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April 5, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. Porter Airlines
Complaint concerning Domestic Tariff Rule 18 (Denied Boarding Compensation)
File No.: M 4120-3/14-01414**

Please accept the following submissions in relation to the above-noted matter as a reply to Porter Airlines' answer dated April 1, 2014.

OVERVIEW

In response to the Complaint dated March 9, 2014, Porter Airlines admitted that its Domestic Tariff Rule 18 requires revisions, and made dubious representations about its reasons for not having revised Rule 18 earlier. Porter Airlines is also asking in its answer:

- (a) that it be permitted to deliver proposed amendments to Rule 18 for review and consideration by the Agency as to clarity and reasonableness; and
- (b) leave to deliver submissions in response to any submissions the Complainant may deliver concerning any proposed amendments hereafter delivered by Porter pursuant to (a) above.

While Porter Airlines' epiphany with respect to the need to revise Domestic Tariff Rule 18 is most welcome, it is submitted that Porter Airlines' submissions are disingenuous, constitute an abuse of process, and serve the real purpose of delaying the inevitable revision of Rule 18.

ISSUES

I. Does Porter Airlines’ answer constitute an abuse of process? 3
 (a) Porter has deliberately and knowingly breached its obligations under the *ATR* . . . 3
 (b) Why did Porter Airlines not deliver proposed amendments to Rule 18? 4
 (c) Conclusions 5

II. Porter Airlines’ request to be permitted to file a reply to the Complainant’s reply 5
 (a) The request is moot or premature 6
 (b) No evidence of prejudice 6
 (c) The right to have the last word. 6

III. The appropriate remedy 7

EXHIBITS

A. Porter Airlines International Tariff Rule 15 10

B. Porter Airlines International Tariff Rule 20 12

ARGUMENT

I. Does Porter Airlines' answer constitute an abuse of process?

(a) Porter has deliberately and knowingly breached its obligations under the *ATR*

Porter Airlines has explicitly acknowledged its obligation under subsection 107(1)(n)(iii) of the *Air Transportation Regulations* (“*ATR*”) to set out its policy with respect to “compensation for denial of boarding as a result of overbooking” in its tariff. Porter Airlines further stated that Rule 18 existed for the sole purpose of satisfying this requirement.

Porter Airlines' Answer (April 1, 2014), para. 3

It is submitted that subsection 107(1)(n)(iii) of the *ATR* is applicable regardless of whether a carrier commercially overbooks its flights. Thus, the time when Porter Airlines began to commercially overbook its flights is not relevant to the finding that Porter Airlines has been in breach of its obligations under subsection 107(1)(n)(iii) of the *ATR*.

Porter Airlines admitted that it was aware of the proceeding before the Agency concerning Air Canada's denied boarding compensation policy for domestic flights. Porter Airlines was also aware of Decision No. 342-C-A-2014, in which the Agency held that:

[...] passengers must be afforded ample opportunity to determine whether they wish to choose travel vouchers in lieu of a cash payment as denied boarding compensation, and that this choice should only be made after Air Canada fully informs passengers of the conditions attached to those vouchers.

Porter Airlines' Answer (April 1, 2014), para. 4

Porter Airlines further admitted that it continued to offer \$500 travel vouchers as denied boarding compensation even after the Agency released Decision No. 342-C-A-2014.

Porter Airlines' Answer (April 1, 2014), para. 5

It is submitted that Porter Airlines' explanation for failing to comply with subsection 107(1)(n)(iii) of the *ATR* with respect to its domestic tariff is not credible, and ought to be rejected by the Agency for a number of reasons. First, a challenge to a carrier's tariff does not exempt the carrier from complying with all provisions of the *ATR*. Second, the September 24, 2013 complaint referenced by Porter Airlines focused on the international tariff of Porter Airlines, and there was nothing to prevent Porter Airlines from amending its domestic tariff to reflect the principles set out in Decision No. 342-C-A-2014.

Thus, Porter Airlines' failure to comply with subsection 107(1)(n)(iii) of the *ATR* was not due to an oversight or a clerical error; rather, it was a deliberate and calculated decision to disobey the law.

