



A I R C A N A D A

Julianna Fox
Counsel
Litigation and Regulatory

Air Canada Center
P.O. Box 7000, Airport Station
Dorval, Quebec H4Y 1J2
Canada

Direct: (514) 422-5959
Facsimile: (514) 422-5829

By Email

September 17, 2012

The Secretary
CANADIAN TRANSPORTATION AGENCY
Complaints and Investigation Division
Air & Marine Investigations Directorate
15, Eddy Street, 19th Floor,
Hull/Ottawa, Canada, K1A 0N9

Attention: Mr. Mike Redmond

**Re: Complaint by Mr. Gábor Lukács against Air Canada
CTA File No. M 4120-3/11-06673**

We are writing in response to the Agency's letter LET-C-A-137-2012 of September 6, 2012, ordering Air Canada to respond to the questions posed by Mr. Lukács in his correspondence dated August 31, 2012.

On September 12, 2012, Air Canada requested that the Agency grant an extension to allow Air Canada additional time to reply to Mr. Lukács' questions. This request was essential given that Air Canada needed to internally verify what information was available and to determine how to provide complete responses to Mr. Lukács' question. Since that time, however, Air Canada has concluded that most of the information requested by Mr. Lukács is not currently available as it would require the creation of specific data sets and/or is not relevant to the present proceedings. As such, Air Canada makes the following submissions in response to Mr. Lukács' correspondence of August 31, 2012.

1- **Responses to Mr. Lukács' Questions 1, 2, 3 and 5 on Air Canada's denied boarding compensation amounts for domestic travel.**

1. Air Canada objects to Questions 1, 2, 3 and 5 on the ground of relevancy.

Section 19 of the *Canadian Transportation Agency General Rules* sets out that a party to a proceeding may direct questions to the other party if the reasons for them and their relevance to the proceedings is supported, and section 20 allows the other party to the proceeding to not provide a response to said questions if it sets out why said questions are not relevant to the proceedings.

As such, Air Canada submits that the information sought by Mr. Lukács under Questions 1, 2, 3 and 5 does not constitute relevant information for the reasons hereinafter set out.

On January 24, 2012, pleadings were closed in the present matter. On July 19, 2012, the Agency requested in LET-C-A-105-2012 that Air Canada respond to certain questions, three of which concerned Air Canada Domestic Tariff Rule 245(E)(1)(B) and seven of which pertained to Air Canada's Domestic Tariff Rule 245(E)(2). Air Canada was requested to answer the following questions with respect to its denied boarding compensation amounts for passengers travelling on domestic flights, as set out in Air Canada's Domestic Tariff Rule 245(E)(2):

1. What methodology did Air Canada apply to determine the level and form of denied boarding compensation for travel within Canada?
2. What was the rationale in determining that these amounts were reasonable?
3. What was the rationale in determining that compensation by travel voucher is reasonable?
4. In what years were these amounts established?
5. Were these amounts ever updated to reflect inflation or compensation levels provided by competitor airlines?
6. For the most recent two-year period for which data are available, how many passengers were denied boarding (a) voluntarily and (b) involuntarily?
7. What was the total amount of denied boarding compensation tendered by Air Canada for that two-year period for each of (a) voluntary and (b) involuntary denied boarding?

On August 15, 2012, Air Canada responded to the Agency's questions. It is our understanding that, in Mr. Lukács' correspondence of August 31, 2012, he takes particular issue with Air Canada's responses to questions numbers 1 and 2 posed by the Agency on July 19, 2012 regarding on what basis Air Canada determined domestic denied boarding amounts.

