DECISION NO. 204-C-A-2013

May 27, 2013

COMPLAINT by Gábor Lukács against Air Canada.

File No. M4120-3/11-06673

INTRODUCTION

[1] On December 12, 2011, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that Air Canada's current practice of overselling domestic flights and certain domestic tariff provisions governing denied boarding compensation appearing in Air Canada's *Canadian Domestic General Rules Tariff No. CDGR-1* (Tariff) are unreasonable. He requests that the Agency:

- direct Air Canada to cease and desist from overselling domestic flights;

- pursuant to subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), disallow Rule 245(E)(1)(b)(iv) of the Tariff. This provision relieves Air Canada from compensating a passenger if, for operational and safety reasons, the aircraft on which the passenger had a confirmed reservation has been substituted with an aircraft of lesser capacity, thereby preventing Air Canada from accommodating the passenger on that aircraft; and,

- pursuant to subsection 67.2(1) of the CTA, disallow Rule 245(E)(2) of the Tariff, which governs the amount of denied boarding compensation tendered to affected passengers. Rule 245(E)(2) provides that, subject to certain conditions, and at the passenger's option, Air Canada will tender liquidated damages in the amount of $100, or will offer a travel voucher in the amount of $200 for travel within Canada, the United States of America or Mexico.

[2] Air Canada's answer of January 16, 2012 was combined with a preliminary motion to dismiss. Mr. Lukács responded to the motion, characterizing it as an abuse of process, and he requested an award of costs against Air Canada. The Agency denied the preliminary motion in Decision No. LET-C-A-47-2012. The Agency also stated in that Decision that the issue of costs would be determined at the conclusion of its investigation of Mr. Lukács' complaint.

ISSUES

1. Is Air Canada's practice of overselling domestic flights unreasonable?
2. Is Air Canada's Rule 245(E)(1)(b)(iv) unreasonable?

3. Is Air Canada's Rule 245(E)(2) unreasonable?
4. Should costs be awarded against Air Canada respecting its preliminary motion, which was included in Air Canada's answer dated January 16, 2012?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[3] The extracts relevant to this Decision are set out in the Appendix.

TEST FOR UNREASONABLENESS

[4] 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. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), and was most recently applied in Decision No. 150-C-A-2013 (*Forsythe v. Air Canada*).

[5] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

[6] 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.

ISSUE 1: IS AIR CANADA'S PRACTICE OF OVERSELLING DOMESTIC FLIGHTS UNREASONABLE?

Positions of the parties

Mr. Lukács

[7] Mr. Lukács submits that he is not aware of any of Air Canada's statutory or operational obligations that would be adversely affected by Air Canada discontinuing the practice of overbooking. He claims that while overselling may have been an industry standard in the 20th Century, it is no longer so today.

[8] Mr. Lukács notes that Air Canada's main domestic competitor, WestJet, does not oversell its flights, and that WestJet nevertheless remains profitable. Mr. Lukács adds that, to his knowledge, Air Canada is the only Canadian domestic carrier that engages in the practice of overselling flights and that, therefore, Air Canada would not be subject to any competitive disadvantage should it discontinue that practice.

[9] Mr. Lukács states that overbooking causes damage to passengers, as recognized by subparagraph 107(1)(*n*)(iii) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), which requires carriers to include terms regarding compensation for overbooking. He maintains that overbooking flights is antithetical to Air Canada's contractual duty to transport passengers, and that such practice renders the contract meaningless.

Air Canada

[10] Air Canada submits that overbooking is a common practice in the air transport industry. Air Canada adds that it is recognized as being reasonable in light of a carrier's operational and commercial obligations, and that it is the counterpart of flexible fares that allow passengers to change itineraries at the last minute, resulting in "no-shows" for a flight. Air Canada maintains that it applies its overbooking practice in a reasonable manner, employing sophisticated systems to analyze "no-shows" and booking patterns. Air Canada notes that its overbooking levels are half of what they are, on average, for American carriers, and that the Agency has previously recognized the reasonableness and validity of Air Canada's overbooking practices in Decision No. 666-C-A-2001, Decision No. 180-C-A-2005 (*B.J. Simcock v. Air Canada*) and Decision No. 181-C-A-2005 (*Kathleen Simcock v. Air Canada*).

[11] Air Canada claims that the Agency also recognized the reasonableness of overbooking in the Agency's Fly Smart publication, and cites U.S. Supreme Court case law which states that overbooking is a "common industry practice" (ref: *Nader v. Allegheny Airlines Inc.*, US 290 [1976]). Air Canada further notes that the U.S. Department of Transportation (DoT) has acknowledged the legitimacy of a well-controlled oversale system.

