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VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Reply

Please accept the following submissions as a reply, pursuant to Rule 20 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 (“*Dispute Rules*”), to Air Canada’s Answer of January 20, 2016.

OVERVIEW

The *Montreal Convention* is an international treaty that has the force of law in Canada, and which governs the liability of airlines vis-à-vis passengers. The *Montreal Convention* imposes on airlines a regime of strict (but not absolute) liability for damages occasioned by delay of passengers up to approximately **\$9,000.00** per passenger.

The Application deals with the reality of Air Canada having two inconsistent sets of policies with respect to compensation of passengers for expenses incurred as a result of delay in transportation:

- (1) Air Canada’s official policy, published in the Tariff, which requires Air Canada to compensate passengers in accordance with the provisions of the *Montreal Convention*; and
- (2) Air Canada’s unofficial policies, which purport to limit Air Canada’s liability with respect to delay to **\$100.00** (or \$150.00) of hotel costs per night, and approximately **\$30.00** of meals per day, and in most cases refers to such amounts as “goodwill” payments.

Air Canada's unofficial policies use a cause-and-fault oriented terminology, and distinguish between three different types of delay in the transportation of passengers:

- (i) "Schedule change," which means a delay caused by events that occur more than 48 hours before the passenger's original scheduled flight departure time.

Air Canada's Answers dated April 6, 2016, para. 13

- (ii) "Irregular operations (IROP), uncontrollable situations," which means delay caused by events that occur within 48 hours before the passenger's original scheduled flight departure time, but outside Air Canada's control or influence.

Air Canada's Answers dated January 19, 2016, Q4

- (iii) "Irregular operations (IROP), controllable situations," which means delay caused by events that occur within 48 hours before the passenger's original scheduled flight departure time, and over which Air Canada "has direct control or influence."

Air Canada's Answers dated January 19, 2016, Q4

Air Canada's position is that it is not liable for the expenses of passengers in the case of a "schedule change" or an "irregular operations, uncontrollable situation," and that any payment in such situations is merely a "goodwill" measure that is not governed by the *Montreal Convention*. Accordingly, Air Canada's agents are instructed that the amount of compensation "should never exceed" the caps set out in the unofficial policies in these cases.

"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2

Air Canada alleges that the cancellation of Mr. Johnson's flight on December 10, 2013 due to mechanical problems with Air Canada's own aircraft was "uncontrollable" and as such Air Canada is not liable for the expenses of Mr. Johnson under the *Montreal Convention*

Air Canada's Answer dated January 20, 2016, paras. 16-17

Air Canada also alleges, without any documentary evidence, that in the case of "controllable" delays, the caps set out in the unofficial policies are often exceeded.

Air Canada's Answer dated January 20, 2016, para. 29

Finally, Air Canada challenges the Agency's jurisdiction to grant the sought remedies.

Air Canada's Answer dated January 20, 2016, para. 36

In reply, the Applicants submit, among other things, that:

- (a) the unofficial policies (Documents A-1 and A-2) contain exclusions and/or limitations of liability that are not stated in Air Canada's International Tariff, contrary to s. 122 of the *Air Transportation Regulations*;
- (b) Air Canada cannot lawfully exonerate itself from liability for all delays caused by "schedule change" or by "irregular operations, uncontrollable situations" as defined by Air Canada, and the cause-and-fault oriented definitions are inconsistent with the *Montreal Convention's* liability-based regime;
- (c) regardless of Air Canada's choice of terminology in its unofficial policies, Air Canada failed to prove the defence set out in Article 19 of the *Montreal Convention*, and as such it is liable for the expenses incurred by Mr. Johnson;
- (d) Air Canada presented no documentary evidence with respect to the compensation of passengers affected by "controllable" delays, and failed to address the Applicants' evidence of specific cases of passengers who were refused compensation based on Air Canada's unofficial policies; and
- (e) the Agency has jurisdiction to grant the sought remedies, including the corrective measures.

SUBMISSIONS

(a) **Contraventions of s. 122 of the ATR**

1. The "Expense Policy" and "Expense Guidelines" (Documents A-1 and A-2) tendered by Air Canada contain limitations and/or exclusions of liability in the case of delay of passengers caused by "schedule change" or "irregular operations (IROP), uncontrollable situations." For example, the "Expense Policy" states that:

All compensation is goodwill and costs should never exceed amounts above.

[Emphasis added.]

The "Expense Guidelines" contains a similar statement.

