Office des transports du Canada

Canadian Transportation Agency

DECISION NO. 31-C-A-2014

January 31, 2014

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No. M4120-3/13-05680

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions in Rules 1, 3.4, 15, 18 and 20 (Existing Tariff Rules) of the Tariff Containing Rules Applicable to Scheduled Services for the Transportation of Passengers and Baggage or Goods Between Points in Canada on the One Hand and Points Outside Canada on the Other Hand (Tariff) applied by Porter Airlines Inc. (Porter) are inconsistent with the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention), and are unclear and/or unreasonable. The Rules at issue set out Porter's responsibilities relating to flight cancellation, schedule change, flight advancement and denied boarding. Mr. Lukács also alleges that Porter's Tariff fails to incorporate certain elements of the *Code of Conduct of Canada's Airlines* (Code of Conduct).

[2] Porter filed proposed revisions to its Existing Tariff Rules (Proposed Tariff Rules) with its answer.

ISSUES

With respect to the Existing Tariff Rules

1. Does the failure to incorporate certain elements of the Code of Conduct into Porter's Tariff render it unreasonable?
2. Is the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR)?
3. Are Existing Tariff Rules 3.4 and 15 unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?
4. Is Existing Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR?
5. Is Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

With respect to the Proposed Tariff Rules

1. Is the definition of "Credit Shell" in Proposed Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR?
2. Is Proposed Tariff Rule 15(a)(iii)(b) unreasonable within the meaning of subsection 111(1) of the ATR?
3. Is Proposed Tariff Rule 15(a)(iv) unreasonable within the meaning of subsection 111(1) of the ATR?
4. Is Proposed Tariff Rule 15(a) unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?
5. Is Proposed Tariff Rule 15(c) unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?
6. Is Proposed Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR?
7. Is Proposed Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[3] The Existing Tariff Rules and Proposed Tariff Rules as well as the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[4] 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.

[5] This test was recently applied in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

Unreasonableness

[6] 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.

[7] 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. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was recently applied in Decision No. 442-C-A-2013.

EXISTING TARIFF RULES

Issue 1: Does the failure to incorporate certain elements of the Code of Conduct into Porter's Tariff render it unreasonable?

Positions of the parties

Mr. Lukács

[8] Mr. Lukács submits that in 2008, the Government of Canada and the three major Canadian air carriers (Air Canada, Air Transat A.T. Inc. carrying on business as Air Transat (Air Transat) and WestJet) voluntarily agreed to the Code of Conduct.

[9] Mr. Lukács asserts that the key points of the Code of Conduct are:

- Passengers have a right to information on flight times and schedule changes. Airlines must make reasonable efforts to inform passengers of delays and schedule changes and to the extent possible, the reason for the delay or change.

- Passengers have a right to punctuality.

  (a) If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the airline will provide the passenger with a meal voucher.

  (b) If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the airline will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.

  (c) If the passenger is already on the aircraft when a delay occurs, the airline will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the airline will offer passengers the option of disembarking from the aircraft until it is time to depart.

- Passengers have a right to take the flight they paid for. If the flight is overbooked or cancelled, the airline must offer passengers a choice between transportation to their destination or a refund of the unused portion.

[10] Mr. Lukács argues that Existing Tariff Rules 3.4 and 15 are inconsistent with the Code of Conduct. He contends that the Rules fail to incorporate the "right for care" provisions (meal voucher, overnight hotel, and drinks and snacks) that the three major Canadian air carriers have long ago adopted, and which Sunwing Airlines Inc. (Sunwing) recently incorporated into its tariff.

Porter

[11] Porter submits that inclusion in tariffs of the provisions set out in the Code of Conduct is not required by the ATR, and that its Proposed Tariff Rules contain reasonable provisions, to the full extent required, concerning remedies available to passengers for delay. In addition, Porter argues that any failure to prescribe a right to vouchers in no way limits the rights of passengers in a manner inconsistent with the Montreal Convention.

Mr. Lukács

[12] Mr. Lukács states that while Porter incorporated (c) of the Code of Conduct as Proposed Tariff Rule 18(d), Porter refuses to incorporate (a) and (b) of the Code of Conduct into its Tariff, and vehemently argues against them.

[13] Mr. Lukács maintains that subsection 86(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), and subsection 111(1) and section 113 of the ATR confer upon the Agency jurisdiction to examine whether the absence of tariff provisions requiring Porter to distribute meal, accommodation and transportation vouchers in the case of flight delay renders Porter's Tariff unreasonable within the meaning of subsection 111(1) of the ATR.

[14] Mr. Lukács asserts that subparagraph 122(*c*)(v) of the ATR requires Porter to state its policy with respect to flight delay in its Tariff. He therefore maintains that even if the Agency's jurisdiction were confined to matters listed under section 122 of the ATR, the issue of distributing meal, accommodation and transportation vouchers to delayed passengers would still be within the Agency's jurisdiction.

[15] Mr. Lukács argues that while passengers have a legitimate interest in being issued meal, accommodation and transportation vouchers in the case of longer delays (as set out in the Code of Conduct), doing so would not affect Porter's ability to meet its statutory, commercial and operational obligations. Mr. Lukács contends that the incorporation of the Code of Conduct has become an industry standard for Canadian air carriers, and Porter's competitors have implemented that Code in their respective tariffs.

[16] Mr. Lukács therefore concludes that the absence of the Code of Conduct from Porter's Tariff, including the requirement to distribute meal, accommodation and transportation vouchers to delayed passengers, renders the Tariff unreasonable.

Analysis and findings

[17] The Agency notes, as does Mr. Lukács, that the Code of Conduct is voluntary, and was agreed upon by Air Canada, Air Transat and WestJet. The word "voluntary", in and of itself, is clearly indicative of a free and unrestrained will. In that sense, the Agency cannot force a carrier, through an Agency decision, to abide by that Code. In any case, the Agency agrees with Porter that its Proposed Tariff Rules provide, to the extent required, reasonable remedies for passengers who have been affected by flight delays. The Agency therefore finds that the absence from Porter's Tariff of all of the elements of the Code of Conduct does not render the Tariff unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 2: Is the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties

Mr. Lukács

[18] Mr. Lukács points out that in Decision No. 344-C-A-2013 (*Lukács v. Porter*), a virtually identical tariff provision that Porter had proposed to include in its domestic tariff was considered, and the Agency held that:

> [108] The Agency is of the opinion that, in and of itself, the proposed definition of "Event of Force Majeure" provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute "force majeure." In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.

[19] Mr. Lukács maintains that the same conclusion is applicable to the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1, and that the definition ought to be disallowed.

Porter

[20] Porter acknowledged that this Existing Tariff Rule as well as the Existing Tariff Rules set out in Issues 3 to 6 require revisions. In this regard, Porter filed Proposed Tariff Rules.

Analysis and findings

[21] The Agency finds that because the definition of "Event of Force Majeure" includes incidents that have not been determined to be of a nature to constitute "force majeure", the same conclusion is applicable in this matter as that reached in Decision No. 344-C-A-2013. The Agency finds, therefore, that the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. As such, the definition is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 3: Are Existing Tariff Rules 3.4 and 15 unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

Position of Mr. Lukács – Reasonableness of Existing Tariff Rules 3.4 and 15: Limitation of liability

[22] Mr. Lukács submits that the Agency explained in Decision No. 16-C-A-2013 (*Lukács v. Porter*) that what determines liability for delay is not the cause of the delay, but rather how the air carrier reacts to the delay.

[23] Mr. Lukács maintains that the effect of Existing Tariff Rules 3.4 and 15 is to relieve Porter from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter and its servants and agents have taken all reasonable measures necessary to avoid the delay. He contends that the impugned provisions effectively limit Porter's liability in the case of delay to providing passengers, at Porter's sole discretion, a credit that is valid for one year or otherwise a refund of the fare paid by the passengers.