(b) Why did Porter Airlines not deliver proposed amendments to Rule 18?

On March 11, 2014, the Agency notified Porter Airlines about the opening of pleadings in the present complaint, and that:

The respondent has 21 days from the date of receipt of this letter to submit its answer to the Agency and provide a copy to the complainant and upon receipt of the answer the complainant will have 7 days to file a reply with the Agency, with a copy to the respondent.

It is the parties' responsibility to ensure that their submissions are filed within the stated time frames.

[Emphasis is in the original.]

In these circumstances, one struggles to understand the purpose of Porter Airlines' request:

that it be permitted to deliver proposed amendments to Rule 18 for review and consideration by the Agency as to clarity and reasonableness;

Porter Airlines' Answer (April 1, 2014), para. 7(a)

The Agency has already provided Porter Airlines with a fair and reasonable opportunity to answer the complaint, and there was nothing to prevent Porter Airlines from delivering its proposed amendments to Rule 18.

Porter Airlines has provided no explanation at all for its failure to deliver its proposed amendments to Rule 18 together with its answer to the complaint, as it did in a number of previous proceedings. Porter Airlines' alleged concerns about the Agency's procedures do not exempt Porter Airlines from complying with the Agency's rules, procedures, and explicit directions.

If Porter Airlines had genuine concerns about procedural fairness, it could have expressed them and sought a remedy at the same time that it delivered proposed amendments to Rule 18. In the present case, however, Porter Airlines is attempting to use its proposed amendments to Rule 18 as some kind of bargaining chip: Porter Airlines will deliver amendments to Rule 18 only if the Agency agrees to change its procedure and order of pleadings for Porter Airlines.

Therefore, Porter Airlines' request for permission to deliver proposed amendments to Rule 18 instead of delivering said proposal as part of its answer is a disingenuous attempt to strong-arm the Agency into changing its procedure with respect to pleadings and/or to frustrate the Agency in carrying out its mandate and rendering a decision in the Complaint in a timely manner.

It is submitted that the Agency ought not tolerate such reprehensible and abusive conduct of Porter Airlines.

(c) Conclusions

Since 2013 or possibly earlier, Porter Airlines has known perfectly well that its Domestic Tariff Rule 18 was not compliant with subsection 107(1)(n)(iii) of the *ATR*, and that its policy of offering only travel vouchers as denied boarding compensation was unreasonable. Nevertheless, Porter Airlines has done nothing to remedy this state of affairs, and it would have done nothing even now, had the present Complaint not been filed with the Agency.

Although the Agency provided Porter Airlines with a fair and reasonable opportunity to respond to the Complaint, including to propose amendments to Domestic Tariff Rule 18, Porter Airlines made the strategic decision not to do so.

There was nothing to prevent Porter Airlines from delivering proposed amendments to Domestic Tariff Rule 18 as part of its April 1, 2014 answer; however, Porter Airlines chose not to do so, and instead, Porter Airlines is attempting to delay the present proceeding by seeking permission to file proposed amendments to Rule 18 at some unspecified later date. Porter Airlines is also attempting to dictate to the Agency how the Agency should conduct the present proceeding, including the order of the pleadings.

Hence, Porter Airlines is attempting to delay the present proceeding, and it is engaging in abuse of the Agency's process. It is submitted that Porter Airlines' conduct ought not be tolerated by the Agency.

II. Porter Airlines' request to be permitted to file a reply to the Complainant's reply

Sections 39-45 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 govern the conduct of proceedings before the Agency in terms of the order of pleadings, starting with an application (such as a complaint), followed by an answer of the respondent, and ending with a reply by the applicant (complainant). Pleadings close when the reply of the applicant is filed.

After the close of pleadings, parties may make a motion to the Agency for permission to make additional filings. Such motions are governed by the principles set out in the Agency's *Requests for Additional Filings after the Close of Pleadings* Guidelines.

Porter Airlines disagrees with the Agency's *General Rules*:

Porter considers that this procedure may operate to its prejudice to the extent that the complainant may make submissions as of right, in his Reply, concerning the contents of such draft amendments, without any right of response by Porter.