[12] Air Canada indicates that, unlike WestJet, whose fares are non-refundable, Air Canada offers certain fares that are fully refundable, and that the different business models of Air Canada and WestJet do not allow for their respective oversale practices to be compared. Air Canada asserts that airline customers place a high value on refundable tickets and flexibility, and that, given its fare practices, Air Canada is exposed to additional risk that certain passengers will not show up for travel. Air Canada also notes that, as an international carrier involved in a global alliance, it has much more connecting traffic, and is therefore exposed to misconnections, which result in additional "no-shows". Air Canada submits that it engages in overbooking to absorb some of the risk and, in turn, to benefit customers.

Mr. Lukács

[13] Mr. Lukács argues that Air Canada's reference to Decision Nos. 180-C-A-2005 and 181-C-A-2005 does not assist Air Canada's position that overselling flights is not unreasonable because those Decisions, in fact, did not address the issue of the reasonableness of overselling, and concerned international itineraries.

[14] Mr. Lukács maintains that the relevance of the U.S. DoT's comments regarding overselling is diminished given the uniqueness of the Canadian market, where Air Canada's main competitor, WestJet, does not oversell its flights.

[15] Mr. Lukács asserts that the Agency's Fly Smart publication is not an authority, as the Agency has stated, in Decision No. LET-C-A-29-2011 (*Lukács v. Air Canada*), that material appearing on the Agency's Web site is provided solely for information purposes.

[16] Mr. Lukács maintains that Air Canada has failed to provide evidence to demonstrate how the discontinuation of overselling domestic flights would impact Air Canada's ability to meet its statutory, commercial and operational obligations.

[17] Mr. Lukács submits that Air Canada's claim that all of WestJet's fares are non-refundable is misleading given that WestJet's tariff provides for the application of unused transportation credits. He maintains that Air Canada's submission fails to substantiate claims that Air Canada's overbooking levels are half of those, on average, for American carriers, and that Air Canada engages in overbooking to absorb some of the risk and, in turn, to benefit customers.

Analysis and findings

[18] Mr. Lukács asserts that WestJet, Air Canada's main domestic competitor, does not overbook its flights and that, nevertheless, WestJet remains profitable. He adds that, to his knowledge, Air Canada is unique among carriers operating in Canada to engage in overbooking. He argues that Air Canada's overbooking of flights conflicts with its contractual duty to transport passengers.

[19] Air Canada notes that overbooking is common throughout the air transport industry, and that it is the counterpart to flexible fares that allow passengers to change itineraries at the last moment, resulting in "no-shows". Air Canada maintains that it applies the practice in a reasonable manner. Air Canada also submits that the different business models followed by Air Canada and WestJet do not allow the carriers' practices to be compared.

[20] The Agency notes, as it did previously in Decision Nos. 180-C-A-2005 and 181-C-A-2005, that overbooking is commonplace among air carriers. The Agency is of the opinion that, in general, the practice serves the interests of both the carriers and the travelling public because carriers are able to operate at maximum capacity, which should result in reduced fares. The systems employed by carriers to forecast the number of reservations for particular flights, and the potential number of "no-shows" for those flights, allow carriers to maximize the use of aircraft, and also allow passengers to utilize a booking regime with the flexibility to alter or cancel reservations without notice and possibly without charge depending on the type of air fare purchased.

[21] The Agency is also of the opinion, as correctly pointed out by Air Canada, that it is inappropriate to compare the overbooking practices of carriers, for example, those of Air Canada and WestJet, given the different business models that those carriers employ.

[22] The Agency therefore finds that Air Canada's submissions respecting the matter of overselling flights are more compelling than those made by Mr. Lukács. The Agency finds that the practice of overselling domestic flights strikes a reasonable balance between Air Canada's statutory, commercial and operational obligations and the passengers' rights to be subject to reasonable terms and conditions of carriage.

ISSUE 2: IS AIR CANADA'S RULE 245(E)(1)(B)(IV) UNREASONABLE?