[24] Mr. Lukács argues that Existing Tariff Rules 3.4 and 15 are provisions tending to relieve Porter from the liability set out in Article 19 of the Montreal Convention and/or to fix a lower limit of liability than what is set out in that Convention. He submits that Existing Tariff Rules 3.4 and 15 are null and void, under Article 26 of the Montreal Convention, and are therefore unreasonable and ought to be disallowed.

Analysis and findings

[25] The Agency finds that Existing Tariff Rules 3.4 and 15 relieve Porter from virtually all liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter and its servants and agents have taken all reasonable measures necessary to avoid the delay. The Agency indicated in Decision No. 16-C-A-2013 that it is how the air carrier reacts to the delay that will determine the liability, and not who caused the delay. As such, the Agency finds that these Rules are inconsistent with Article 19 of the Montreal Convention, are null and void pursuant to Article 26 of that Convention, and are therefore unreasonable within the meaning of subsection 111(1) of the ATR.

Position of Mr. Lukács – Concomitant obligation of air carriers to reprotect passengers

[26] Mr. Lukács points out that in Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), the Agency held that:

> [25] It is clear that Article 19 of the Convention imposes on a carrier liability for damage occasioned by delay in the carriage of, amongst other matters, passengers, but a carrier will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures. As the Agency stated in the Show Cause Decision, with a presumption of liability for delay against a carrier, there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of delay. [...]

[27] Mr. Lukács cites certain court cases to support his position.

[28] Mr. Lukács argues that a carrier cannot avoid liability under Article 19 of the Montreal Convention by merely stating that its flights were fully booked. He maintains that, instead, the carrier must take steps to mitigate the damage suffered by passengers as a result of the delay, and must attempt to secure seats on other carriers.

Analysis and findings

[29] The Agency finds that when a flight delay occurs, Article 19 of the Montreal Convention imposes an obligation on the carrier to take the necessary steps to mitigate the damage suffered by passengers because of the delay, including the arranging of alternative air transportation. As such, the Agency finds that the absence of this obligation in Existing Tariff Rules 3.4 and 15 renders them inconsistent with Article 19 of the Montreal Convention, null and void pursuant to Article 26 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR.

Position of Mr. Lukács – Passengers are entitled to a refund if the carrier is unable to transport them within a reasonable period of time

[30] Mr. Lukács points out that in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. He also points out that in that Decision, the Agency substituted Air Transat's International Tariff Rule 6.3(d) with the following provision:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.

[31] Mr. Lukács submits that passengers have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control. Mr. Lukács adds that, in particular, the carrier cannot keep the fare paid by passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

[32] Mr. Lukács points out that in Decision No. 344-C-A-2013 (*Lukács v. Porter*), the Agency considered Porter's proposed Domestic Tariff Rule 16(f), and reached the same conclusion as in Decision No. 28-A-2004. He asserts that the same conclusion is applicable to Existing Tariff Rules 3.4 and 15, namely, that they are unreasonable, because they purport to allow Porter to refuse to refund fares paid for flights that were cancelled.

Analysis and findings

[33] The Agency finds that as they allow Porter to refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger's control, Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR. The Agency finds that the Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – The choice with respect to refund lies with the passenger

[34] Mr. Lukács refers to Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*), where the Agency expressed the preliminary opinion that it is unreasonable for a carrier to retain the choice between reprotecting passengers and providing a refund, and that the choice ought to lie with the passengers. He points out that in Decision No. 250-C-A-2012, the Agency affirmed this finding, and stated that:

> [123] [...] the Agency finds that Tariff Rule 91(B)(3), as currently drafted, is unreasonable for failing to give the passenger sole discretion to choose to obtain a refund.
>
> [124] The Agency also determines that Air Canada's proposal to leave the choice of option with the passenger is reasonable.

[35] Mr. Lukács argues that the choice of whether to obtain a refund or be reprotected ought to lie solely with the passenger, and any provision purporting to allow the carrier to retain that choice is unreasonable. He therefore concludes that Existing Tariff Rules 3.4 and 15 are unreasonable as they fail to give the passenger sole discretion to choose to obtain a refund.

Analysis and findings

[36] The Agency finds that the absence of a provision in Existing Tariff Rules 3.4 and 15 providing the passenger with the sole discretion to determine whether a refund will be tendered or reprotection occurs, renders those Rules unreasonable within the meaning of subsection 111(1) of the ATR. The Agency therefore finds that these Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – In certain circumstances, passengers are entitled to transportation to their point of origin without a charge in addition to a full refund

[37] Mr. Lukács refers to Decision No. LET-C-A-80-2011, where the Agency held that:

> [104] [...] As Mr. Lukács submits, payment of a partial refund may force a passenger to absorb some of the costs directly associated with their delayed travel. The Agency accepts Mr. Lukács' submission that the actual costs, or damages, incurred by a passenger may exceed the mere refund of the unused ticket.
>
> [105] Accordingly, the Agency is of the preliminary opinion that the part of Tariff Rule 91(B) that allows for a refund of the unused portion of the ticket only is unreasonable. Air Canada has not demonstrated why, given its commercial and operational obligations, it cannot refund the entire ticket cost. Furthermore, Air Canada has not addressed the question of returning a passenger to their point of origin, within a reasonable time and at no extra cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. As Mr. Lukács argues, many situations can be envisioned in which a passenger could be forced to absorb the cost of a flight that does not meet their needs, nor fulfill their purpose of travel, and does not coincide with the transportation for which the passenger contracted.

[38] Mr. Lukács maintains that in Decision No. 250-C-A-2012, the Agency affirmed these preliminary findings. He also notes that Air Canada, Air Transat, Sunwing and WestJet have all incorporated provisions in their tariffs that give effect to these findings. He submits that Porter will suffer no competitive disadvantage by doing the same.

[39] Mr. Lukács asserts that Existing Tariff Rules 3.4 and 15 are unreasonable in that they fail to address the question of returning a passenger to their point of origin, within a reasonable time and at no cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. He also asserts that these Rules fail to provide for a refund of the full fare in such situations.

Analysis and findings

[40] The Agency finds that Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR because they do not provide for the return of a passenger to their point of origin, within a reasonable time and at no cost, when a delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. The Agency finds that the absence of such a provision in Existing Tariff Rules 3.4 and 15 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Existing Tariff Rule 3.4: "without notice to any passengers affected thereby"

[41] Mr. Lukács points out that Existing Tariff Rule 3.4, which he also submits is unreasonable because it purports to deprive passengers of the right to notice of schedule changes affecting their travel, states that:

> The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, **without notice to any passengers affected thereby** and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure [...] [Emphasis added by Mr. Lukács]

[42] Mr. Lukács points out that in Decision No. LET-A-112-2003, the Agency held, in relation to Air Transat's tariff, that:

> The Agency notes that Rule 5.2(b) of the tariff is devoid of any provision relating to the notification of passengers in the event of a flight delay. As such, the Agency is of the view that this provision may not be just and reasonable. The Agency is of the opinion that **Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.** [Emphasis added by Mr. Lukács]

[43] Mr. Lukács submits that the right of passengers to be informed about delays and schedule changes was more recently recognized by the Agency in Decision No. 16-C-A-2013, in the context of Porter's International Tariff.

[44] Mr. Lukács maintains that in the absence of notice about schedule changes, passengers are at risk of losing the entire benefit of the itinerary for which they have paid. He asserts that it is unreasonable to deprive passengers of notice about schedule changes, and that any provision exempting Porter from the obligation to notify passengers ought to be disallowed as unreasonable.