"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2

2. Air Canada explicitly stated in its Answer to the Application that:

[...] Air Canada is not bound to provide compensation for delays and/or cancellations that were uncontrollable.

Air Canada's Answer dated January 20, 2016, para. 19

Limits only apply in the case of goodwill offers where Air Canada is not bound to reimburse passengers.

Air Canada's Answer dated January 20, 2016, para. 6

3. Thus, it is undisputed that Air Canada's position, policy and practice is that:
 - (a) Air Canada can and does exclude all liability for the expenses incurred by passengers who are delayed because of what Air Canada calls a "schedule change" or "irregular operations (IROP), uncontrollable situations"; and
 - (b) Air Canada would reimburse passengers in such cases only as a goodwill measure and only up to the limits set out in the unofficial policies (approx. \$130.00 per day).

Whether Air Canada calls the internal document setting out this policy an "Expense Policy" or "Expense Guidelines" does not alter the fact that Air Canada's agents are directed to strictly adhere to the monetary caps ("should never exceed"; emphasis added).

4. This policy concerns exclusion and/or limits to Air Canada's liability and/or failure of Air Canada to operate the service or failure to operate on schedule, but is not set out in Air Canada's International Tariff.

Air Canada's Answers dated January 11, 2016, Q2

5. Subsection 122(c) of the *ATR* requires Air Canada to set out in its tariff its policy with respect to limits and exclusions of liability and failure to operate the service or failure to operate on schedule. The policy must be set out in such a manner that "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."

***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 40
Air Transportation Regulations, s. 122(c)**

6. Therefore, Air Canada has contravened s. 122 of the *ATR* by failing to set out in its International Tariff, at the very least:
 - (a) the limitation and/or exclusion of liability summarized at paragraph 3 above, and
 - (b) the definitions of a "schedule change" and "irregular operations (IROP), uncontrollable situations."
7. Air Canada's policy with respect to delay of passengers caused by what Air Canada calls "controllable" events will be addressed below.

(b) Inconsistency with the *Montreal Convention*

8. Air Canada seeks to circumvent the strict liability regime of the *Montreal Convention* by using a cause-and-fault oriented terminology of “controllable” and “uncontrollable” events and “schedule change.” This terminology serves the sole purpose of lending an air of legitimacy to Air Canada’s systemic and blatant disregard of its obligation to compensate passengers in accordance with the *Convention*; however, liability does not and cannot depend on the choice of terminology.

(i) Air Canada cannot exclude liability for all “uncontrollable” delays

9. Air Canada’s unofficial policies (Documents A-1 and A-2) are based on the erroneous premise that under the *Montreal Convention*, Air Canada is not liable for the damages of delayed passengers unless the delay was caused by “controllable” events. In fact, Air Canada explicitly stated in its Answer to the Application that:

[...] Air Canada is not bound to provide compensation for delays and/or cancellations that were uncontrollable.

Air Canada’s Answer dated January 20, 2016, para. 19

10. Part of the mischief is in Air Canada’s definition of “controllable” and “uncontrollable”:

Controllable: Any circumstance that Air Canada has direct control or influence over.

Uncontrollable: Any circumstance outside Air Canada’s control or influence.

Air Canada’s Answers dated January 19, 2016, Q4

11. While these definitions might possibly be adequate for a fault-based notion of liability, it is inconsistent with the presumption of liability created by the first sentence of Article 19 of the *Montreal Convention*, and the high threshold for the defence established by its second sentence.
12. Contrary to Air Canada’s position, the cause of the delay and whether the airline had a direct control or influence over the cause of the delay does not determine liability:

[...] In short, the first sentence of Article 19 states clearly that the carrier is liable for delay. Article 19 only brings the carrier’s servants and agents into play in terms of avoidance of liability when it has proved that these personnel took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[...] what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

Lukács v. United, 467-C-A-2012, paras. 41-42
Lukács v. Porter, 16-C-A-2013, paras. 104-105

13. The Applicants adopt the Agency's analysis in these two decisions as their own position, and submit that Air Canada cannot exclude liability for damages occasioned by delay in the transportation of passengers on the basis that the delay was caused by "uncontrollable" events, because it falls short of what is necessary in order to establish a defence under Article 19.
14. Therefore, Air Canada's unofficial policies are inconsistent with the *Montreal Convention* in that they purport to exclude and/or limit Air Canada's liability for delay in the transportation of passengers caused by "uncontrollable" events.