Air Canada submits that it already completely and adequately addressed these questions posed by the Agency. Indeed, Air Canada fully responded to the Agency's request with respect to how domestic denied boarding amounts are currently determined:

- a. The benchmark to the average Air Canada domestic economy cabin fare, the amount of which remains fairly stable and within the range of the compensation offered. In this case, the domestic economy average fares provided by Air Canada in the submissions of August 15, 2012 were calculated by dividing the amount of revenue from domestic economy travel by the number of revenue passengers on board domestic Air Canada flights. This represents the arithmetic mean of the total amount of fares purchased by revenue passengers. These figures were not unverifiable, but, rather, were supported by a declaration from Air Canada's manager of premium revenues, who actively participates in the establishment of commercial policies for Air Canada operations.
- b. The benchmark against other Canadian airlines denied boarding policies and compensation amounts.

Air Canada objects to the qualification by Mr. Lukács that it is misleading to rely on a single statistical quantity without disclosing the full dataset. The reality of the industry is such that, due to the sheer volume of passengers travelling on Air Canada, as shown in Annex E of Air Canada's submissions of August 15, 2012, the average fare is calculated by taking the total amount of revenue from domestic economy travel and dividing it by the number of revenue passengers.

It is based on this information that Air Canada takes its commercial decisions regarding the amount of domestic denied boarding amounts. Air Canada has not presented misleading information, but rather has been opened regarding how these amounts are determined, without placing more or less weight on certain fare types. How these amounts are determined is a commercial decision based on the information provided by Air Canada in its submissions of August 15, 2012.

Further, in the calculation of average domestic economy fares, Air Canada included full economy fares (i.e. the highest priced economy fares) even though passengers paying full economy fares are not likely subject to denied boarding according to the denied boarding priorities set out in Domestic Tariff Rule 245(C)(2)(B). As such, Air Canada submits that, in order to ensure that the compensation offered is equal or higher to the actual fare paid for the majority of passengers being denied boarding, it based its decision using an average economy domestic fare which is higher than what it would be if only the domestic economy fares of passengers who are likely to be denied boarding had been considered.

Mr. Lukács is going beyond the scope of the questions posed by the Agency and of the proceedings themselves in requesting this information. In particular, because (1) Air Canada already provided full and complete response to the Agency on how the denied boarding amounts for domestic travel are determined, and (2) the compilation of data requested by Mr. Lukács regarding the fares paid by passengers over the years 2004 to 2012, as well as the standard and average deviation of Air Canada's fares over the past years is irrelevant for the determination of how Air Canada establishes denied boarding compensation amounts, which has already been established in Air Canada's submissions of August 15, 2012.

2. Air Canada objects to Questions 1, 2, 3 and 5 on the ground that Mr. Lukács is seeking information that would require Air Canada to create evidence and organize data in a particular manner.

First, Mr. Lukács' requests access to obtain all of Air Canada's datasets for its domestic economy cabin fares for each of the years 2004-2012 that were used for the calculation is not only a request for extremely commercially sensitive information (for which Air Canada reserves its right to present arguments should the Agency order the disclosure of such information), but also constitutes a fishing expedition by Mr. Lukács in search of information that goes beyond the scope of the questions posed by the Agency on how Air Canada determines its denied boarding compensation amounts. Air Canada adequately answered the Agency in explaining how domestic denied boarding amounts were calculated. However, Mr. Lukács is going beyond the questions posed by the Agency in seeking full disclosure of all Air Canada datasets for its domestic cabin fares in order to determine how data is distributed and construct further arguments based on Air Canada's fare structure. The purpose of such a request clearly constitutes a fishing expedition, which is prohibited by law¹.

In any event, Air Canada specifies that the average domestic economy fare was calculated by dividing the total amount of revenue from domestic economy travel by the number of revenue passengers on board domestic Air Canada flights for the concerned years. In addition, the consolidation of all passengers' fares between 2004 and 2012 would require that Air Canada compile the data in order for it to be transmitted to the Agency. Air Canada currently does not have a compilation of the specific data requested by Mr. Lukács as there has historically never been a need for this format by Air Canada. Consequently, Air Canada would need to create a specific query in order to obtain said information from its extensive databases.

