

Jean-François Bisson-Ross
Counsel - Litigation
Direct Line: (514) 422-5813
Facsimile: (514) 422-5829
Email: jean-francois.bisson-ross@aircanada.ca



Law Branch, Zip 1276
P.O. Box 7000, Station Airport
Dorval, Quebec, Canada
H4Y 1J2

VIA E-MAIL: secretariat@otc-cta.gc.ca

January 20, 2016

The Secretary

CANADIAN TRANSPORTATION AGENCY
Secretary
15 Eddy Street
17th Floor Mailroom
Gatineau QC J8X 4B3

**SUBJECT: Mr. Christopher C. Johnson and Dr. Gábor Lukács
v. Air Canada
Case No.: 15-05627
Our File No.: LIT-2015-000544
Response to Application**

Dear Madam Secretary:

1. Air Canada is pleased to respond to Dr. Gábor Lukács and Mr. Christopher Johnson's (collectively referred to as "the Complainants") application filed on December 3, 2015 (hereinafter "the Complaint")
2. The Complainants, both represented by Dr. Lukács, challenge Air Canada's reimbursement of expenses allegedly incurred by Mr. Johnson following the cancellation of flight AC 889 from London, UK, to Ottawa on December 10, 2013 due to an unforeseen mechanical issue.
3. Although the Complaint was initiated subsequent to Mr. Johnson's claim for reimbursement of expenses, the remedies proposed by the Complainants attempt to compel Air Canada to publish a public call to reprocess, under the Canadian

Transportation Agency (the "Agency")'s purview, all of its finalized passenger expense claims of the last 2 years.

4. Air Canada has filed a request under section 31 of the *Canadian Transportation Agency Rules* concerning the internal documents submitted in response to Dr. Lukács's questions on January 11 and January 19, 2016, as well as the document to be submitted as annex **A-2** to Air Canada's Response to the present Complaint. Consequently, the documents that are subject to this request will only be attached to the Agency's copy of this response and not to the Complainants' pending the Agency's ruling on Air Canada's application.

1. Summary of Air Canada's position

5. The "Impugned Policy" in effect at the relevant time to Mr. Johnson's complaint with Air Canada referred to by the Complainants and further disclosed by Air Canada within the context of the present matter constitutes internal recommendations for Air Canada Customer Relations Representatives ("Representatives") ("Internal Recommendations", re-attached herewith as annex **A-1** for ease of reference). Where delays and cancellations are controllable, Air Canada is liable to reimburse out of pocket expenses as per the *Convention for the unification of certain rules in air transportation* signed at Montreal in May 1999 (the "Montreal Convention") as incorporated in Canadian legislation by the *Carriage by Air Act, RSC 1985, c C-26* and Air Canada's Tariff.
6. The Internal Recommendations do not constitute liability limits in the case of controllable situations and Air Canada often reimburses passengers beyond the recommended amounts. Limits only apply in the case of goodwill offers where Air Canada is not bound to reimburse passengers. Expenses claims are assessed on a case by case basis. Air Canada's current Expense Guidelines, attached herewith as annex **A-2**, are to the same effect. Another section of annex **A-2** has not been disclosed as it does not relate to Irregular operations or schedule changes and related expenses therefrom.
7. The fact that Air Canada's Representatives have referred to a Policy in refusing to reimburse the totality of expenses claimed by some passengers does not equate to a systematic denial of expenses in controllable situations.
8. Air Canada submits that it neither infringes the Montreal Convention, the *Canada Transportation Act, SC 1996, c 10* and its Regulations nor Air Canada's Tariff in setting up internal recommendations for its Representatives. Air Canada believes that no corrective measures and no further reimbursement in this matter is

warranted under any applicable Conventions, Laws or its Tariff. Subsidiarily, should the Agency consider the question of remedies, Air Canada submits that the remedies proposed by the Complainants are outside of the Agency's complaint based jurisdiction and mandate as well as being unnecessary and excessive.

9. Without limiting the foregoing, in particular, the Complainants' propositions to compel Air Canada to issue a public call to reprocess claims and for the Agency to force and oversee the treatment of previously closed expense refund requests is beyond the Agency's mandate, unnecessary and excessive. Furthermore, such propositions do not take the different circumstances of each expense refund request into account, which evaluation has already been performed by Air Canada. Moreover, Air Canada objects to the remedies proposed, given the fact that the Complainants have no mandate to represent an undefined and non-existent class of passengers with remote commonality of issues.