(ii) Air Canada cannot exclude liability for delays caused by "schedule change"

15. Air Canada's unofficial policies (Documents A-1 and A-2) also provide that in the case of a delay of passengers caused by a "schedule change," all compensation is goodwill and their amount should never exceed the amounts set out in the unofficial policies (approximately \$100.00 per day).
"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2
16. In practical terms, this means that Air Canada's policy is that the airline is not liable for the damages of passengers who are delayed as a result of a "schedule change," which Air Canada defines as follows:

[...] a Schedule Change encompasses events that occur beyond 48 hours prior to a passenger's original scheduled departure flight time.

Air Canada's Answers dated April 6, 2016, para. 13

17. The Applicants submit that Air Canada cannot avoid liability for damages to passengers who were delayed on the basis that the delay was caused by events that occurred more than 48 hours prior to the passenger's original scheduled departure. As a matter of law, the time when the cause for the delay arose is not recognized as a defence under Article 19 of the *Montreal Convention*. In fact, the longer the time is between the cause of the delay and the scheduled departure, the more time Air Canada has to react and take measures to prevent or mitigate the damage.

18. While there have been numerous attempts by airlines to avoid liability by recasting delay in the transportation of passengers as a “schedule change” (typically using what used to be “Condition 9” on paper tickets) there are a wealth of authorities confirming that liability does not depend on such a choice of terminology.

- (a) In *Jones v. Britannia Airways Limited*, the County Court overturned the dismissal of a passenger’s claim for damages for delay, which was dismissed by a lower court based on “Condition 9.” The County Court held (referring to the *Warsaw Convention*) that:

It is within that context that I have to consider the terms contained in clauses 9 and 11 of the actual ticket. For as Mr. Jackson, who appears on behalf of the defendants, rightly concedes, those provisions cannot exclude liability under Article 19 because Article 23 provides that shall not be the case, and any provision which has a tendency to relieve the carrier of liability, or to fix a lower sum than is provided for in the convention is to be null and void.

Accordingly, the provisions contained in the ticket, and the provisions contained within the General Conditions of Carriage for Passengers and Baggage cannot, in my judgment, in any way seek to limit or narrow the rights conferred upon the passenger by virtue of *inter alia* the provisions of Article 19. It seems to me that that was a point which, regrettably, escaped the learned district judge.

Jones v. Britannia Airways Limited (Chester County Ct, 5th November 1998)

- (b) In Canada, the same conclusion was reached in *Assaf c. Air Transat A.T. Inc.*, [2002] J.Q. no 8391, where the court held that “Condition 9” was null and void according to Article 23 of the *Warsaw Convention* (which is identical in its effect to Article 26 of the *Montreal Convention*):

[11] La condition 9 contredit les articles 19 et 20 (1) de la Convention sous trois rapports essentiels : le devoir de transporter sans retard est remplacé par une simple obligation de faire de son mieux, les heures de départ et d’arrivée indiquées sur le billet sont exclues du contrat et le transporteur s’exonère de toute responsabilité pour les correspondances ainsi que les retards.

[12] Sous ces trois aspects, la condition 9 est nulle par application de l’article 23.

***Assaf c. Air Transat A.T. Inc.*, [2002] J.Q. no 8391, paras. 11-12**

- (c) A similar conclusion was reached in *Zikovsky c. Air France*, 2006 QCCQ 948, where it was held that “Condition 9” both contravenes the *Montreal Convention* and tends to relieve the carrier from performing the essence of the contract.

***Zikovsky c. Air France*, 2006 QCCQ 948, paras. 23 and 30-31**

19. Therefore, Air Canada's unofficial policies are inconsistent with the *Montreal Convention* in that they purport to exclude and/or limit Air Canada's liability for delay in the transportation of passengers caused by a "schedule change."

(c) **Liability for the expenses incurred by Mr. Johnson**

20. The flaw in Air Canada's cause-and-fault centred terminology is underscored by the airline's argument that it is not liable for Mr. Johnson's expenses because the breakdown of Air Canada's own aircraft was, allegedly, an uncontrollable event.

Air Canada's Answer dated January 20, 2016, paras. 16-17

21. The Applicants submit that Air Canada failed to discharge its burden of proof under Article 19 of the *Montreal Convention*. Air Canada has failed to establish that it has taken all reasonable measures to prevent the breakdown of its aircraft; furthermore, it failed to lead any evidence about what steps it took in the face of the flight cancellation to prevent or mitigate the damage to Mr. Johnson.