Analysis and findings

[45] The Agency finds that the absence of a provision in Existing Tariff Rule 3.4 requiring Porter to provide notice to passengers regarding schedule changes renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR. The Agency therefore finds that Existing Tariff Rule 3.4 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Lack of clarity of Existing Tariff Rules 3.4 and 15

[46] Mr. Lukács contends that Existing Tariff Rule 18, which was established in its existing form following Decision No. 16-C-A-2013, imposes liability upon Porter for damage occasioned by delay that reflects Porter's obligations under Article 19 of the Montreal Convention. He adds that, at the same time, Existing Tariff Rules 3.4 and 15 purport to relieve Porter from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter demonstrated the facts necessary to invoke the defense set out in Existing Tariff Rule 18.1(i) (which reflects Article 19 of the Montreal Convention). Mr. Lukács concludes that Existing Tariff Rules 3.4 and 15 contradict Existing Tariff Rule 18 and, as such, they render Porter's Tariff unclear, contrary to section 122 of the ATR.

Analysis and findings

[47] The Agency finds that Existing Tariff Rules 3.4 and 15 are unclear, contrary to section 122 of the ATR given the contradiction between those Rules and Existing Tariff Rule 18(c). Given that contradiction, the Agency finds that Existing Tariff Rules 3.4 and 15 are stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rules' application.

Issue 4: Is Existing Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR?

Position of Mr. Lukács

[48] Mr. Lukács contends that while in the case of flight delays failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, the failure of Porter to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times. He argues that making "reasonable efforts" sets the bar too low for Porter in the case of flight advancements, and points out that in Decision No. LET-A-112-2003, the Agency stated, under the heading "Passenger Notification", that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[49] Mr. Lukács points out that, subsequently, in Decision No. 344-C-A-2013, the Agency held that:

> [64] [...] The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.
>
> [65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. [...]

[50] Mr. Lukács concludes that Existing Tariff Rule 18(c) ought to be substituted with wording that imposes on Porter the requirement to "undertake" to inform passengers of flight advancements.

Analysis and findings

[51] The Agency agrees with Mr. Lukács' submission. As the Agency indicated in Decision No. 344-C-A-2013, the absence of a provision in Existing Tariff Rule 18(c) requiring Porter to undertake to advise passengers of a flight advancement renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR. The Agency finds that Existing Tariff Rule 18(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Issue 5: Is Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

[52] Mr. Lukács challenges the reasonableness and clarity of Existing Tariff Rule 20, as a whole, because it is, according to him, inconsistent with the legal principles set out by the Agency in Decision Nos. 666-C-A-2001, 204-C-A-2013 (*Lukács v. Air Canada*) and 227-C-A-2013 (*Lukács v. WestJet*).

Reasonableness

Position of Mr. Lukács – "reasonable efforts" and "same comparable, or lower booking code"

[53] Mr. Lukács asserts that it is a common practice of air carriers to reprotect passengers who are denied boarding on booking codes higher than their original codes, if doing so results in mitigation of the passengers' delay. He also asserts that reprotecting passengers, on a higher booking class if necessary, is the normal and ordinary consequence of overselling a flight, and is consistent with the carrier's concomitant obligation under Article 19 of the Montreal Convention to mitigate the delay of passengers.

Analysis and findings

[54] The Agency finds that the phrase "same comparable, or lower booking code" is unreasonable within the meaning of subsection 111(1) of the ATR because such phrase is inconsistent with the obligation under Article 19 of the Montreal Convention to mitigate the delay of passengers, including reprotecting those passengers on booking codes higher than their original reservations.

Position of Mr. Lukács – No refund or alternate transportation for flights originating in the United States

[55] Mr. Lukács notes that Existing Tariff Rule 20 provides, in part, that:

> If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:
>
> [...]
>
> (b) where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

[56] Mr. Lukács submits that a literal reading of this provision suggests that with respect to flights originating in the United States, Porter provides only monetary compensation, but has no obligation to provide a refund or to arrange for alternate transportation.

[57] Mr. Lukács contends that while this is likely not the intended meaning of Existing Tariff Rule 20, it is obvious that the Rule is either unclear or unreasonable with respect to the rights of passengers departing from the United States.

Analysis and findings

[58] The Agency finds that the absence of a provision from Existing Tariff Rule 20 requiring Porter to also provide a refund or arrange for alternate transportation for flights originating in the United States renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR. In this regard, the Agency finds that Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – No denied boarding compensation for passengers departing from Canada

[59] Mr. Lukács submits that Existing Tariff Rule 20 contains no provisions requiring Porter to pay compensation to passengers departing from Canada who are denied boarding, and that, instead, the Rule is confined to the reprotection of these passengers. He argues that reprotection of passengers is not a form of compensation, but rather the belated fulfillment of the contract of carriage.

[60] Mr. Lukács refers to Decision No. 666-C-A-2001, where the Agency considered the principles governing the amount of denied boarding compensation payable to passengers, and held, in part, that:

> [...] any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

[61] Mr. Lukács contends that compensation of victims of denied boarding has two components:

(1) reimbursement for out-of-pocket expenses, including refunds; and,
(2) denied boarding compensation (lump sum, no evidence of specific damage is required).

[62] Mr. Lukács maintains that this principle has been recognized, for example, in Decision No. 268-C-A-2007 (*Kirkham v. Air Canada*), where the Agency ordered Air Canada to both reimburse the passenger for his out-of-pocket expenses and pay the passenger denied boarding compensation.

[63] Mr. Lukács points out that in Decision No. 227-C-A-2013, the Agency considered the lack of tariff provisions requiring the payment of denied boarding compensation in WestJet's International Tariff, and stated that:

> [21] [...] any passenger who is denied boarding is entitled to compensation. [...] The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.
>
> [...]
>
> [39] [...] The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[64] Mr. Lukács maintains that Existing Tariff Rule 20 is unreasonable because it fails to impose any obligation of paying denied boarding compensation to passengers, contrary to the Agency's findings in Decision No. 666-C-A-2001. Mr. Lukács asserts that the Rule ought to be substituted with a provision that implements the denied boarding compensation amounts of the United States regime, so that the same amounts will apply to all international flights of Porter, regardless of the point of origin.

Analysis and findings

[65] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR because the Rule does not require Porter to tender denied boarding compensation to passengers departing from Canada, contrary to the Agency's findings in Decision No. 666-C-A-2001. The Agency therefore finds that Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Substitution of aircraft with one of a smaller capacity

[66] According to Mr. Lukács, Existing Tariff Rule 20 relieves Porter from the obligation to pay denied boarding compensation to passengers who are denied boarding because "a smaller capacity aircraft was substituted for safety or operational reasons." He notes that a virtually identical provision was recently considered in Decision No. 204-C-A-2013.

[67] Mr. Lukács points out that in Decision No. 204-C-A-2013, the Agency concluded that, in the absence of specific language that established context or qualified Air Canada's exemption from paying denied boarding compensation, the applicable rule was unreasonable.

[68] Mr. Lukács submits that this conclusion is equally applicable to Existing Tariff Rule 20, and therefore the impugned provision is unreasonable.

Analysis and findings

[69] The Agency finds that the finding in Decision No. 204-C-A-2013 relating to the payment of denied boarding compensation when substitution to a smaller aircraft occurs is equally applicable to this matter. The absence of specific language that establishes context or qualifies Porter's exemption from paying denied boarding compensation renders Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR as it fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Cash v. voucher

[70] Mr. Lukács points out that Existing Tariff Rule 20 provides, under the heading "Method of Payment", that:

> 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. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[71] Mr. Lukács submits that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency stated that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He adds that this finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding compensation.