Second, the calculations Mr. Lukács is asking Air Canada to carry out involves, notably, determining the amount paid by each passenger and comparing it to the arithmetic mean of the fares paid over a certain period of time. This involves specific calculations and the creation of a data compilation that currently does not exist, as set out in the previous paragraph. Even if Air Canada were to have such a compilation, Mr. Lukács cannot require Air Canada to calculate such standard deviations and average deviations.

It is a well-established legal principle that, in order to require the production of a document (or information), said document (or information) must exist². Notably, in *Mutuelle du Canada, Compagnie d'Assurance sur la vie v. Compagnie d'assurance-vie Manufacturers* [1987] R.D.J. 192, the Quebec Court of Appeal agreed with the judge of first instance who had rejected *La Mutuelle's* request to obtain a complete list of particular data (in this case, the compilation of all the respondent's insurance policies that were emitted at the request of employees who had previously worked for *La Mutuelle*).

¹ See notably *R. v. 1353837 Ontario Inc.*, [2005] O.J. No. 656; and *Blaikie v. Commission des valeurs mobilières du Québec*, [1990] J.Q. no 457 (Quebec Court of Appeal).

² See notably *Guzha v. Eclipse Colour and Imaging Corp.* [2004] O.J. No. 5686; and *Industries G.D.S. inc. v. Carbotech inc.*, J.E. 2005-1340 (Quebec Court of Appeal); see also *R.G. v. Commission administrative des régimes de retraite et d'assurances*, 2001 QCCA1 197, where the Quebec Access to Information Commission rejected a request to have the defendant produce a document that did not exist and that would require said defendant to create and compile data in order to create such a document.

The judge rejected the request and concluded that his discretion to order the transmission of such information “should be exercised with discretion particularly inasmuch as it is (sic) imposes a serious inconvenience upon citizens corporate or otherwise”. As the respondents were not in possession of the requested list, even if they had all the data that would allow them to compute such a list, *La Mutuelle*’s request was rejected.

As such, Air Canada submits that the Agency should find that the information requested by Mr. Lukács in his letter of August 31, 2012 is irrelevant to the present proceedings and or constitutes information that Air Canada is not required to transmit as it would involve the creation of specific database compilations and calculations. Air Canada has filed the attached declaration in support of the above submissions.

II- Responses to Mr. Lukács’ Question 4 on Air Canada’s denied boarding compensation amounts for domestic travel.

Air Canada objects to this question on the ground of relevancy. As previously indicated, this question is drafted in order to address Air Canada’s answers to the questions posed by the Agency in their letter LET-C-A-105-2012 regarding how domestic denied boarding amounts are established. For the reasons set out above, including the fact that Air Canada has fully and completely responded to the Agency’s questions, Air Canada considers that Mr. Lukács is requesting information that is beyond the scope of the present proceedings.

Notwithstanding the foregoing, in the spirit of cooperation, and as this information is readily accessible to Air Canada, please note that the average economy cabin domestic fares, which was referenced by Air Canada in the submissions of August 15, 2012, was inclusive of all air transportation charges (Air Canada imposed surcharges), as defined by the Agency in the proposed *Regulations amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations* (available at <http://www.gazette.gc.ca/rp-pr/p1/2012/2012-06-30/html/reg1-eng.html>). The only items of the total price that were not included are third party imposed fees.

III- Response to Mr. Lukacs’ Questions 6 to 10 on Air Canada’s downgauges.