Positions of the parties

Mr. Lukács

[23] Mr. Lukács argues that Rule 245(E)(1)(b)(iv) is effectively a blanket exclusion from liability. He asserts that the tariff provision exonerates Air Canada from compensating passengers who are denied boarding because of Air Canada's poor planning and/or inadequate maintenance of its equipment. Mr. Lukács acknowledges that Air Canada should not imperil the safety of passengers; however, he submits that the phrase "operational and safety reasons", appearing in the tariff provision, can be "arbitrarily stretched", only reflects Air Canada's interests, and fails to strike a balance between Air Canada's statutory, commercial and operational obligations and the passengers' rights to be subject to reasonable terms and conditions of carriage.

Air Canada

[24] Air Canada points out that the U.S. DoT does not require carriers to tender compensation to passengers who are denied boarding when, for operational and safety reasons, the passenger's aircraft has been substituted by an aircraft of lesser capacity, otherwise referred to as a "downgauge". Air Canada maintains that it is of utmost importance that Air Canada be able to decide, for operational and safety reasons, when an aircraft should be substituted, and that such a decision should not have negative commercial repercussions on Air Canada nor entail payment of compensation.

[25] Air Canada submits that a downgauge due to safety reasons may be associated with, among other reasons, weather conditions; for example, in the absence of Instrument Landing Systems for specific runways at certain airports, an aircraft not equipped with a Global Positioning System (GPS) may be unable to safely land in certain weather conditions. Air Canada also notes that a downgauge due to safety reasons may be linked to an unplanned mechanical issue with the aircraft scheduled to operate the flight. Air Canada indicates that unplanned mechanical issues usually occur within 48 hours of the departure time; for example, if a bird strikes an Air Canada aircraft on landing, the aircraft will be subject to unplanned maintenance procedures and may not be able to operate a subsequent flight, which may require substitution of the aircraft. Air Canada maintains that it is not possible to take into account such unplanned problems or to consistently have a same-capacity aircraft available to operate a flight. Air Canada adds that given the extensiveness of its network, when planning aircraft movements, it cannot foresee such considerations as it does not have sufficient aircraft to have back-up aircraft available at each airport from which it operates.

[26] Air Canada states that a downgauge due to purely operational reasons may be associated with, for example, noise curfews, such as the one in Montréal between midnight and 7 a.m., which would require the use of an aircraft that can be operated 24 hours a day due to its weight and noise profiles. Air Canada notes that a downgauge due to operational reasons is commonly related to and a consequence of an upline safety reason; for example, substitution may occur because of a delayed inbound flight, which may also be caused by an upline safety-related reason

such as an unplanned mechanical or weather issue. Air Canada notes that a downgauge associated with uniquely commercial concerns would not be included in this exception. Air Canada submits that commercially-driven downgauges only occur in exceptional circumstances where flight capacity is at a low for reasons beyond Air Canada's control, such as during the 2003 SARS epidemic in Toronto. Air Canada further submits that commercially-driven downgauges may also happen in limited circumstances where a route requires an aircraft of greater capacity which, in turn, would require that the larger aircraft be taken from another route that will consequently be subject to a downgauge. Air Canada points out that in such circumstances, the exchange will not occur if it creates a situation of denied boarding on the downgauged route.

Mr. Lukács

[27] Mr. Lukács states that Air Canada has merely declared that its tariff provision is preferable, which is not sufficient to support its reasonableness. He submits that the phrase "operational and safety reasons" is vague, may be used as a "catch-all excuse" not to pay any denied boarding compensation, and mixes two reasons that may be substantially different, namely, operational reasons and safety reasons. He asserts that Air Canada should assume the financial consequences associated with the substitution of aircraft for safety reasons because Air Canada can reasonably be expected to maintain its fleet, and take into consideration the possibility of mechanical failures. Mr. Lukács states that his position is consistent with the judgments rendered in *Quesnel v. Voyages Bernard Gendron inc.* [1997] J.Q. No. 5555, *D'Onofrio v. Air Transat A.T. inc.* [2000] J.Q. No. 2332, and *Lukacs v. United Airlines*, 2009 MBQB 29. Mr. Lukács maintains that the term "operational reasons" creates a "back door" for the overselling of flights, namely, by advertising and selling tickets for a flight on a particular aircraft, and then substituting that aircraft with a smaller one.

[28] According to Mr. Lukács, the denied boarding regime adopted by the U.S. DoT includes language created and promoted by the International Air Transport Association (IATA), which represents the interests of carriers, and that the Canadian jurisprudence (e.g. *Lukács v. United Airlines*) is more onerous for carriers than the American one.