2. The Complainants' claim for reimbursement of expenses

10. The Complainants, both represented by Dr. Lukács, challenge Air Canada's reimbursement of expenses allegedly incurred by Mr. Johnson following the cancellation of flight AC 889 from London, UK, to Ottawa on December 10, 2013. Flight AC 889 was cancelled due to an uncontrollable electric pump failure.
11. Given the flight cancellation, most passengers were reprotected by Air Canada on another flight the same day, according to the space available. In order to limit the effects of this irregular operation, Air Canada called for volunteers to stay overnight in London to be reprotected on Air Canada's subsequent flight with space available.
12. Mr. Johnson volunteered to fly with Air Canada on the subsequent day and confirmed being directed to pick up his luggage where he would then subsequently be provided with accommodation and meals. Mr. Johnson also confirmed having received instructions to be transported by Air Canada to a hotel from the airport.
13. Unfortunately, Mr. Johnson advised that he was not able to find the arranged transportation to a hotel where he would have been provided with meal vouchers and a room. Subsequently, as appears from Mr. Johnson's Passenger Name Record ("PNR"), attached herewith as annex **A-3**, Air Canada informed Mr. Johnson to prepare a claim to Air Canada's Customer Relations. Air Canada did not confirm at this moment any expense limit, in answer to Mr. Johnson's inquiry,

as the claim would have to be individually reviewed by Air Canada's Representatives, who would then determine whether Air Canada would be liable to reimburse the out of pocket expenses.

14. Following his overnight stay in London without the accommodation and meal vouchers to be provided by Air Canada, Mr. Johnson declares having incurred the following out of pocket expenses:
 - Hotel accommodation (including transportation and breakfast) \$CAD461.77
 - Cost of dinner \$CAD69.79.
15. Mr. Johnson requested Air Canada to reimburse the totality of the out of pocket expenses above. Considering the uncontrollable circumstances that led to the cancellation of flight AC 889, Air Canada reimbursed Mr. Johnson the sum of \$CAD 222.

2.1 Cause of flight AC 889 Cancellation

16. As appears from a Statement from Mr. Tom Liepins, Senior director, Maintenance Operations control at Air Canada, provided in attachment therewith as annex **A-4**, flight AC 889 of December 10, 2013 was cancelled due to a low hydraulic system pressure caused by a wiring fault. This malfunction could not have been detected and controlled by Air Canada, who took all reasonable measures in making a pre departure check of the system prior to every flight.
17. As per the Montreal Convention, Air Canada was not bound to reimburse out of pocket expenses or provide accommodation and meals as per the Montreal Convention following the uncontrollable cancellation of flight AC 889.

2.2 Air Canada's Tariff

18. According to Air Canada's Tariff Rule 80, applicable to Mr. Johnson's contract of carriage, attached to the present as annex **A-5**, passengers will be provided with hotel accommodation and meal vouchers for delays or cancellations within Air Canada's control. Passengers are provided with accommodations and meals proactively, alleviating the need for passengers to claim back expenses incurred during these situations.
19. *A contrario*, Air Canada is not bound to provide compensation for delays and or cancellations that were uncontrollable.

2.3 The Air Canada “Impugned Policy”

20. In response to Dr. Lukács’ questions dated December 29, 2015, Air Canada communicated a copy of the applicable internal recommendations - at the time of Mr. Johnson’s claim - for Customer Relations Representatives entitled “Expense Policy”, in effect on December 2013 (annex **A-1**). The Internal Recommendations provide internal guidance for expenses in the context of irregular operations and schedule changes.
21. The Internal Recommendations do not constitute Air Canada’s policy for passenger claims, which are rather reviewed on a case by case basis, as confirmed through a Statement by Ms. Twyla Robinson, attached herewith as annex **A-6**.
22. As provided in the Internal Recommendations the Lead Customer Relations Representative (the “Lead”)'s approval must be obtained before responding to the writer ie. the passenger making an expense refund request. The Lead also allows expenses above the recommendations and for total expenses that exceed 300\$. Furthermore, as confirmed by Ms. Robinson, Lead Customer Service Representatives are not bound to apply the policy and have discretion to reimburse higher amounts, when circumstances warrant such actions, each customer expense claim being reviewed on a case by case basis. In fact, the recommendations are often exceeded, as further confirmed by Ms. Robinson. As such, the Complainants’ allegation that Air Canada referred to a Policy in two other instances with passengers who are not parties to the present matter is irrelevant to a systemic inquiry of whether Air Canada respected Rule 80 of its Tariff in the present matter. The reference to a Policy in refusing to reimburse the totality of expenses claimed by two other passengers does not equate to a systematic denial of expenses in controllable situations.