Questions 6 through 10 pertain to the information contained in Annex C of Air Canada’s submissions of August 15, 2012. Currently, the concerned aircraft that form part of Air Canada’s mainline fleet have the following seating capacity:

A319 version 1: 14J/106Y
A319 version 2: 132Y
A320 : 14J/132Y
E75 : 9J/64Y
E90 : 9J/84Y

Air Canada’s specialized charter program, named Air Canada Jetz, operates both A319 and A320 in a reduced capacity as they both only have 58 economy class seats available. Where Jetz aircraft are not performing Jetz operations, Air Canada’s System Operations Control (SOC) may use the aircraft to substitute mainline aircraft in order to recover from irregular operations. Due to this reduced seating capacity, where Jetz A319 and A320

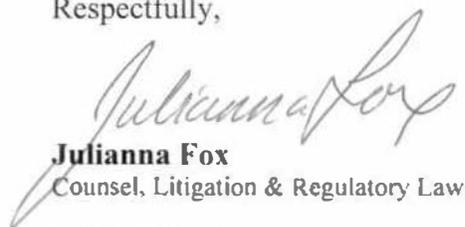
replace Air Canada's mainline A319, A320, E75 and E90, it is considered as a downgrade.

IV- Conclusion

Finally, Air Canada requests that the Agency reject the additional arguments submitted by Mr. Lukács regarding whether it is reasonable to oversell, and any assumptions made about the change fees and the number of fares sold that are non-refundable and/or refundable (p.8). These issues raise new arguments to which Air Canada should be entitled to respond, if accepted by the Agency. Mr. Lukács cannot, at this stage, enter new arguments into the proceedings, which have been closed since January 24, 2012. Additional arguments extend the pleadings and are procedurally unfair. Air Canada should be given the opportunity to respond should the Agency accept such additional arguments.

We trust that the Agency can adequately dispose of the present file based on the information that is currently on record. However, should the Agency require the production of information requested under questions 1, 2, 3 and 5, Air Canada reserves its right to make future submissions on the basis of confidentiality.

Respectfully,



Julianna Fox
Counsel, Litigation & Regulatory Law

cc. Mr. Gabor Lukács

Attachement



AIR CANADA

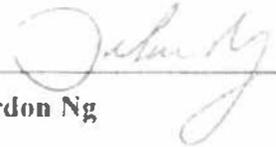
IN THE MATTER OF A COMPLAINT FROM GABOR LUKACS AGAINST AIR CANADA
- CANADIAN TRANSPORTATION AGENCY FILE NO. M4120-3/11-06673

I, GORDON NG, declare as follows:

1. I am the manager premium revenues for Air Canada.
2. I am also a part of the revenue management operations team and, therefore, participate in the establishment of commercial policies for Air Canada operations.
3. In this capacity, I provided a signed declaration on in support of Air Canada's submissions to the Agency dated August 15th, 2012.
4. I will, in the present declaration, further explain how the average domestic economy cabin fare is calculated:
 - a) The average domestic economy cabin fares provided in my previous declaration filed in support of Air Canada's in the submissions of August 15, 2012, were calculated by dividing the amount of revenue from domestic economy travel by the number of revenue passengers on board domestic Air Canada flights.
 - b) All economy fare types were accounted for in the determination of the average domestic economy cabin fare, without more or less weight being placed on certain fare types, including full economy cabin fares, which are the highest priced economy fares.
 - c) To my knowledge, the average economy cabin domestic fares, which were provided in my previous declaration in support of Air Canada's submissions of August 15, 2012, include Air Canada imposed surcharges.
5. Air Canada's commercial decision regarding the amount of domestic denied boarding compensation is based, notably, on the average fares calculated per paragraph 4(a) of the present declaration.
6. The consolidation of all passengers' fares between 2004 and 2012 would require that Air Canada compile specific data. Air Canada currently does not have a compilation of the specific data requested by Mr. Lukács as there has historically never been a need for this format by Air Canada. Consequently, Air Canada would need to create a specific query in order to obtain said information from its extensive databases.

7. In addition, Air Canada currently does not have the standard and average deviation amounts for its domestic economy fares. In order to obtain such information, this would require specific calculations based on a data set that has yet to be compiled, as explained in paragraph 6 of the present declaration.

And I have signed on this 17th day of September, 2012



Gordon Ng