[29] Mr. Lukács states that he is aware of the presence in the U.S. legislation of the phrase "operational or safety reasons" in a provision governing exceptions to eligibility for denied boarding compensation. He submits that there is no evidence before the Agency concerning the interpretation of this phrase by American courts or the U.S. DoT, and that it is therefore not possible to conclude that the U.S. legislation supports Air Canada's position.

[30] Mr. Lukács contends that the very narrow and strict manner in which the European Court of Justice interpreted Article 5(3) of Regulation (EC) 261/2004 concerning "extraordinary circumstances" relieving an air carrier from payment of denied boarding compensation, in *Wallentin-Hermann v. Alitalia*, Case C-549/07, is consistent with his position in this matter.

[31] In response to Air Canada's submission that downgauging due to the inability of an aircraft lacking GPS to land in adverse weather conditions is an event outside of Air Canada's control, Mr. Lukács argues that while Air Canada has no control over the weather, it does have full

control over its fleet and the equipment it chooses to install in its aircraft. He submits that operating aircraft that are not equipped with GPS and/or failing to upgrade an aircraft's avionic systems is Air Canada's choice, and that this choice apparently has an impact on its passengers, who may consequently be denied boarding. Mr. Lukács therefore argues that Air Canada should bear the costs of the consequences of such choices.

[32] With respect to Air Canada's submission relating to an "unplanned mechanical issue", Mr. Lukács submits that the approach of the European Court of Justice in *Wallentin-Hermann v. Alitalia* represents an adequate balance between the rights of passengers for performance of the contract of carriage in a timely manner and the operational needs of air carriers. This approach holds that while technical or mechanical problems, on their own, are not extraordinary circumstances that relieve the carrier from the obligation of paying denied boarding compensation, if such problems arise from causes that are entirely outside of the carrier's control, such as sabotage, acts of terrorism, or a hidden manufacturing defect (which affects all aircraft of a particular model), then the carrier should not be required to pay denied boarding compensation.

[33] Mr. Lukács asserts that the approach of the European Court of Justice is consistent with the Canadian jurisprudence (i.e., *Quesnel v. Voyages Bernard Gendron inc*., *Lukács v. United Airlines* [leave to appeal denied; 2009 MBCA 111], *Lambert v. Minerve Canada,* 1998 CanLII 12973 (QC C.A.), and *Elharradji v. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11). He submits that it is therefore unreasonable for Air Canada to relieve itself from the obligation of paying denied boarding compensation in situations where the downgauging is necessitated by mechanical problems, unless the problems themselves were caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

[34] As to the matter of noise curfews, Mr. Lukács states that he disagrees with Air Canada's submission that those curfews are unexpected events that justify not paying denied boarding compensation in the case of downgauging of equipment. He maintains that, with respect to the case of the Montréal Pierre Elliott Trudeau International Airport to which Air Canada refers, the curfew is part of the standard airport information periodically published together with the various procedural charts related to the airport, and that this information is publicly available on the Internet. Mr. Lukács submits that he fails to see how a restriction that is widely known and published months in advance of the flight can be considered by Air Canada as an operational reason that warrants depriving passengers of denied boarding compensation.

[35] Concerning Air Canada's submission regarding delayed inbound flights, Mr. Lukács states that the common consequence of a delayed inbound flight is that the outbound flight is also delayed. He argues that a delay of the inbound flight does not exempt a carrier from compensating passengers for the delay under the principles of Article 19 of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Montreal Convention). Mr. Lukács maintains that downgauging an aircraft to resolve the problem of a delayed inbound flight is a deliberate operational decision, and that although the downgauging may save the carrier the cost of compensating all passengers for the delay, it is done at the cost of denied boarding of some of the passengers due to the smaller capacity of the substitute aircraft.

[36] Mr. Lukács submits that the mere fact that an inbound flight is delayed does not mean that it is not possible for the carrier, with some effort, and perhaps cost, to arrange for another aircraft of the same or higher capacity to transport the passengers. Mr. Lukács contends that downgauging is an "airline-centred approach", which fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Air Canada's statutory, commercial and operational obligations.

[37] Mr. Lukács asserts that Air Canada's submission regarding the 2003 SARS epidemic is not relevant to this case.

[38] Mr. Lukács claims that the decision rendered by the European Court of Justice in *Finnair Oyj v. Timy Lassooy,* Case C-22/11, is relevant to this matter. He explains that this case concerned the obligation of a carrier to pay compensation in cases where a passenger is denied boarding for operational reasons. Mr. Lukács adds that the Court noted that under Regulation (EC) No. 261/2004, a carrier cannot rely on "extraordinary circumstances" to relieve itself from the obligation to pay denied boarding compensation.