[72] Mr. Lukács argues that the acceptance of other forms of denied boarding compensation must be an informed decision, based on the passenger being fully informed of the restrictions that accepting an alternative form of compensation may entail. Mr. Lukács states that this principle is common to both the American and the European denied boarding compensation regimes.

[73] Mr. Lukács contends that although, in theory, receiving a travel voucher for an amount equal to double or triple the cash denied boarding compensation may mutually benefit Porter and its passengers, in practice, the vouchers tend to be nearly worthless due to the many restrictions imposed on their use, and benefit only Porter. He states that one of these restrictions is that vouchers seem to be valid only for Porter's flights, and that is a significant restriction given that Porter does not have an extensive network.

[74] Mr. Lukács asserts that the vast majority of passengers are not aware of the many restrictions associated with vouchers, and that it is very difficult to verify whether passengers have been adequately informed about their rights by the carrier. He maintains that even if passengers are made aware of all the restrictions and limitations of Porter's travel vouchers, they cannot make an informed decision at the airport, in a matter of minutes, as to whether to seek cash compensation or accept a travel voucher instead.

[75] Mr. Lukács points out that in Decision No. 252-C-A-2012 (*Lukács v. WestJet*), the Agency recognized the importance of passengers having a reasonable opportunity to fully assess their options.

[76] Mr. Lukács submits that in this case, acceptance of compensation by way of travel vouchers may have very significant disadvantages for passengers, and there is a very serious concern about passengers being deprived of the ability to make an informed decision, based on the consideration of all the pros and cons, about the form of compensation that they wish to receive.

[77] Mr. Lukács maintains that even if the Agency were to find that paying compensation by way of travel vouchers, with the written consent of the passenger, is a reasonable alternative to cash compensation, passengers ought to be able to change their minds within a reasonable amount of time, and exchange their travel vouchers with cash compensation.

[78] Mr. Lukács refers to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*), where the Agency considered the issue of appropriate method of payment of denied boarding compensation. He states that in that Decision, the Agency imposed the following restrictions on Air Canada offering denied boarding compensation by way of travel vouchers:

> (R1) carrier must inform passengers of the amount of cash compensation that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;
>
> (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
>
> (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;
>
> (R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;
>
> (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

[79] Mr. Lukács submits that these restrictions are reasonable, and strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations. He also submits that if Porter chooses to offer denied boarding compensation by way of travel vouchers at all, then Porter ought also be subject to the aforementioned restrictions.

Analysis and findings

[80] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR because of the absence of provisions that provide for the following:

- denied boarding compensation must be tendered in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger;
- the passenger must be fully informed of the restrictions that may apply to alternative forms of compensation;

- in the event that a passenger opts for travel vouchers as compensation, the passenger must be able to change their mind within a reasonable amount of time, and exchange their vouchers for cash;
- if the carrier offers travel vouchers, the restrictions set out in Decision No. 342-C-A-2013 must apply.

[81] The Agency finds that, in the absence of the above provisions, Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Lack of clarity

Position of Mr. Lukács – Where does the choice lie?

[82] Mr. Lukács points out that in Decision No. LET-A-82-2009, the Agency considered a similar provision in Air Canada's tariff and raised serious concerns about its clarity. He also points out that Air Canada subsequently amended its tariffs to clarify that it retained the choice between a refund and alternate transportation. Mr. Lukács maintains that in Decision No. 479-A-2009, the Agency accepted this amendment for the limited purpose of the Agency's concerns about clarity; however, subsequently, in Decision No. LET-C-A-80-2011, the Agency stated that:

> [108] [...] By retaining some discretion over the selection of the choice of options from its Tariff provision, Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency also notes that with respect to this Issue, Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

[83] Mr. Lukács states that following this finding, Air Canada amended its tariffs to ensure that the choice lies exclusively with the passenger.

[84] Mr. Lukács asserts that Existing Tariff Rule 20 is unclear in its current form because it fails to specify with whom the choice lies between a refund and alternate transportation. He maintains that the choice between a refund and alternate transportation ought to lie exclusively with the passenger.

Analysis and findings

[85] The Agency finds that Existing Tariff Rule 20 is unclear because it fails to specify with whom the choice lies between a refund and alternate transportation. The Agency finds that the choice between a refund and alternate transportation ought to lie exclusively with the passenger. The Agency therefore finds that Existing Tariff Rule 20 is contrary to section 122 of the ATR because the Rule is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

Position of Mr. Lukács – "reasonable efforts" and "same comparable, or lower booking code"

[86] Mr. Lukács argues that the phrase "will make reasonable efforts" renders Existing Tariff Rule 20 unclear in that it does not impose a clear obligation upon Porter, and that "will make reasonable efforts" ought to be replaced simply with "shall". He also argues that Existing Tariff Rule 20 purports to limit Porter's obligation to secure alternate transportation on flights "in the same comparable, or lower booking code". Mr. Lukács submits that this phrase is unclear because Porter's booking codes may not be comparable to the booking codes of other air carriers, and that, more importantly, this restriction is unreasonable.

Analysis and findings

[87] The Agency finds that the phrase "will make reasonable efforts" in Existing Tariff Rule 20 is unclear in that the provision, as worded, does not impose a clear obligation on Porter. The Agency agrees with Mr. Lukács' submission that the phrase "same comparable, or lower booking code" is unclear because other carriers may not have booking codes comparable to those of Porter. The Agency finds that, given those phrases, Existing Tariff Rule 20 is contrary to section 122 of the ATR because it is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

Reasonableness and lack of clarity

Position of Mr. Lukács – Passenger's option

[88] Mr. Lukács notes that Existing Tariff Rule 20 provides, under the heading "Passenger's Option", that:

> Acceptance of the compensation relieves the Carrier from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

[89] Mr. Lukács contends that this provision is virtually identical to WestJet's Tariff Rule 110(G) in effect at that time that was considered in Decision No. 227-C-A-2013, where the Agency held, in part, that:

> [28] [...] the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner [...]

[90] Mr. Lukács argues that the same conclusion is applicable to the "Passenger's Option" section of Existing Tariff Rule 20, and thus the provisions under this heading are both unclear and unreasonable.

Analysis and findings

[91] With respect to the issue of clarity, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unclear, contrary to section 122 of the ATR, because it leaves the impression that the passenger cannot seek to recover damages in a court of law or in some other manner even if a payment is accepted by the passenger. The Agency finds that the provision at issue in Existing Tariff Rule 20 is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[92] With respect to the reasonableness of the provision at issue, the Agency agrees with Mr. Lukács' submission. The Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unreasonable within the meaning of subsection 111(1) of the ATR because even if a passenger has accepted a payment, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency therefore finds that the provision fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Last sentence of "Method of Payment"

[93] Mr. Lukács notes that Existing Tariff Rule 20 provides, under the heading "Method of Payment", that:

> [...] The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[94] Mr. Lukács maintains that this provision is virtually identical to WestJet's Proposed Tariff Rule 110(G) that was considered in Decision No. 227-C-A-2013, where the Agency held that:

> [44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács' submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

[95] Mr. Lukács submits that the same conclusion is applicable to the last sentence of the "Method of Payment" section of Existing Tariff Rule 20, and thus the impugned sentence is both unclear and unreasonable.

Analysis and findings

[96] With respect to clarity, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unclear, contrary to section 122 of the ATR, because it leaves the impression that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by Porter. The Agency therefore finds that the provision at issue in Existing Tariff Rule 20 is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[97] With respect to reasonableness, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unreasonable within the meaning of subsection 111(1) of the ATR. The Agency therefore finds that the provision fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

PROPOSED TARIFF RULES

Issue 1: Is the definition of "Credit Shell" in Proposed Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR?