Porter Airlines' Answer (April 1, 2014), para. 8

On this dubious basis, Porter Airlines is asking permission to file a reply to the Complainant's reply.

(a) The request is moot or premature

The purpose of Porter Airlines' reply would be to respond to the Complainant's comments on Porter Airlines' proposed amendments to Rule 18; however, Porter Airlines has not delivered proposed amendments to Rule 18.

Thus, Porter Airlines' request is moot.

Alternatively, even if Porter Airlines did deliver proposed amendments to Rule 18, the request would be premature and hypothetical, and thus incapable of meeting the Agency's *Requests for Additional Filings after the Close of Pleadings* Guidelines.

(b) No evidence of prejudice

Recently, the Agency has rendered three decisions in complaints involving Porter Airlines: 16-C-A-2013, 344-C-A-2013, and 31-C-A-2014. Thus, the present one is the fourth such proceeding involving Porter Airlines.

As the Agency's records and decisions confirm, Porter Airlines chose to propose tariff amendments in each one of these previous complaints, and the Complainant filed a reply in response, which closed the pleadings. Porter Airlines has never sought to reopen pleadings in any of these past proceedings, nor did Porter Airlines argue that the procedure itself was unfair in any way.

Thus, it is submitted that Porter Airlines' argument concerning potential prejudice to Porter Airlines is speculative, and it flies on the face of Porter Airlines' conduct in past proceedings before the Agency.

(c) The right to have the last word

The Agency's rules governing pleadings have been modelled on parallel rules found in various Canadian jurisdictions, including the Federal Courts. Pleadings consist of an opening statement (such as an application or a statement of claim), an answer (such as a statement of defence), and a reply.

The applicant is offered the protection of being able to reply to any new arguments or issues that the responding party may raise. The responding party is protected by the rule that the reply must be confined to issues raised in the opening statement and in the answer of the responding party. Thus, no new issues can be raised in a reply, but the applicant has the right to have the last word, to be the last to plead.

This procedure, which has been widely adopted in Canada and around the world, is not unfair to the responding party in any way. It simply requires the responding party to put its best foot forward, and not to hold back any evidence or argument as a litigation tactic.

Departing from this procedure would create unfairness and unnecessarily waste valuable judicial resources, because it would encourage responding parties to hold back their best arguments and evidence until their reply to the applicant's reply.

Therefore, it is submitted that the application-answer-reply pleading procedure is not only fair, but departing from it and allowing a responding party to have the last word would result in procedural unfairness to the applicant.

It is further submitted that in rare cases, where the reply does raise a new argument, which is not merely a response to the submissions put forward in the answer, the appropriate remedy is to reopen the pleadings, and allow both parties to make additional submissions: first the respondent, and then the applicant, who will be permitted to file a final reply. Indeed, the Agency has been following this principle in, for example, *Lukács v. Air Canada*, LET-C-A-25-2011.

III. The appropriate remedy

Porter Airlines does not dispute that its Domestic Tariff Rule 18 fails to be clear and reasonable, nor does it dispute that Rule 18 must be revised.

Although the Agency provided Porter Airlines a fair and reasonable opportunity for meaningful participation in the present proceeding, it is submitted that Porter Airlines has effectively chosen not to fully participate. Indeed, Porter Airlines has made the deliberate and calculated choice to not propose amendments to Rule 18.

Instead, Porter Airlines has made an unnecessary and abusive request to the Agency to be permitted to propose amendments to Rule 18 (knowing perfectly well that such permission is not required), and has attempted to dictate how the Agency should conduct the proceeding.

It is submitted that the Agency ought not allow Porter Airlines to frustrate the conduct of the present proceeding by withholding its proposed amendments to Rule 18, and providing them only if the Agency changes the pleading process to meet Porter Airlines' demands. Tolerating such conduct by a carrier that the Agency regulates would undermine the Agency's ability to fulfill its mandate.