(i) **Paragraph 6 of the Statement of Mr. Liepins**

22. The Applicants ask that the Agency disregard paragraph 6 of the Statement of Mr. Liepins tendered by Air Canada, which is an improper attempt to put forward a conclusion or argument in the guise of evidence.
23. In the alternative, the Applicants ask that the Agency draw adverse inference with respect to paragraph 6 of the Statement of Mr. Liepins, because Air Canada failed to produce any records capable of supporting the conclusion that the "malfunction could not have been detected or prevented by Air Canada," even though the Applicants explicitly requested such productions.

Air Canada's Answers dated April 6, 2016, Q16 and Q17

(ii) **The facts**

24. The Applicants accept that Flight AC 889 on December 10, 2013 was cancelled due to a mechanical issue.
25. Based on the "Production Permit," the Applicants also accept that the aircraft that was supposed to operate Flight AC 889 on December 10, 2013 (bearing Tail no. 642) has been used for a total of **91384 hours**.

Air Canada's Answers dated April 6, 2016, Document AQ3-1

26. Bearing in mind the average aircraft utilization of approximately 10 hours per day, the aircraft was approximately **25 years old** (91384 / 3650).

(iii) The law

27. In order to exonerate itself from liability under Article 19 of the *Montreal Convention*, the airline must prove that the airline, its servants, and its agents have taken all reasonable measures to prevent the delay or that such measures were not available. For greater clarity, the burden of proof is on the airline.

Montreal Convention, Article 19

28. Mechanical issues affecting only one particular aircraft are not recognized as Force Majeure capable of establishing a defence under Article 19 of the *Montreal Convention*.

Elharradji c. Compagnie nationale Royal Air Maroc, 2012 QCCQ 11, para. 13
(citing Louis Jolin: *Le droit du tourisme au Québec*, 2ème Édition, 2005, Les Presses de l'Université du Québec, p. 82)

29. Unlike systemic issues affecting all aircraft of a particular model, mechanical issues affecting only one particular aircraft are not beyond the control of the airline:

[...] the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to ensure the maintenance and proper functioning of the aircraft it operates for the purposes of its business.

[Emphasis added.]

van der Lans v. KLM, European Court of Justice, Case C-257-14, para. 43

30. Mechanical issues are inherent to the normal exercise of an air carrier's activity and they must be anticipated by the airline:

Dans un temps où la mondialisation des voyages et des échanges commerciaux s'accroît de façon considérable de jour en jour, il est raisonnable de s'attendre à une grande régularité de services chez une société aérienne de l'envergure de l'intimée Air Canada. Certes, le transporteur aérien demeure tributaire des phénomènes atmosphériques. En revanche, il doit escompter la possibilité de bris mécaniques et prévoir pour cette raison des solutions efficaces de rechange afin d'assurer le service promis.

[Emphasis added.]

Quesnel c. Voyages Bernard Gendron inc., [1997] J.Q. no 5555, para. 15

31. Regardless of the (initial) cause of the delay, in order to exonerate itself from liability under the *Montreal Convention*, the carrier must lead evidence to prove that no reasonable alternative transportation existed for the affected passengers:

Il ne lui suffisait pas d'affirmer que l'on avait tenté de trouver des sièges sur un vol d'une autre compagnie deux heures plus tard mais que les passagers seraient arrivés de toute façon en retard. Il lui incombait de prouver qu'aucune solution de rechange raisonnable n'existait, par substitution ou autrement, y compris la mise en opération d'un autre appareil. En l'absence d'une telle preuve, la présomption de responsabilité doit jouer contre l'intimée Air Canada.

Quesnel c. Voyages Bernard Gendron inc., [1997] J.Q. no 5555, para. 16

(iv) Application of the law to the facts of the case

32. The breakdown of the aircraft that was designated to operate Flight AC 889 on December 10, 2013 was within Air Canada's control for the following reasons:
- (a) There is no evidence to suggest that the breakdown of Air Canada's aircraft was caused by a systemic (manufacturing) issue affecting all aircraft of this model, or by an act of terrorism or sabotage.
 - (b) Air Canada has full control over its fleet, the aircraft that it uses to operate its flights, and their maintenance.
 - (c) Air Canada chose to use a **25-year-old** aircraft to operate Flight AC 889 on December 10, 2013.
 - (d) Just like cars, the older an aircraft is, the more prone it is to mechanical issues. Thus, Air Canada could and should have anticipated the breakdown of the aircraft.
33. There is no evidence that once Flight AC 889 was cancelled, Air Canada took all reasonable measures to transport Mr. Johnson to his destination on the same day nor that it was impossible to do so. Air Canada led no evidence at all about the availability of seats (including in higher classes) on its flights on December 10, 2013 nor about availability of seats on flights of other airlines.
34. Therefore, as in *Quesnel*, Air Canada failed to discharge its burden of proof, and as such it is liable for the expenses incurred by Mr. Johnson. Reimbursement of these expenses is not a "goodwill" measure, but rather a legal obligation, which the Applicants are asking the Agency to recognize and enforce.