Position of Mr. Lukács

[98] Mr. Lukács notes that stipulation (a) of the proposed definition of "Credit Shell" is that a "Credit Shell" is valid only for one year, and stipulation (c) of that definition states that a "Credit Shell" can be used only once, and the remainder of the balance is forfeited. He submits that the "Credit Shell" refers to payments made by passengers, and that, therefore, it appears that a "Credit Shell" is not a form of goodwill credit by Porter to passengers, but rather a credit for consideration received by Porter.

[99] Mr. Lukács argues that stipulations (a) and (c) purport to permit Porter to keep some or all of the consideration offered by passengers without providing any services in exchange, and that the absence of services (consideration) provided to passengers in return would result in the unjust enrichment of Porter. He maintains that the unjust enrichment of Porter provided by the "Credit Shell" fails to strike a balance between the rights of passengers and the ability of Porter to meet its statutory, commercial and operational obligations, and hence stipulations (a) and (c) of the "Credit Shell" proposed definition are unreasonable.

Analysis and findings

[100] A "Credit Shell" represents one of the alternatives available to a passenger under Proposed Tariff Rule 15 when the passenger's carriage is affected by flight overbooking, cancellation or advancement. As correctly noted by Mr. Lukács, the "Credit Shell" constitutes a remedy, and not a goodwill gesture. The Agency finds that the restrictions associated with the "Credit Shell", as set out in (a) and (c) of the definition in Proposed Tariff Rule 1.1 fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the definition of "Credit Shell" in Proposed Tariff Rule 1.1 would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 2: Is Proposed Tariff Rule 15(a)(iii)(b) unreasonable within the meaning of subsection 111(1) of the ATR?

Position of Mr. Lukács

[101] Mr. Lukács asserts that Proposed Tariff Rule 15(a)(iii)(b) is overly restrictive with respect to the rights of passengers, and imposes an unreasonable and impossible burden of proof on passengers, who do not always have evidence about the cause of a schedule irregularity. He argues that the burden of proof ought to rest with the carrier, rather than the passengers, and the test ought to incorporate the principle of "all reasonable measures".

[102] Mr. Lukács refers to Decision No. 204-C-A-2013, where the Agency considered the question of what conditions a carrier must satisfy to relieve itself from the obligation to pay denied boarding compensation in the case of aircraft substitution with one of a smaller capacity. He states that the Agency made the following key findings:

> In order to relieve itself from the obligation to pay denied boarding compensation, the carrier must demonstrate that:
>
> (1) substitution occurred for operational and safety reasons beyond its control; and,
> (2) it took all reasonable measures to avoid the substitution or that it was impossible for the carrier to take such measures.
>
> If the carrier fails to demonstrate both of these, then compensation should be due to the affected passengers.

[103] Mr. Lukács contends that in that Decision, the Agency concluded that, in the absence of specific language that establishes context or qualifies Air Canada's exemption from paying denied boarding compensation, the Air Canada tariff provision at issue was unreasonable. He argues that the same principles are applicable to the obligation to refund passengers for the fare and charges paid for segments already travelled that no longer serve the purpose for which the passenger undertook the travel. Mr. Lukács maintains that Porter ought to be able to relieve itself from this obligation only if it demonstrates that:

(C1) the Schedule Irregularity occurred for reasons beyond its control, and
(C2) it took all reasonable measures to avoid the Schedule Irregularity or that it was impossible for the carrier to take such measures.

[104] Mr. Lukács concludes that based on the Agency's findings in Decision No. 204-C-A-2013, Proposed Tariff Rule 15(a)(iii)(b) is unreasonable without imposing on Porter the requirement to demonstrate (C1) and (C2).

Analysis and findings

[105] The Agency agrees with Mr. Lukács' submission respecting this matter. Particularly, the Agency agrees that the principles set out in Decision No. 204-C-A-2013 (respecting the matter of the conditions that a carrier must satisfy to relieve itself from the obligation of tendering denied boarding compensation in the event of substitution of aircraft) also apply to refunding passengers for the fare and charges paid for segments already travelled that no longer serve a purpose.

[106] The Agency finds that Proposed Tariff Rule 15(a)(iii)(b) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the Agency finds that Proposed Tariff Rule 15(a)(iii)(b) would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 3: Is Proposed Tariff Rule 15(a)(iv) unreasonable within the meaning of subsection 111(1) of the ATR?

Position of Mr. Lukács

[107] Mr. Lukács points out that in Decision No. LET-C-A-83-2011, the Agency stated that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He adds that this finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding. Mr. Lukács maintains that the same conclusion is applicable with respect to the refund of fares and charges in the case of flight cancellation or advancement: passengers who paid cash or equivalent are entitled to be refunded in the same manner.

[108] Mr. Lukács contends that the "Credit Shell" is a highly restricted instrument: it is valid only for one year from the original ticket's issuance date and it can be used only once; any balance remaining after its use is forfeited by the passenger. He asserts that these restrictions have a high potential of unjust enrichment for Porter, without providing any benefit to passengers, and that allowing Porter to offer passengers a "Credit Shell" instead of a refund carries the same risks and disadvantages for passengers as offering travel vouchers in lieu of denied boarding compensation.

[109] Mr. Lukács submits that a future credit is not a proper form of refunding passengers money paid for services that were not provided, and that Proposed Tariff Rule 15(a)(iv) is unreasonable. He argues that the Agency should impose the same restrictions on Porter providing a "Credit Shell" in lieu of a refund as the Agency did with respect to travel vouchers in lieu of denied boarding compensation in Decision No. 342-C-A-2013. Mr. Lukács proposes the following restrictions:

> (R1) carrier must inform passengers of the amount of cash refund that would be due, and the passenger may decline travel vouchers, and receive cash or equivalent;
>
> (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
>
> (R3) carrier must obtain 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 refund;
>
> (R4) the amount of the travel voucher must be not less than 300% of the amount of cash refund that would be due;
>
> (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

Analysis and findings

[110] The Agency finds that in the absence of the safeguards set out in Decision No. 342-C-A-2013 associated with the tendering of travel vouchers when denied boarding occurs, Proposed Tariff Rule 15(a)(iv) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the Agency finds that Proposed Tariff Rule 15(a)(iv) would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 4: Is Proposed Tariff Rule 15(a) unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

Positions of the parties

Porter

[111] Porter contends that Proposed Tariff Rule 15 resolves the inconsistency found between Existing Tariff Rules 3.4 and 15 and Existing Tariff Rule 18, by removing the exclusionary language in Existing Tariff Rule 15, and with the revision in Proposed Tariff Rule 15(a), which expressly indicates that passengers affected by schedule irregularities may be entitled to reimbursement for damages resulting from delays under Tariff Rule 18. Porter notes that in Decision Nos. 248-C-A-2012 (*Lukács v. Air Transat*), 249-C-A-2012 (*Lukács v. WestJet*) and

250-C-A-2012 (*Lukács v. Air Canada*), the Agency determined that situations of overbooking and cancellation that are within the carrier's control constitute delays entitling passengers to relief, and such relief may, in certain circumstances, also apply where overbooking and cancellation are not within the carrier's control. Porter submits that by expressly indicating that relief under Proposed Tariff Rule 18 may be available to passengers affected by schedule irregularities, Proposed Tariff Rule 15 harmonizes the two Rules.

[112] Porter submits that, similarly, Proposed Tariff Rule 15 omits the language in Existing Tariff Rule 3.4 indicating that Porter is not required to give notice of schedule irregularities to passengers, consistent with the requirement in Tariff Rule 18 that Porter make efforts to notify passengers in advance of any schedule changes.

[113] Porter maintains that consistent with the circumstance-focussed approach endorsed by the Agency in Decision Nos. 248-C-A-2012, 249-C-A-2012 and 250-C-A-2012, Proposed Tariff Rule 15 sets out those remedies which are potentially available in cases of schedule irregularities – including alternative transport within a reasonable time and at no additional cost, refund, credit and remedies under the principles of Article 19 of the Montreal Convention.