Analysis and findings

[39] Air Canada argues that it is of utmost importance that it be allowed to determine when an aircraft should be substituted for operational and safety reasons, and that Air Canada should not be financially penalized for that determination. Air Canada submits that downgauges for safety reasons may be related, for example, to weather conditions, under which an aircraft not equipped with a GPS may not be able to land safely, or to unplanned mechanical issues. Air Canada maintains that it is not possible to foresee unplanned problems or, on a consistent basis, to have available same-capacity aircraft for a flight. Air Canada points out that downgauges for operational reasons may be the result of noise curfews applied by airports, or the consequence of upline safety reasons. Air Canada also points out that commercially-driven downgauges are exceptional.

[40] Mr. Lukács submits that Rule 245(E)(1)(b)(iv) represents a blanket exclusion from liability, exonerating Air Canada from compensating passengers who are denied boarding due to Air Canada's poor planning and/or inadequate maintenance of its fleet. He asserts that the phrase "operational and safety reasons" may be used as a "catch-all excuse". Mr. Lukács maintains that "operational reasons" may allow Air Canada to advertise and sell tickets for a flight, the aircraft for which is then substituted with a smaller one. With respect to downgauges because of delayed inbound flights, Mr. Lukács contends that those downgauges represent a deliberate operational decision, and that it is possible for Air Canada to arrange for another aircraft of a similar or higher capacity to carry the passengers affected by the substitution of aircraft.

[41] The Agency is of the opinion that Air Canada should have the flexibility to control its fleet and determine when an aircraft should be substituted for operational and safety reasons, provided that Air Canada is able to demonstrate that the events prompting the substitution were beyond Air Canada's control.

[42] The determination as to what may be within or outside a carrier's control is made on a case-by-case basis. In this regard, the Agency refers to Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), in which the Agency, in addressing liability under the Montreal Convention in situations of overbooking or flight cancellation, stated:

> [31] In the Show Cause Decision, the Agency recognized that there may be limited situations where overbooking and cancellation do not constitute delay but, in fact, constitute non-performance of the contract and thus would not be subject to the limits of liability set out in the Convention. The Agency at paragraph 42 of the Show Cause Decision recognized that as further complaints, with different fact situations, are brought before the Agency, the Agency will be able to clarify the conditions that constitute non-performance. The Agency adds that there may be situations in which overbooking or cancellation will not cause a passenger any delay at all, for example where the passenger arrives at their destination within the intended timeframe.
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> [32] Air Canada emphasizes the fact that the drafters of the Convention were aware of the difficulty of defining what constitutes delay and that the courts themselves have had difficulties drawing the line between delay and non-performance of a contract of carriage. This points to the fact that cases where delay might be at issue must be assessed on a case-by-case basis and are dependent on the facts. Accordingly, Air Canada argues that it would be inconsistent for the Agency to assume that situations of overbooking and cancellation are presumed to be a delay and cause damages under the Convention. It is important to note that the Agency did not preliminarily find that Air Canada's Tariff must always assume that overbooking and cancellation constitute delay. However, the Agency is of the opinion that situations of overbooking or cancellation may fall within the definition of delay in Article 19 of the Convention, and that in many cases such situations will constitute delay. Accordingly, Air Canada's Tariff should allow for this where appropriate.
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> [33] The Agency is also of the opinion that there may be situations where, for example, overbooking does not necessarily constitute delay, such as when no delay occurs or when an event is characterized by non-performance.

[43] The Agency's position in this matter corresponds to that taken by the European Court of Justice in *Wallentin-Hermann v. Alitalia*, in which the Court concluded that, with reference to European Union Regulation (EC) No. 261/2004, the responsibility rests with the carrier to establish whether events were beyond its control, and ultimately with the court to determine whether those events existed.

[44] The Agency is also of the opinion that the burden must rest with Air Canada to establish that the events prompting the substitution were beyond Air Canada's control and that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures. Air Canada should not be expected to tender compensation when it has demonstrated that substitution occurred for operational and safety reasons beyond its control, and

that it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures. In the event that Air Canada fails to so demonstrate, compensation should be due to the affected passengers.

[45] In light of the foregoing, the Agency finds that, in the absence of specific language that establishes context or qualifies Air Canada's exemption from paying compensation, Rule 245(E)(1)(b)(iv) is unreasonable.