(d) **Compensation of passengers delayed as a result of “controllable” events**

(i) **Undisputed facts**

35. Air Canada did not dispute that two passengers (unrelated to Mr. Johnson) were denied compensation for their expenses based on its impugned unofficial policies. Thus, Air Canada has accepted that it failed to apply its tariff with respect to these passengers.

Email of Air Canada (February 6, 2014), Document No. 2
Email of Air Canada (November 12, 2014), Document No. 3

36. These undisputed facts alone are sufficient to trigger the Agency’s jurisdiction under s. 113.1 of the *ATR* to order corrective measures (which does not require proof of a systemic issue). These facts also provide the evidentiary basis for further inquiry (in the sense of “train of inquiry”) into the practices and unofficial policies of Air Canada with respect to compensation of passengers who are delayed as a result of “controllable” events, where Air Canada does not dispute its liability.

(ii) **Perjury, fraud, and adverse inference**

37. The representations and purported evidence tendered by Air Canada contradict each other, and are false and/or fraudulent:

- (a) On the one hand, according to the statement of Ms. Robinson:

In the case of a delay which is within Air Canada’s control, the recommended limit is often exceeded as per the Lead’s authorization [...]

Air Canada’s Answer dated January 20, 2016, Document A-6, para. 10

- (b) On the other hand, Air Canada stated in response to the Applicants’ request that it produce documentary evidence (records) pertaining to Ms. Robinson’s statement that:

[...] Air Canada does not keep a register of previously processed passenger refund requests which contains the itemized list of the compensation heads it paid to passengers, and does not keep record of whether these payments were made pursuant to controllable or uncontrollable Delays.

Air Canada’s Answers dated April 6, 2016, para. 33

38. These two statements cannot be simultaneously true, because without a register of previously processed claims, Ms. Robinson has no way of knowing whether the recommended limit was “often exceeded.”

39. Thus, either Ms. Robinson made her statement without any factual basis, or Air Canada deceived the Agency by claiming to have no records of past claims in order to shield its conduct from scrutiny.
 - (a) Due to the statutory obligation to retain records set out in ss. 230 and 248 of the *Income Tax Act*, and in the absence of sworn evidence from Air Canada explaining its failure to retain the records, it is submitted that the Agency should find that Air Canada has fraudulently claimed to have no records of past claims.
 - (b) With respect to Ms. Robinson, who is an employee at the mercy of Air Canada, the Applicants submit that it is possible that she merely exaggerated in her statement, and she did not intentionally make a false statement.
40. Either way, the Agency should draw an adverse inference from the failure of Air Canada to produce documentary evidence in support of the bald allegation that the monetary limits set out in the unofficial policies are “often exceeded.”
41. Furthermore, although Air Canada has been aware of the Application since November 2015, and it has full control over its own record keeping, it has been unable to produce evidence of even one passenger who received compensation in excess of the limits in the unofficial policies.
42. Therefore, it is submitted that, on balance of probabilities, Air Canada does not compensate passengers who are delayed as a result of “controllable” events in accordance with the *Montreal Convention*, but rather uses its unofficial policies.
43. Even if the Agency were to find that Air Canada applied its tariff correctly with respect to what Air Canada calls “controllable” events, this has no bearing on the questions of law as to whether Air Canada can lawfully exclude and/or limit its liability with respect to “uncontrollable” events and “schedule changes.”
44. The Applicants submit that the root of the problem is that the cause-and-fault based categories used by Air Canada (controllable, uncontrollable, and schedule change) are incompatible and inconsistent with the liability regime of the *Montreal Convention*, and are not a proper basis for determining liability under Article 19.

(e) Remedies

(i) The *Cheung v. Westjet* case

45. In *Cheung v. Westjet*, cited by Air Canada, the Panel was concerned that “Even if the Agency had accepted Ms. Cheung’s application in its entirety, it would have only captured five air carriers, providing a small proportion of the transborder and international air services market.”