[114] Porter contends that Proposed Tariff Rule 15 clearly states that Porter (a) "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", (b) will not limit its consideration of alternative transportation to its own services, and (c) will "make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger".

[115] Porter argues that Proposed Tariff Rule 15 clearly sets forth the range of potential remedies arising from scheduling irregularities, and indicates that Porter will, acting in good faith and in light of all relevant circumstances, offer a remedy or remedies designed to "appropriately mitigate the impact of the Schedule Irregularity", including remedies available under Proposed Tariff Rule 18.

[116] Porter submits that Proposed Tariff Rule 18 clearly indicates that it is the passenger who bears "the choice" among the remedies offered, including as between a refund (Proposed Tariff Rule 15(a)(iii)) and a credit (Proposed Tariff Rule 15(a)(iv)).

[117] Porter also submits that its Proposed Tariff Rule 15(a) is similar to that of Air Transat in all material respects, and thus similarly meets the requirement of clarity.

Mr. Lukács

[118] Mr. Lukács points out that Proposed Tariff Rule 15(a) requires Porter to offer passengers the choice between one or more of five remedial options, including:

> v. a monetary payment to the passenger for any amounts to which the passenger may be entitled pursuant to Rule 18 of this Tariff.

[119] Mr. Lukács contends that this suggests that Porter views the monetary payment pursuant to Proposed Tariff Rule 18 as an alternative to reprotecting passengers, instead of viewing the two as working together, in tandem.

[120] Mr. Lukács submits that it is not clear whether Proposed Tariff Rule 15(a) is simply unclear, or if Porter intended it to be read as monetary compensation under Proposed Tariff Rule 15(a)(v) being an alternative to reprotection. He suggests that the latter interpretation is reinforced by Porter's submission, which refers to three options, at the passenger's choice:

> i. alternative transportation to their destination within a reasonable time at no additional charge; or
> ii. where the flight is interrupted at a connection point, return to the point of origin and a refund or credit for unused segments or the full ticket in the indicated circumstances; and
> iii. compensation for resulting damages under Rule 18, which incorporates the principles of Article 19 of the Montreal Convention per Decision No. 16-C-A-2013.

[121] Mr. Lukács argues that the presence of (v) renders Proposed Tariff Rule 15(a) at the very least unclear, but possibly also unreasonable, depending on its intended meaning.

[122] Mr. Lukács asserts that Proposed Tariff Rule 15 ought to clearly state that passengers are entitled to monetary payment pursuant to Proposed Tariff Rule 18 regardless of how they choose to be reprotected (transportation to destination, transportation to point of origin, or refund).

Analysis and findings

[123] As noted by Mr. Lukács, the monetary payment available to passengers under Proposed Tariff Rule 15(a) represents one of several options made available by Porter to passengers affected by flight overbooking, delay or cancellation. Given the wording of that Rule, i.e., "the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices", it is not entirely clear whether a monetary payment constitutes a sole remedy. The Agency finds that Proposed Tariff Rule 15(a) is stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rule's application and, as such, the application of that Rule is unclear.

[124] With respect to the reasonableness of Proposed Tariff Rule 15(a), the Agency finds that the Rule should clearly state that passengers are entitled to monetary payment, under Tariff Rule 18, irrespective of how the passengers choose to be reprotected. Given that Proposed Tariff Rule 15(a) does not do so, the Agency finds that it fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[125] Therefore, the Agency finds that Proposed Tariff Rule 15(a) would be found unreasonable within the meaning of subsection 111(1) of the ATR and unclear, contrary to section 122 of the ATR, if filed with the Agency.

Issue 5: Is Proposed Tariff Rule 15(c) unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

Positions of the parties

Porter

[126] Porter argues that Proposed Tariff Rule 15(c) is consistent with the rule filed by WestJet as a result of Decision No. 249-C-A-2012.

[127] Porter maintains that Proposed Tariff Rule 15(c) does not purport to exclude any liability on Porter's part, but rather confirms that the intention of that Rule is not to create an absolute liability regime; that is, there may be instances where schedule irregularities resulting from matters beyond the carrier's control do not necessarily result in the carrier's liability under the principles of Article 19 of the Montreal Convention. Porter notes that in Decision No. 249-C-A-2012, the Agency stated that:

> [93] Whether a carrier will be held liable under Article 19 of the Convention will depend on whether it or its servants and agents took all measures that could reasonably be required to avoid damage occasioned by delay, or that it was impossible for them to take such measures. Rather than setting out broad exclusions from liability such as acts of nature or of third parties, a case by case approach is warranted which looks, for example, at the predictability of an event in determining whether the carrier is exonerated under Article 19 of the Convention.

[128] Porter points out that the Agency ultimately accepted a tariff filing by WestJet upon its clarification that it was not intended that WestJet be liable for acts of nature or third parties "in all cases", which clarification is reflected in Proposed Tariff Rule 15(c).

Mr. Lukács

[129] Mr. Lukács submits that Proposed Tariff Rule 15(c) creates the impression that Porter does not have to reprotect or refund passengers for the unused portions of their tickets if Porter can demonstrate the "all reasonable measures" defense. He states that if this was not Porter's intent, then Proposed Tariff Rule 15(c) is simply unclear, and that if it was Porter's intent, then Proposed Tariff Rule 15(c) is unreasonable, and inconsistent with the Agency's findings in Decision No. 344-C-A-2013.

[130] Mr. Lukács also submits that Proposed Tariff Rule 15(c) confuses two different rights of passengers who are affected by a flight cancellation, denied boarding or flight advancement:

1. the right for damages occasioned by the cancellation, denied boarding, or flight advancement (Proposed Tariff Rule 18); and,

2. the right for reprotection or refund of unused portion (Proposed Tariff Rules 15(a)(i) to (iii)).

[131] Mr. Lukács argues that the difference between the nature of these two obligations is very substantial. He maintains that a carrier can relieve itself from the obligation under right 1 above by demonstrating that it and its agents and employees have taken all reasonable steps necessary to avoid the damage or that no such measures were available, but a carrier cannot relieve itself from the obligation under right 2 above.

[132] Mr. Lukács contends that passengers are entitled to reprotection or a refund regardless of the reason for their inability to travel, as long as the passengers are not culpable for it. He notes that in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.

[133] Mr. Lukács submits that Proposed Tariff Rule 15(c) is either unclear or unreasonable in that it purports to relieve Porter from the obligation to refund the unused portions of tickets to passengers, contrary to the Agency's findings in Decision No. 344-C-A-2013.

[134] Mr. Lukács asserts that the first half of Proposed Tariff Rule 15(c) incorrectly focuses on the cause of the so-called "Schedule Irregularity" rather than on how Porter reacts to it, and thus misstates the test under Article 19 of the Montreal Convention. He notes that in Decision No. 16-C-A-2013, the Agency explained that what determines liability for delay is not the cause of the delay, but rather how the carrier reacts to the delay. Mr. Lukács argues that Proposed Tariff Rule 15(c) is inconsistent with the findings of the Agency in that Decision, and thus it ought to be disallowed as being either unclear or unreasonable.

[135] Mr. Lukács maintains that the "all reasonable measures" test set out in Proposed Tariff Rule 15(c) does not relieve Porter from the obligation to refund or reprotect passengers, regardless of the cause of the "Schedule Irregularity", and that the test is relevant only to the obligation to refund the fares and charges for segments travelled that no longer serve any purpose for the passenger's travel. He submits, therefore, that the scope of Proposed Tariff Rule 15(c) ought to be confined to the second portion of Proposed Tariff Rule 15(a)(iii).

