submits that the Agency is not being asked to enforce Regulation (EC) No. 261/2004, but to consider the obligations in determining the reasonableness of Rule 87(B)(3)(B) and an appropriate substitute.

**Analysis and findings**

- [112] In Decision No. 432-C-A-2013, the Agency addressed a submission that Sunwing's tariff neglected to reflect Sunwing's obligations relating to denied boarding as imposed by Regulation (EC) No. 261/2004. In that Decision, the Agency stated:

[103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

- [113] The Agency will not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.

**Positions of the parties - Denied boarding compensation set out in Rule 87(B)(3)(B)**

Mr. Lukács

- [114] Mr. Lukács notes that Rule 87(B)(3)(B), which governs denied boarding compensation with respect to flights between points in Canada and points in the United Kingdom, states that if a passenger is denied boarding, then the carrier will pay 100 percent of the value of the passenger's remaining ticket to the passenger's next stopover, but not less than \$50 and not more than \$200. He submits that the rule is inconsistent with the principle of a flat rate of denied boarding compensation, which is equal for all passengers, regardless of the fare paid.
- [115] Mr. Lukács argues that Rule 87(B)(3)(B) is inconsistent with the principle of a flat rate of denied boarding compensation.
- [116] Mr. Lukács submits that in response to a question he posed, British Airways filed a list of the denied boarding compensation amounts tendered to passengers departing from Canada to the United Kingdom during the years 2010, 2011 and 2012, and that this list confirms that British Airways paid GBP125 or GBP250 to each passenger. He further submits that such compensation is more than double the maximum amount of CAD\$200 stipulated in Rule 87(B)(3)(B), and that, therefore, Rule 87(B)(3)(B) does not reflect British Airways' current practices related to denied boarding compensation.
- [117] Mr. Lukács contends that British Airways did not provide any explanation or rationale how denied boarding compensation amounts of GBP125 or GBP250 were established, and made no submissions as to why these amounts are reasonable within the meaning of the ATR.

- [118] Mr. Lukács requests the Agency to make a finding that Rule 87(B)(3)(B) is unreasonable as the Agency did in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) respecting Air Canada's denied boarding compensation tariff provisions, and in Decision No. 227-C-A-2013 (*Lukács v. WestJet*). He also requests the Agency to impose on British Airways a new, reasonable denied boarding compensation policy in the same fashion, albeit with different parameters, as the Agency did in Decision No. 342-C-A-2013 (*Lukács v. Air Canada*).

#### British Airways

- [119] British Airways notes that Air Canada is British Airways' sole competitor on Canada – United Kingdom routes, and that Air Canada only pays \$200 cash or \$500 voucher for passengers departing from Canada to the United Kingdom. British Airways submits, therefore, that it would suffer a competitive disadvantage if required to replace Rule 87(B)(3)(B) with the provisions set out in Regulation (EC) No. 261/2004.
- [120] British Airways submits that Rule 87(B)(3)(B) only relates to denied boarding compensation to which Regulation (EC) No. 261/2004 does not apply, and that the Rule is clear and reasonable.

#### **Analysis and findings**

- [121] With respect to the current levels of denied boarding compensation appearing in British Airways' Tariff, the Agency notes that British Airways did not make any submissions on those levels, other than declaring that they are reasonable. There is no presumption that a tariff is reasonable. A mere statement by a carrier that a tariff provision is reasonable does not render that provision so.
- [122] In Decision No. 204-C-A-2013, the Agency determined that Air Canada's amounts for denied boarding compensation of \$100 cash or \$200 voucher for domestic carriage were unreasonable. Following this, the Agency determined in Decision No. 342-C-A-2013, that both the denied boarding regime existing in the United States of America, and that proposed by Mr. Lukács during the course of proceedings relating to that Decision, were reasonable. The Agency, in considering which of the two regimes the Agency would require Air Canada to apply, concluded that the regime proposed by Mr. Lukács was the preferable option, and consequently ordered Air Canada to incorporate into its tariff that regime.
- [123] The Agency also notes that in Decision No. 442-C-A-2013, the Agency determined that the existing denied boarding compensation amounts of \$200 cash or \$500 voucher were unreasonable. The Agency also determined that a denied boarding compensation regime proposed by Air Canada for international carriage of \$400 or \$800 depending on the delay on arrival at destination, was reasonable.
- [124] In both situations, Air Canada had not demonstrated how it would be at a competitive disadvantage if it were to raise the amounts of denied boarding compensation and amend its tariff rules accordingly.