Cheung v. Westjet, 324-AT-A-2015, para. 62

46. The concern raised in *Cheung* is not relevant to the present case, because:

- (a) the *Montreal Convention* applies equally and uniformly to all airlines; and
- (b) the present Application does not seek to impose additional obligations on Air Canada, but rather seeks to enforce the obligations that apply to each and every airline transporting passengers to and from Canada, namely, the *Montreal Convention*.

Thus, it is not necessary to consider the practices of other airlines in order to resolve the present Application.

(ii) Mandate and jurisdiction of the Agency

47. Contrary to what is stated at paragraph 39 of Air Canada’s submissions, the mandate of the Agency is different than the mandate of common law courts, whose primary role is to resolve private disputes of individual parties before them. In sharp contrast, the Agency has broad powers to order “corrective measures” that go beyond individual remedies for the complainants before the Agency.

Lukács v. Air Canada, 250-C-A-2012, para. 30

48. Air Canada’s argument that the powers under s. 113.1 of the *ATR* are confined to granting remedies to individual complainants flies in the face of the numerous Agency decisions and orders, where the Agency exercised these powers on its own motion, and without the participation of any individual who was adversely affected by the carrier’s unlawful conduct.

**Decision No. 232-A-2003 (affirmed in *Northwest Airlines Inc. v. CTA*, 2004 FCA 238)
Order No. 2005-A-8**

49. More recently, in *Lukács v. WestJet*, the Agency directed WestJet to apply a tariff provision of its international tariff “in a manner consistent with paragraph 3 of Article 36 of the *Montreal Convention*.”

Lukács v. WestJet, 420-C-A-2014, para. 23

50. Less than a year ago, the Agency issued on its own motion a show cause order in which it was contemplating to order SkyGreece to:
- take immediate corrective measures to properly apply its international tariff for all passengers affected by schedule irregularities, including
 - Informing passengers of their options and providing them with a copy of the tariff;
 - Implementing forthwith the option chosen by passengers;
 - Establishing a 1-800 help line where passengers can be directed to a person who can accept and address their claim; and
 - Updating its website to fully explain the measures put in place to address the situation.

Decision No. LET-A-55-2015

51. Based on these authorities, the Applicants submit that the Agency has jurisdiction to grant the sought corrective measures (in fact, even in the absence of an individual complainant).

(iii) Nature of the corrective measures being sought

52. Contrary to what is suggested by Air Canada at paragraph 36 of its submissions, the Applicants are not seeking arbitrary remedies unrelated to Air Canada's tariff. Rather, the Applicants are asking the Agency to order Air Canada to take corrective measures that will ensure compliance with the terms and conditions set out in Air Canada's tariff, namely, compensation of passengers in accordance with the *Montreal Convention*.
53. Contrary to what is suggested by Air Canada at paragraph 37 of its submissions, the Applicants are not asking the Agency to order Air Canada to make any kind of goodwill payments, but only payments that passengers are entitled to by law under the *Montreal Convention*.
54. The Applicants submit that Air Canada has been systematically and improperly denying and/or limiting claims for compensation for delay and misrepresenting the partial payments that it did make as "goodwill." Air Canada has done so based on its unofficial policies (Documents A-1 and A-2), which provide with respect delays caused by "uncontrollable" events and "schedule change" that:

All compensation is goodwill and costs should never exceed amounts above.

As a result it failed to apply the *Montreal Convention*, which is incorporated into its tariff.

"Expense Policy": Air Canada's Answers dated January 11, 2016, Document A-1
"Expense Guidelines": Air Canada's Answer dated January 20, 2016, Document A-2

55. The unofficial policies tendered by Air Canada (Documents A-1 and A-2) and its answers to the questions directed to it demonstrate that Air Canada has failed to apply the terms and conditions set out in its tariff by applying these unofficial policies, which exclude and/or limit liability in cases that Air Canada defines “uncontrollable” and “schedule change,” instead of the provisions of the *Montreal Convention*. The Applicants submit that these definitions are inconsistent with the liability regime of the *Montreal Convention*.
56. The Applicants thus ask the Agency to order corrective measures that require Air Canada to fulfill its obligations under its tariff and the *Montreal Convention*.
57. The scope of the corrective measures sought is confined to undoing the damage that Air Canada caused to passengers while unjustly enriching itself, and ensuring that passengers receive the compensation that they are lawfully entitled to.
58. Therefore, the nature of the corrective measures being sought by the Applicants is similar to the ones contemplated in Decision No. LET-A-55-2015 of the Agency with respect to SkyGreece.

All of which is most respectfully submitted.

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

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