ISSUE 3: IS AIR CANADA'S RULE 245(E)(2) UNREASONABLE?

Positions of the parties

Mr. Lukács

[46] Mr. Lukács argues that the amount of Air Canada's denied boarding compensation has never been updated to reflect inflation and/or an increase in the consumer price index. He points out that the compensation of $100 tendered by Air Canada for denied boarding is significantly lower than the regime mandated by the United States of America, which provides for compensation up to a maximum amount of $1,300 under certain circumstances, and by the European Union, which requires compensation up to a maximum amount of 600 euros under certain circumstances. Mr. Lukács maintains that the American and European standards represent reasonable compensation for denied boarding without being punitive to carriers. He further argues that those standards adequately consider the lengths of the delay and trip that are affected by the denied boarding.

Air Canada

[47] Air Canada argues that in Decision No. 666-C-A-2001, the Agency recognized the reasonable nature of Rule 245(E)(2).

[48] Air Canada indicates that, contrary to the American environment, Air Canada's overbooking practice is applied in a reasonable and well-controlled manner. Air Canada points out that only 0.09 percent of its domestic passengers are subject to denied boarding, including passengers who volunteer to surrender their seats. Air Canada argues that denied boarding amounts were increased in the United States of America for reasons not considered related to Air Canada's denied boarding policies.

[49] As for the denied boarding regime applied by the European Union, Air Canada submits that it is subject to that regime for the applicable flights and that, as such, it is not at a competitive disadvantage given that other carriers are also so subject. Air Canada argues that if it were required to apply the same regime to its domestic flights, it would be at a significant competitive disadvantage relative to other domestic carriers that are not subject to that regime. Air Canada also points out that the compensation levels required by the European Union are based on distance of flights in a geography where the countries are small and in close proximity, and are also based on the particular imperatives of the European economy and political framework.

[50] Air Canada submits that its level of denied boarding compensation was determined by various factors, one of which is 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. Air Canada calculated the average fares by dividing the total passenger revenue for domestic segments by the number of total revenue passengers on those segments. These calculations produced the following yearly averages:

- 2004: $159
- 2005: $173
- 2006: $176
- 2007: $182
- 2008: $189
- 2009: $175
- 2010: $181
- 2011: $181
- 2012: $189

[51] Air Canada states that another factor in determining the level of compensation is the benchmark against Air Canada's competitors. Air Canada identifies some of those competitors and specified the compensation they tender. Air Canada argues that its denied boarding compensation amounts are in line with those competitors.

[52] Air Canada submits that its extensive domestic network allows for the fast reprotection of passengers on subsequent flights, and, as a result of the principles set out in Decision No. 251-C-A-2012 (*Lukács v. Air Canada*), more reprotection options are now available. According to Air Canada, it is often able to reprotect passengers within narrow time frames, and both the United States of America and the European Union's denied boarding legislation waives or reduces the requirement to pay denied boarding compensation when reprotection occurs within a certain timeline. Air Canada contends that its domestic competitors do not have such an extensive network, and that the more limited reprotection options available for those competitors would necessarily entail a higher compensation level due to passenger inconvenience.

[53] Air Canada points out that in the event that a customer is denied boarding, Air Canada not only provides an alternate flight to the customer, but is also responsible for providing hotel accommodation, meal vouchers and compensation for other incidental costs (transportation for the customer, phone calls, reasonable costs claimed, etc.) Air Canada maintains that, as a result, its denied boarding compensation is above and beyond the actual damage caused to the passenger due to the denied boarding.

Mr. Lukács

[54] Mr. Lukács maintains that Air Canada's statements on compensation levels in the European Union and Canada are contradictory, and that Air Canada's arguments concerning the competitive disadvantage it would face in offering higher denied boarding compensation are absurd given that Air Canada's main domestic competitor, WestJet, does not oversell its flights.

[55] Mr. Lukács argues that Decision No. 666-C-A-2001 is distinguishable from this case as that Decision addressed the egalitarian nature of the compensation provided for under the tariff provision at issue, and not the reasonableness of the amount of compensation in relation to current industry standards. Mr. Lukács agrees with the egalitarian principle formulated in that Decision that the amount of denied boarding compensation should not depend on the fare paid by the individual passenger. He submits, however, that a single rate of compensation that is independent of the length of the delay caused by the denied boarding does not serve the purpose of encouraging air carriers to mitigate the inconvenience experienced by persons who are denied boarding.