Analysis and findings

[136] The Agency finds that Proposed Tariff Rule 15(c) creates the impression that Porter does not have to reprotect or refund passengers for the unused portions of their tickets if Porter can demonstrate the "all reasonable measures" defense. As such, the Agency finds that Proposed Tariff Rule 15(c) is contrary to section 122 of the ATR because the Rule is stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rule's application.

[137] As for reasonableness, Mr. Lukács correctly notes that passengers are entitled to reprotection or a refund, irrespective of the reason for their inability to travel, as long as the passengers are not responsible for it. In Decision No. 28-A-2004, the Agency recognized the right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. Taking "all reasonable measures" does not relieve Porter from its obligation to refund passengers for the unused portions of their tickets or reprotect passengers affected by flight

cancellation, denied boarding or flight advancement. If it was Porter's intent under Proposed Tariff Rule 15(c) not to reprotect or refund for unused portions of tickets, employing the "all reasonable measures" defense, Proposed Tariff Rule 15(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[138] Therefore, the Agency finds that Proposed Tariff Rule 15(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR and unclear, contrary to section 122 of the ATR, if filed with the Agency.

Issue 6: Is Proposed Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR?

Positions of the parties

Porter

[139] Porter submits that Proposed Tariff Rule 18 reflects an approach similar to those adopted by Air Transat and WestJet in their tariff rules concerning remedies for schedule irregularities, filed in response to Decision Nos. 248-C-A-2012 and 249-C-A-2012.

[140] Porter advises that its Existing Tariff Rule 18 was filed in response to Decision No. 16-C-A-2013, and following issues raised in this complaint, Porter has made further revisions, reflected in Proposed Tariff Rule 18, which:

(a) Extend the rights set forth therein, including concerning advance notice, to passengers affected by flight advancements (Proposed Tariff Rules 18(c) and 18.1); and,
(b) Confirm Porter's practices concerning on-board flight delays, consistent with the voluntary Code of Conduct.

[141] Porter argues that Proposed Tariff Rule 18.1 entitles passengers affected by flight advancements to resulting damages to the same extent as such are available to passengers affected by flight delays pursuant to Article 19 of the Montreal Convention. Porter submits that taken together with the remedies available to such passengers under Proposed Tariff Rule 15, the Tariff would provide clear and reasonable recourse for such passengers which accord with the Agency requirements.

[142] Porter states that it has proposed in Proposed Tariff Rule 18(c) to make "best efforts" to inform passengers of flight advancements. Porter argues that it is not in a position to guarantee that notice will reach the passenger despite any efforts Porter may make. Porter submits that it would be required to take the same steps on a "best efforts" basis as pursuant to an "undertaking"; the distinction being, however, one of result: As Porter cannot guarantee that the passenger will receive the message, it cannot "undertake" to ensure that the passenger is informed.

[143] Porter maintains that the explicit extension of the remedies under Proposed Tariff Rule 18, together with the availability of the remedies under Proposed Tariff Rule 15, satisfy the Agency's prescribed requirements as to relief that must be made available in the case of flight advancements.

Mr. Lukács

[144] Mr. Lukács argues that "best efforts" to advise of flight advancements are not sufficient, and that Porter must "undertake" to inform passengers affected by such an event. He notes that in Decision No. LET-A-112-2003, the Agency held, under the heading "Passenger Notification", that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[145] Mr. Lukács also points out that in Decision No. 344-C-A-2013, the Agency held that:

> [63] [...] When the air carrier advances the scheduled departure of a flight, the consequences may be more severe than a delay for the passenger and it follows that the duty to inform should be no less onerous.
>
> [64] [...] The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.
>
> [65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable [...]

[146] Mr. Lukács submits that in response to Decision No. 344-C-A-2013, Porter amended its Domestic Tariff Rule 16(c) to read as follows:

> Schedules are subject to change. Passengers have a right to information on flight times and schedule changes, and the Carrier will make reasonable efforts to inform passengers of flight delays, and schedule changes and, to the extent possible, the reasons for them. Carrier will also undertake to inform passengers of any advancement of departure times.

[147] Mr. Lukács contends that Porter does not have any difficulty to "undertake" to inform passengers on domestic itineraries about advancement of departure times. He adds that the purpose of the requirement to "undertake" to inform passengers of flight advancements is precisely to provide an adequate recourse for passengers affected by these advancements. He submits that the consequence of a passenger not being notified about a flight advancement is not merely a delay of a few hours, but rather the passenger missing the flight, and possibly forfeiting the ability to travel.

[148] Mr. Lukács concludes that in respect of flight advancements, Porter ought to bear all the risks and consequences associated with passengers missing their flights because they did not know about the flight advancement. He argues that Porter making merely a "best effort" to inform such passengers ought not to relieve Porter from these risks, consequences and liabilities, because it is inconsistent with the passengers' fundamental rights to travel on the itinerary they paid for.

Analysis and findings

[149] The Agency finds that "best efforts" to advise passengers of flight advancements is unreasonable within the meaning of subsection 111(1) of the ATR for the reasons set out by Mr. Lukács, that carriers must undertake to inform passengers of those advancements, and that the Agency has already ruled on this matter in other decisions. Therefore, the Agency finds that Proposed Tariff Rule 18(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. The Agency therefore finds that Proposed Tariff Rule 18(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 7: Is Proposed Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR and/or unclear, contrary to section 122 of the ATR?

Position of Porter

Form of compensation

[150] Porter argues that Proposed Tariff Rule 20 is already clear that the choice between cash or voucher lies solely with the passenger, and this discretion on the passenger's part is maintained with the broadening of the denied boarding compensation regime to Canadian-originating flights. Porter states that, consistent with the Agency's ruling in Decision No. 342-C-A-2013, Porter may only tender vouchers in lieu of cash as follows:

(a) at a value ratio of 3:1; i.e., vouchers offered must be redeemable at three times the value of cash compensation the passenger would otherwise be entitled to;
(b) upon disclosing to the passenger all material restrictions applicable to the vouchers;
(c) if the passenger agrees in writing to accept the vouchers in lieu of cash.

[151] Porter submits that in recognition that passengers accepting vouchers will be making decisions affecting their legal rights in a relatively short time frame, Porter will permit passengers to reverse their decisions and exchange their vouchers for cash within 30 days of the denied boarding incident, in accordance with the Agency's finding in Decision No. 342-C-A-2013.

Reprotection of passengers who are involuntarily denied boarding

[152] Porter points out that passengers affected by overbooking are now expressly entitled to certain remedies under Proposed Tariff Rule 15, including the choice between reprotection and a refund, and Porter is not limited to offering alternative service on its own flights or the "same or lower booking code" on another carrier's flights.

Denied boarding compensation is available on all flights

[153] Porter contends that while Existing Tariff Rule 20 provides distinct remedies depending on whether a flight departs from the United States or Canada (the only two countries served by Porter), Proposed Tariff Rule 20 removes this distinction, applying the same rules on all flights under the Tariff.

Amount of denied boarding compensation

[154] Porter proposes to implement the same "grid" of compensation amounts, depending on length of the delay in the passenger's arrival at their destination, as currently applies to its United States-originating flights.

[155] Porter points out that in Decision No. 204-C-A-2013, the Agency found that the United States' compensation regime and an alternative regime proposed by Mr. Lukács were both reasonable options. Porter indicates that it has elected to implement the United States regime for all of Porter's international flights, including those originating in Canada. Porter believes that the adoption of a single compensation regime will be less confusing to passengers, and that the implementation of a single, uniform regime across all of its stations will ensure consistency and facility of implementation for its own personnel.