Thus, it is submitted that the Agency ought to close pleadings in the present case, and render a decision based on the pleadings of the parties. Doing otherwise, and prolonging the present proceeding, would unnecessarily maintain the current situation, where Porter Airlines' passengers are subject to terms and conditions that are admittedly unreasonable.

Since Porter Airlines itself has indicated that it would prefer to see Rule 18 replaced by provisions established in Decision No. 31-C-A-2014, it is submitted that the Agency ought to substitute Porter Airlines' Domestic Tariff Rule 18 with the language of International Tariff Rules 15 and 20, established by the Agency in Decision No. 31-C-A-2014 (see Exhibits "A" and "B"), with appropriate changes necessary for the context of domestic flights.

RELIEF SOUGHT

The Complainant is asking the Agency that:

- A. the Agency close pleadings in the present proceeding;
- B. the Agency disallow Porter Airlines' Domestic Tariff Rule 18; and
- C. the Agency substitute Porter Airlines' Domestic Tariff Rule 18 with Rules 15 and 20 established by the Agency in Decision No. 31-C-A-2014, with appropriate changes necessary for the context of domestic flights.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Complainant

Cc: Mr. Robert Deluce, President and CEO, Porter Airlines
Mr. Greg Sheahan, Counsel, Porter Airlines

LIST OF AUTHORITIES

Legislation

1. *Air Transportation Regulations*, S.O.R./88-58.
2. *Canada Transportation Act*, S.C. 1996, c. 10.
3. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

Case law

4. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-25-2011.
5. *Lukács v. Air Canada*, Canadian Transportation Agency, 204-C-A-2013.
6. *Lukács v. Air Canada*, Canadian Transportation Agency, 342-C-A-2013.
7. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 16-C-A-2013.
8. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 344-C-A-2013.
9. *Lukács v. Porter Airlines*, Canadian Transportation Agency, 31-C-A-2014.
10. *Lukács v. WestJet*, Canadian Transportation Agency, 227-C-A-2013.

PORTER AIRLINES INC.

CTA (A) No. 1
3rd Revised Page 29 Cancels
2nd Revised Page 29**SECTION III - RESERVATIONS****RULE 13. CONFIRMATION OF RESERVED SPACE**

A reservation of space on a given flight is valid when the availability and allocation of such space is confirmed by the carrier to a person subject to payment or other satisfactory credit arrangements. A passenger with a valid confirmation number reflecting reservations for a specific flight and date on the carrier is considered confirmed, unless the reservation was cancelled due to one of the reasons indicated in Rule 14. The carrier does not guarantee to provide any particular seat on the aircraft.

RULE 14. CANCELLATION OF RESERVATIONS

Refer to **Rule 3.3 Passenger Cancellation, Change and Refund Terms** for applicable terms and conditions.

RULE 15. CARRIER CANCELLATION, CHANGE, AND REFUND TERMS

- (a) If the passenger's journey is interrupted due to overbooking, a flight cancellation or an advancement of a flight's scheduled departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff (each a "Schedule Irregularity"), the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices:
- i. alternative transportation, within a reasonable time and without additional charge, to the passenger's intended destination;
 - ii. return transportation to the passenger's point of origin within a reasonable time and without additional charge; and
 - iii. a refund of the fare paid by the passenger for each unused segment, and, subject to Rule 15(c), for segments already flown if they no longer serve the purpose for which the passenger undertook such travel;

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 25, 2014EFFECTIVE DATE
March 28, 2014
Per SP No. 50064

PORTER AIRLINES INC.

CTA (A) No. 1
1st Revised Page 29A Cancels
Original Page 29A

- (b) In defining the remedy or remedies appropriate in each case arising under Rule 15(b) above, the Carrier:
- i. will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule Irregularity;
 - ii. will not limit itself to considering its own services or the services of carriers with which it has interline or code-sharing agreements; and
 - iii. will make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger.
- (c) If the Carrier demonstrates that (1) the Schedule Irregularity occurred for reasons beyond its control, and (2) it took all reasonable measures to avoid the Schedule Irregularity or it was impossible for the Carrier to take such measures, then the Carrier shall not be required to refund passengers for segments already travelled, regardless of whether they serve the purpose for which the passenger undertook such travel.
- (d) The rights of a passenger against the Carrier in the event of overbooking and cancellation is, in most cases of international carriage, governed by the Montreal Convention. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it took all reasonable measures to avoid the damage or that it was impossible for it to take such measures. There are some exceptional cases of international carriage in which the rights of passengers are not governed by an international convention. In such cases, only a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

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March 28, 2014
Per SP No. 50064

PORTER AIRLINES INC.