[125] The Agency finds that Mr. Lukács' submissions respecting this matter are more compelling than those by British Airways. British Airways has not demonstrated that it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation, and amend Rule 87(B)(3)(B). It has simply argued that Air Canada only pays denied boarding compensation of \$200 in cash, or \$500 in voucher, for passengers departing from Canada to the United Kingdom, which is no longer the case, as mentioned above, and that it would suffer a competitive disadvantage if required to replace Rule 87(B)(3)(B) with the provisions set out in Regulation (EC) No. 261/2004. Accordingly, Rule 87(B)(3)(B), as it relates to the denied boarding compensation tendered by British Airways, fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations. As such, Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Positions of the parties - Sole remedy**

##### Mr. Lukács

[126] Mr. Lukács observes that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under any other law, including the Montreal Convention. He points out that the Rule refers to "full compensation for all actual or anticipatory damages." He submits that in Decision No. 249-C-A-2012 (*Lukács v. WestJet*), the Agency found that a tariff provision with the identical effect as Rule 87(B)(3)(B) was unreasonable as it does not provide passengers with a reasonable opportunity to fully assess their options, and that in such situations, the rights of a passenger established by the Montreal Convention should remain available.

[127] Mr. Lukács also asserts that this finding is consistent with Article 12 of Regulation (EC) No. 261/2004, which states that the regulation shall apply without prejudice to a passenger's rights to further compensation.

##### British Airways

[128] British Airways did not address this issue in its submission.

#### **Analysis and findings**

[129] As correctly noted by Mr. Lukács, the Agency, in Decision No. 249-C-A-2012, found that a rule similar to that of Rule 87(B)(3)(B) was unreasonable for failing to provide passengers with a reasonable opportunity to fully assess their options, and that in such situations, the rights of a passenger established by the Montreal Convention should remain available. The Agency finds that the same finding applies to the present matter, and that Rule 87(B)(3)(B) does not strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations.

[130] The Agency finds that Rule 87(B)(3)(B), insofar as it relates to the issue of sole remedy, is unreasonable within the meaning of subsection 111(1) of the ATR.

### **SUMMARY OF CONCLUSIONS**

#### **Issue 1**

[131] The introductory text to Rule 55(C) is unclear contrary to paragraph 122(c) of the ATR and unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 2**

[132] Rule 55(C)(6) is unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 3**

[133] Rule 55(C)(7) is unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 4**

[134] Rule 55(C)(8) is unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 5**

[135] Rules 55(C)(10), and the portion of Rule 115(N) that governs liability are unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 6**

[136] Rule 115(H) is consistent with Article 22(2) of the Montreal Convention and is reasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 7**

[137] Rules 85(A) and 85(B)2 are unreasonable within the meaning of subsection 111(1) of the ATR.

#### **Issue 8**

[138] Rule 87(B)(3)(B) is unreasonable within the meaning of subsection 111(1) of the ATR.

[139] The Agency will not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.

[140] Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the ATR.

[141] Rule 87(B)(3)(B), insofar as it relates to the issue of sole remedy, is unreasonable within the meaning of subsection 111(1) of the ATR.

**ORDER**

[142] The Agency, pursuant to paragraph 113(a) of the ATR, disallows the following provisions of British Airways' Tariff:

- The introductory text to Rule 55(C);
- Rule 55(C)(6);
- Rule 55(C)(7);
- Rule 55(C)(8);
- Rule 55(C)(10) and the portion of Rule 115(N) that governs liability;
- Rules 85(A) and 85(B)2; and
- Rule 87(B)(3)(B) in respect of sole remedy.

[143] The Agency orders British Airways, by no later than February 17, 2014, to amend its Tariff and conform to this Order and the Agency's findings set out in this Decision.

[144] Further, the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:

1. The regime applicable in the United States of America;
2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or
4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

[145] Pursuant to paragraph 28(1)(b) of the CTA, the disallowance of the above Rules shall come into force when British Airways complies with the above or on February 17, 2014, whichever is sooner.

(signed)

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Geoffrey C. Hare  
Member

(signed)

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Sam Barone  
Member