[156] Porter points out that it has modified the United States regime slightly to provide for compensation of "at least" the amount prescribed under that regime, up to the stipulated maximums. Porter advises that while this will not prejudice passengers, it will allow Porter some flexibility during the rollout of its broader denied boarding compensation program as overbooking is tested on more routes, whereby it may simply offer the maximum amount to passengers during initial rollout until it can confidently implement a compensation regime based on actual fares paid by each individual passenger. Porter submits that it will not pay any passenger less than the minimum amounts indicated in Proposed Tariff Rule 20, which amounts the Agency has found to be reasonable.

Position of Mr. Lukács

Form of compensation

[157] Mr. Lukács points out that in Decision No. 342-C-A-2013, the Agency imposed the following conditions on the offering of travel vouchers in lieu of denied boarding compensation:

(R1) carrier must inform passengers of the amount of cash compensation that would be due, and the passenger may decline travel vouchers, and receive cash or equivalent;

(R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;

(R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;

(R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;

(R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

[158] Mr. Lukács argues that while Proposed Tariff Rule 20 incorporates (R2), (R4), and (R5), it fails to incorporate (R1) and to fully incorporate (R3).

[159] Mr. Lukács notes that Proposed Tariff Rule 20 only requires Porter to obtain a written agreement from passengers to accept vouchers in lieu of cash or cheque payment, but omits the requirement to obtain written confirmation that the passengers were provided with the information required under (R1) and (R2). He asserts that the absence of (R1) and the full incorporation of (R3) renders Proposed Tariff Rule 20 unreasonable, and Porter ought to be ordered to fully incorporate (R1) and (R3) into the Rule.

[160] Mr. Lukács submits that it is common knowledge that cash or equivalent, which constitutes legal tender, is more valuable than any kind of coupons or vouchers, which can be used only for payment at a specific business or from a service provider. He notes that vouchers, as acknowledged by Porter, are subject to restrictions imposed by Porter (including an expiry date), while legal tender is not subject to these restrictions.

[161] Mr. Lukács maintains that the conditions on the offering of travel vouchers in lieu of denied boarding compensation set out in Decision No. 342-C-A-2013 mitigate these disadvantages, and it is important to bear in mind that the restrictions were imposed by the Agency precisely for the purpose of mitigating the disadvantage to passengers.

The reference to "reconfirmation requirements" in Proposed Tariff Rule 20

[162] Mr. Lukács argues that the reference to "reconfirmation requirements" renders Proposed Tariff Rule 20 unclear and/or unreasonable for the following reasons:

1. Porter's general conditions of carriage state that: "3. Reconfirmation of flights is not required [...]". Thus, Proposed Tariff Rule 20 appears to be incorporating a non-existent requirement, which creates substantial confusion and lack of clarity, at the very least;

2. The word/term "reconfirmation" is nowhere defined in Porter's Tariff;

3. Reconfirmation of reservations is an outdated requirement that has been abandoned by the industry, given that the standard practice is to issue confirmed reservations; and,

4. It is virtually impossible for a passenger to prove that they reconfirm their reservation.

[163] Mr. Lukács maintains, therefore, that conditioning the payment of denied boarding compensation on some sort of reconfirmation would effectively deprive passengers of their right to be paid denied boarding compensation.

Analysis and findings

[164] The Agency finds that paragraphs (a) to (d) under "Method of Payment" in Proposed Tariff Rule 20 do not fully incorporate the restrictions imposed by Decision No. 342-C-A-2013 (R1 to R5). Specifically, R3 is not fully incorporated into paragraph (c) because it only requires Porter to obtain a written agreement from the passenger to accept vouchers in lieu of cash or cheque payment, but omits the requirement to obtain written confirmation that the passengers were provided with the information required under (R1) and (R2). Also, R1 is not reflected in Proposed Tariff Rule 20. The Agency finds that the failure to fully reflect the conditions associated with the issuance of travel vouchers, set out in Decision No. 342-C-A-2013, fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[165] The Agency also finds that the reference to "reconfirmation requirements" makes Proposed Tariff Rule 20 unclear for the reasons set out by Mr. Lukács. The Agency therefore finds that the Rule is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[166] Furthermore, the Agency agrees with Mr. Lukács' submission that requiring reconfirmation fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[167] Therefore, the Agency finds that Proposed Tariff Rule 20 would be found unreasonable within the meaning of subsection 111(1) of the ATR and unclear, contrary to section 122 of the ATR, if filed with the Agency.

SUMMARY OF CONCLUSIONS

With respect to Porter's Existing Tariff Rules

Issue 1

[168] The Agency has determined that the absence from Porter's Tariff of all of the elements of the Code of Conduct does not render the Tariff unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 2

[169] The Agency has determined that the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 3

[170] The Agency has determined that Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR and are unclear, contrary to section 122 of the ATR.

Issue 4

[171] The Agency has determined that Existing Tariff Rule 18(c) is unreasonable within the meaning of subsection 111(1) of the ATR.

Issue 5

[172] The Agency has determined that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR and is unclear, contrary to section 122 of the ATR.

With respect to Porter's Proposed Tariff Rules

Issue 1

[173] The Agency has determined that the definition of "Credit Shell" in Proposed Tariff Rule 1.1 would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 2

[174] The Agency has determined that Proposed Tariff Rule 15(a)(iii)(b) would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 3

[175] The Agency has determined that Proposed Tariff Rule 15(a)(iv) would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 4

[176] The Agency has determined that Proposed Tariff Rule 15(a) would be found unreasonable within the meaning of subsection 111(1) of the ATR and unclear, contrary to section 122 of the ATR, if filed with the Agency.

Issue 5

[177] The Agency has determined that Proposed Tariff Rule 15(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR and unclear, contrary to section 122 of the ATR, if filed with the Agency.

Issue 6

[178] The Agency has determined that Proposed Tariff Rule 18(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR if filed with the Agency.

Issue 7

[179] The Agency has determined that Proposed Tariff Rule 20 would be found unreasonable within the meaning of subsection 111(1) of the ATR and unclear, contrary to section 122 of the ATR, if filed with the Agency.

ORDER

[180] The Agency, pursuant to section 113 of the ATR, disallows the following provisions of Porter's Tariff:

- the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1;
- Existing Tariff Rules 3.4 and 15;
- Existing Tariff Rule 18(c); and,
- Existing Tariff Rule 20.

[181] The Agency orders Porter, by February 28, 2014, to amend its Tariff to conform to this Order and the Agency's findings set out in this Decision in the following manner:

Adopt Proposed Tariff Rules 1.1, 15, 18 and 20 with the following amendments:

1. Delete (a) and (c) from the definition of "Credit Shell" in Proposed Tariff Rule 1.1.

2. Amend Proposed Tariff Rule 15(a)(iii) to read:

   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 the travel.

3. Delete Proposed Tariff Rule 15(a)(v), and delete Proposed Tariff Rule 15(a)(iv) should Porter choose not to include the additional provisions under Proposed Tariff Rule 20 set out below in (6).

4. Amend Proposed Tariff Rule 15(c) to read:

   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 that 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.

5. Amend Proposed Tariff Rule 18(c) by replacing "best efforts" with "undertake".

6. Amend the provision in Proposed Tariff Rule 20 appearing as the first bullet under the heading "Compensation for Involuntary Denied Boarding" by deleting the word "reconfirmation"; and should Porter choose to retain a "Credit Shell" as a form of compensation, add the following conditions under the heading "Method of Payment":

   - Carrier must inform passengers of the amount of cash compensation that would be due and the passenger may decline travel vouchers, and receive cash or equivalent.

   - Carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation.

[182] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rules 1.1, 3.4, 15, 18(c) and 20 shall come into force when Porter complies with the above or on February 28, 2014, whichever is sooner.

(signed)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member