2.4 Air Canada’s position on Mr. Johnson’s claim for reimbursement of expenses

23. In the matter at hand, Mr. Johnson was offered accommodation and meals for an overnight stay, as he answered a call for volunteers to fly with an Air Canada flight on the subsequent day, within the context of an uncontrollable flight cancellation. In line with the Montreal Convention and its Tariff, Air Canada does not have to reimburse expenses where the delay or cancellation was outside its control. Air

Canada made a goodwill offer to Mr. Johnson in offering accommodation and meals pending his flight.

24. As Mr. Johnson was unable to locate the Air Canada representative arranging the accommodation and meals, he made overnight arrangements by himself. Having another opportunity to review Mr. Johnson's claim, in complete resolution of the present matter, Air Canada offers, as a further goodwill gesture, to compensate the remaining \$CAD309.56, considering the circumstances at hand.

2.5 Passenger claims for expenses under the Montreal Convention

25. Claims for delays under the Montreal Convention are limited to 4 694 Special Drawing Rights ("SDRs), and Air Canada reviews such claims in respect of the Convention. In some instances, Air Canada may deny its liability based on the exemption motives as set out under the Montreal Convention. Furthermore, while the Montreal Convention provides for a liability threshold limiting passenger claims for events such as delays, they remain subject to rules of evidence and damage mitigation.
26. As such, while there is no policy limiting Air Canada's reimbursement of expenses for controllable delays or cancellations, a Representative will consider all of the former elements in deciding to allow or refuse – in totality or in part - expense refund requests.
27. In other instances, based on goodwill, Air Canada may decide to provide compensation despite not being liable to do so as per the Montreal Convention, such as in the current matter.

2.6 Conclusion on Air Canada's liability

28. In light of the above, Air Canada denies having a policy limiting reimbursement of passengers' expenses for delays or cancellations that are within its control or systematically limiting passenger claims for related expenses therefrom. Air Canada has internal recommendations for Representatives in handling passenger expense refund requests. The Internal Recommendations are not terms and conditions of carriage and are not set out in Air Canada's Tariff. Passenger claims for reimbursement of expenses are examined on a case by case basis, respecting the requirements under the Montreal Convention.

29. With regards to delays that are within Air Canada's control, the Internal Recommendations are often exceeded through the Lead Representatives' approval, who are consulted by Representatives as per Air Canada's recommendations. Otherwise, Air Canada internally recommends to respect goodwill compensation allowances in cases where it is not liable under the Montreal Convention or its Tariff to provide accommodation and meals.
30. While the Montreal Convention prevents limitation of liability for expenses resulting from a controllable delay or cancellation, applicable liability principles may sometimes allow an airline not to reimburse the totality of expenses claimed. For instance, a claim may be reduced where damages could have been further mitigated, without being considered as a limitation of liability under the Montreal Convention.

3. Remedies sought by the complainants

31. Air Canada denies that its Internal Recommendations contravene the Montreal Convention, the *Canada Transportation Act* and its Regulations or its Tariff as they do not limit expenses to be reimbursed to customers in the context of controllable delays or cancellations. The remedy proposed in paragraph 41 a) in the Complaint is thus unnecessary.
32. Air Canada addresses the Complainants' remaining proposed remedies as follows: With regard to the remedy set out in paragraph 41 b), while the current Expense Guidelines filed under annex **A-2** do not limit any reimbursement of expenses under controllable situations, Air Canada agrees to make the following modifications in order to avoid misunderstandings with passengers:
 - a) Change reference from "Policy and/or Procedure" to "Internal Recommendations";
 - b) Cease referring to the Internal Recommendations as a "Policy" in communications with passengers.
33. The change of title is sufficient to prevent misunderstandings in handling reimbursement claims.

3.1 The remedies in paragraph 41 c) and d), namely, to compel Air Canada to issue a public call to reopen and reprocess claims and for the Agency to oversee the treatment of previously closed expense matters is beyond the Agency's mandate, unnecessary, excessive and outside of the Agency's jurisdiction.