[56] Mr. Lukács maintains that there is no evidence on record to support the contention that the air carriers cited by Air Canada in its submission, other than WestJet and Porter Airlines Inc. (Porter), are competitors of Air Canada. He submits that, as the Agency noted in Decision Nos. LET-C-A-129-2011 and 251-C-A-2012, "an industry practice does not, in itself, mean that the practice is reasonable".

[57] With respect to Air Canada's submission regarding its extensive network, Mr. Lukács agrees that Air Canada's new denied boarding compensation rules should include a provision similar to the European Union's Article 7(2), Regulation (EC) 261/2004, or the DoT's 14 CFR 250.5(a)(2), both of which allow the carrier to reduce the amount of compensation payable by 50 percent if the passengers reach their destinations within less than, for example, two hours after their originally booked arrival time. Mr. Lukács suggests that such a provision would create an incentive for Air Canada to reroute passengers as quickly as possible, which clearly benefits passengers, and would relieve Air Canada from part of the financial burden.

[58] Mr. Lukács disagrees with Air Canada's submission that an extensive network, on its own, justifies paying less denied boarding compensation, because the size of the network does not necessarily correlate to availabilities and efficiency of its use. He argues that Air Canada should not be "rewarded" for its extensive network alone, but rather, the denied boarding compensation policy should reward Air Canada for using its network well, to the benefit of the passengers, by ensuring that they reach their final destinations within two hours of the originally booked arrival time.

[59] Mr. Lukács points out that Air Canada is not the only air carrier that has an extensive network in a particular region. He submits that although a number of American carriers have as extensive, or even larger, networks than Air Canada and, similarly, Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) and Société Air France carrying on business as Air France have vast networks in Europe, authorities chose to impose on these carriers the same rules concerning denied boarding compensation as on smaller carriers.

[60] Mr. Lukács maintains that there is no evidence that Air Canada would suffer a competitive disadvantage if it increased the amount of denied boarding compensation that it pays. He submits that, based on Air Canada's submissions, it is possible to determine with great certainty that Air Canada would not suffer such a disadvantage at all, and the impact on Air Canada would be negligible.

[61] Mr. Lukács contends that the fare dataset submitted by Air Canada, which was used for calculating the average one-way domestic economy cabin fare, is unreliable because that dataset corresponds to single domestic flight segments. He submits that this explains the low averages that Air Canada provided to the Agency. Mr. Lukács argues that Air Canada's dataset significantly distorts statistical quantities that rely on the number of observations (data entries), because it artificially increases the number of data entries (by counting flight segments instead of one-way trips), and thus unrealistically deflates the resulting averages. While also noting that the dataset includes portions of international itineraries and certain anomalous amounts, Mr. Lukács argues that the Agency should reject the averages that were provided by Air Canada because they do not reflect the average one-way domestic economy fare between two places in Canada.

[62] Mr. Lukács submits that if the Agency were to find Air Canada's dataset reliable, a consolidation of the segments on the same ticket and the same day into a single one-way itinerary would mitigate the problem he views as associated with the dataset. He maintains that a consolidation in this manner represents a good approximation of reality given the very limited information in the dataset. Based on his consolidation of the dataset, and on Air Canada's own premise that reasonable compensation should be at parity with the fares purchased by passengers, Mr. Lukács submits that more than 80 percent of passengers are "shortchanged" by Air Canada's current denied boarding compensation of $100.

[63] Mr. Lukács maintains that a reasonable denied boarding compensation policy ought to distinguish between those cases where stranded passengers are quickly rerouted and reach their final destinations within a short time (less than two hours) after the originally booked time, and those cases where the delay is more significant. He submits that, furthermore, those passengers who experience very significant delays (over six hours) in reaching their final destinations ought to be very substantially compensated.

[64] Mr. Lukács points out that, according to Air Canada's own submissions, Air Canada has a very extensive network and is able to reroute stranded passengers rather quickly. He claims, therefore, that a delay-based compensation scheme would be favourable to Air Canada, and at the same time would provide substantial compensation to those passengers who are exceptionally affected by the denied boarding incident.