CTA (A) No. 1
3rd Revised Page 37 Cancels
2nd Revised Page 37**(b) Involuntary Cancellations**

Refer to **Rule 15 Carrier Cancellation, Change and Refund Terms** for applicable terms and conditions.

RULE 20. DENIED BOARDING COMPENSATION**General**

If a passenger has been involuntarily denied a reserved seat in case of an oversold flight on Porter Airlines, the Carrier will provide the passenger with:

- (a) a remedy or remedies in accordance with Rule 15 above; and
- (b) denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 20, 2014EFFECTIVE DATE
March 21, 2014
Per SP No. 94823

PORTER AIRLINES INC.

CTA (A) No. 1
2nd Revised Page 38 Cancels
1st Revised Page 38**Compensation for Involuntary Denied Boarding**

If you are denied boarding involuntarily on a flight, you are entitled to a payment of "denied boarding compensation" from Carrier unless:

- you have not fully complied with the Carrier's ticketing and check-in requirements, or you are not acceptable for transportation under the Carrier's usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons, and the events prompting such substitution were beyond the Carrier's control and the Carrier took all reasonable measures to avoid the substitution or it was impossible for the Carrier to take such measures; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers with a confirmed seat on Porter Airlines who are denied boarding involuntarily from an oversold flight are entitled to:

- (a) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
- (b) No less than 200% of the fare to the passenger's destination or first stopover, with a maximum of \$650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and
- (c) No less than 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 6, 2014EFFECTIVE DATE
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Per SP No. 99014

PORTER AIRLINES INC.

CTA (A) No. 1
2nd Revised Page 39 Cancels
1st Revised Page 39

0 to 1 hour arrival delay	No compensation.
1 to 4 hour arrival delay	At least 200% of one-way fare (but no more than \$650 USD).
Over 4 hours arrival delay	At least 400% of one-way fare (but no more than \$1,300 USD).

For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment, provided:

- (a) The Carrier has informed the passenger of the amount of cash compensation that would be due and that the passenger may decline travel vouchers, and receive cash or equivalent;
- (b) the value of such voucher(s) is no less than 300% of the value of the cash compensation to which the passenger would otherwise have been entitled;
- (c) the Carrier has disclosed to the passenger all material restrictions applicable to the use of such vouchers;
- (d) the Carrier obtains the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of cash or equivalent compensation; and
- (e) The passenger may in any event refuse to accept such vouchers and insist on the cash/cheque payment, including that any passenger who accepts vouchers in lieu of cash or cheque payment at the time of involuntary denied boarding may, within 30 days, elect to exchange such vouchers for the cash or cheque payment she would have been entitled to receive had the passenger not accepted vouchers,

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 6, 2014

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Per SP No. 99014

PORTER AIRLINES INC.

CTA (A) No. 1
4th Revised Page 40 Cancels
3rd Revised Page 40

provided that the vouchers have not been redeemed by the passenger in whole or in part.

RULE 21. CHECK-IN REQUIREMENTS

In addition to any other check in requirements set out in this tariff, the following check-in requirements must be complied with:

- (a) a passenger must have obtained his/her boarding pass and checked any baggage by the check-in deadline below and must be available for boarding at the boarding gate by the deadline shown below. Failure to meet these deadlines may result in the loss of the passenger's assigned seat or the cancellation of the passenger's reservation.

For example of abbreviations, reference marks and symbols used but not explained hereon, see page 2.

ISSUE DATE
March 12, 2014

EFFECTIVE DATE
March 13, 2014
Per SP No. 99314