3.1.1 Agency's mandate and jurisdiction

34. The Agency is an independent, administrative body created under *the Canada Transportation Act*. In light of the Agency's status as an administrative tribunal, it only has the jurisdiction and mandate specifically granted to it by its enabling legislation. It does not have a Superior Court's inherent jurisdiction. Though it may exercise powers akin to a common law court, this would only be circumscribed to the proper exercise of its own jurisdiction¹.
35. The Agency's jurisdiction, including for the reimbursement of travel expenses, is confined under Part V, Division II, International Tariffs, of the *Air Transportation Regulations*, SOR/88-58, as amended (the "ATR"). The Agency's primary mandate is related to overseeing carriers' terms and conditions.
36. The agency exercises quasi-judicial functions through an individual complaint driven mechanism against unreasonable terms and conditions of carriage². Sections 113 and 113.1 of the ATR provide for the remedies within the Agency's powers in adjudicating such claims:

113 The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to

(a) take the corrective measures that the Agency considers appropriate; and

(b) pay compensation for any expense incurred by **a person** adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff. [emphasis added]

¹ *Canada Transportation Act*, SC 1996, c 10, s. 25.

² *Canada Transportation Act*, s. 67(2); *Cheung v. West Jet*, 324-AT-A-2015 at paras 59-68; *Newrot v. Sunwing*, 432-C-A-2013 at paras 120, 134; *In re: determinations of what constitutes an "air service" and the criteria to be applied by the CTA*; 390-A-2013 at para 25; *Azar v. Air Canada*, 442-C-A-2013 at para 6.

The corrective measures referred to in subsection 113.1 of the ATR do not confer upon the Agency a broad power to take any measure it desires within the context of a carrier's infringement of the ATR. The corrective measures are put in place to ensure that the carrier applies the "fares, rates, charges or terms and conditions set out in the tariff". Separately from these corrective measures, within the context of its complaint driven mechanism, the Agency can otherwise direct a carrier to compensate a person who has incurred expenses. Subsection 113.1 of the ATR certainly does not grant powers to the Agency to order payment of goodwill outside the parameters of an air carrier's tariff.

3.2 The remedies sought by the Complainants

37. The Complainants request the publication of a call for any delayed passenger, irrespective of whether their claim has already been processed by Air Canada, to submit their Claim for compensation and for all Claims to be processed under the purview of the Agency. Air Canada considers these remedies to fall outside of the Agency's mandate and jurisdiction, as explained above, as well as to be excessive, unnecessary and disproportionate.
38. The proposed remedies would fall outside the scope of the individual complaint based mechanism, and are unnecessary considering that the Agency issues public decisions, following resolutions of complaints. The Complainants' suggested remedies would further diverge from the Agency's power conferred by subsection 113 of the ATR in ensuring that a carrier acts in conformity with its tariff, and transform the Agency into an inquisitory tribunal outside of its mandate.³
39. The remedies sought by the Complainants would further place the Agency beyond the powers of a common law court of inherent jurisdiction, even acting outside the confinements of a class action lawsuit, in light of the fact that the Complainants have no authorization to act on behalf of a large undefined group of unidentified past passengers, with remote commonality of issues.

Conclusion

40. Considering:

- 1- That Air Canada does not limit (outside of the Montreal Convention Limits) passenger expenses reimbursement within the context of controllable delays

³ *Cheung v. West Jet*, 324-AT-A-2015 at paras 59-68.

and cancellations, and as such, does not contravene the Montreal Convention, the *Canada Transportation Act* and its *Regulations* or its *Tariff*;

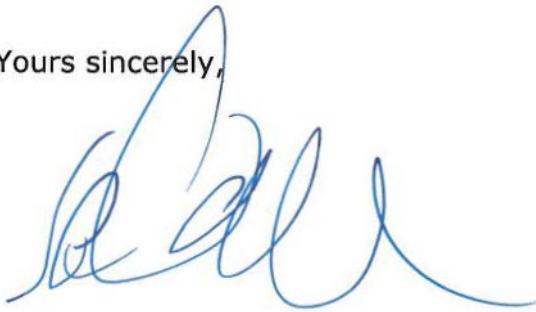
2- That Air Canada, having reviewed Mr. Johnson's claim submitted before the Agency, agrees to refund the remaining expenses of \$CAD309.56, solely on a goodwill basis;

3- That Air Canada will change its reference to "Policy and/or Procedure" when referring to the "Internal Recommendations" and/or "Expense Guidelines" and cease to refer to it as a "Policy" in communications with passengers, in order to avoid any misunderstanding.

Air Canada hereby requests that the Agency dismiss the Complainants' Claim and its proposed remedies.

The whole, respectfully submitted,

Yours sincerely,



Jean-François Bisson-Ross

Counsel – Litigation

JFBR/sa

Encl.

c.c. Dr. Gábor Lukács, Co-applicant and representative for Mr. Johnson