[65] Mr. Lukács submits that, based on his calculations, $400, in cash, would be a reasonable base amount for denied boarding compensation, and proposes the following regime:

- Length of delay: Less than 2 hours
  Compensation: 50% of the base amount

- Length of delay: 2 hours or more, but less than 6 hours
  Compensation: 100% of the base amount

- Length of delay: 6 hours or more
  Compensation: 200% of the base amount

Analysis and findings

[66] Air Canada asserts that its overbooking system is applied reasonably and in a well-controlled manner, noting that only 0.09 percent of its domestic passengers are affected by denied boarding, and that its compensation amounts are consistent with its domestic competitors. Air Canada submits that if it were required to apply the European Union regime to its domestic carriage, it would be at a competitive disadvantage relative to other domestic carriers that do not apply the same regime. Air Canada submits that its average domestic economy cabin fare has remained stable and within the range of its denied boarding compensation. Air Canada adds that its extensive domestic network often enables Air Canada, in a timely manner, to reprotect passengers who are denied boarding, and that the regimes applied by both the United States of America and the European Union allow for the waiving or reduction of the requirement to tender compensation when reprotection occurs within a certain period.

[67] Mr. Lukács submits that the denied boarding compensation tendered by Air Canada is significantly lower than the compensation required under the respective regimes administered by the United States of America and the European Union. He argues that there is no evidence on file to support Air Canada's contention that the air carriers to which Air Canada refers, other than WestJet and Porter, and with which Air Canada submits that it compares favourably in respect of denied boarding compensation, are competitors of Air Canada. He adds that an extensive network does not justify paying less denied boarding compensation because the size of the network does not correspond with availabilities and efficiency of use. Mr. Lukács asserts that no evidence has been presented to indicate that Air Canada would suffer a competitive disadvantage should it introduce higher levels of denied boarding compensation. Mr. Lukács indicates that a single rate of compensation, independent of the length of delay caused by denied boarding, does not encourage air carriers to mitigate the inconveniences experienced by affected passengers. He maintains that a delay-based regime is reasonable, and proposes such a regime.

[68] The Agency has considered the submissions of the parties respecting this matter, and finds that Mr. Lukács has presented a more compelling case that Air Canada's statutory, commercial and operational obligations fail to outweigh the rights of passengers to be subject to reasonable terms and conditions of carriage.

[69] Although it is true that the Agency determined in Decision No. 666-C-A-2001 that Rule 245(E)(2) was reasonable, that Decision was rendered nearly 12 years ago. Today, prices of air carrier tickets, accommodation, and other incidental expenses are not the same. Air Canada has not demonstrated to the Agency's satisfaction that Air Canada's denied boarding compensation is still reasonable.

[70] As noted by Mr. Lukács, Air Canada's submission that, based on the levels of compensation offered by certain competitors, Air Canada's compensation is reasonable, is not persuasive. As pointed out in previous Agency decisions, the mere fact that a carrier's term and condition of carriage is comparable to that applicable to other carriers does not render that term and condition reasonable.

[71] The Agency is also of the opinion that Air Canada has failed to demonstrate how a higher level of compensation would place it in a disadvantageous position relative to other domestic air carriers. Also, Air Canada's submission that Air Canada's extensive network allows for the timely reprotection of passengers who are denied boarding does not justify the current level of compensation tendered by Air Canada, particularly for those passengers who, because of the time or date of their scheduled flight, are inconvenienced to the extent, for example, of having to travel on another day. In this regard, Air Canada's argument that its actions, including arranging alternate transportation or hotel accommodations, exceed the damage experienced by a passenger affected by denied boarding is not persuasive. Such actions may not, in fact, entirely or sufficiently mitigate the damages experienced by that passenger.

[72] In light of the foregoing, the Agency finds that Rule 245(E)(2) is unreasonable.

[73] Having determined that Air Canada's current level of $100, in cash, for denied boarding compensation is unreasonable, the question now arises as to what may constitute a reasonable compensation regime. Mr. Lukács submits that the regime existing in the United States of America or the European Union is a reasonable alternative to that of Air Canada's. He also proposes his own regime, based on the consolidation of the fare data filed by Air Canada, and his calculations relating to that consolidation.

[74] The American regime and the regime proposed by Mr. Lukács feature compensation based on the length of time an affected passenger is delayed, while the European Union regime involves compensation based on both time and the distance of the passenger's air travel. The Agency is not convinced that an approach that includes a distance component correlates with the inconvenience that may be experienced by a passenger who is denied boarding. Rather, compensation based on the length of time by which a passenger is delayed more accurately reflects the damage which may be experienced. As such, the Agency is of the opinion that the regime applied by the United States of America and that proposed by Mr. Lukács represent reasonable options, while that applied by the European Union does not.

ISSUE 4: SHOULD COSTS BE AWARDED AGAINST AIR CANADA RESPECTING ITS PRELIMINARY MOTION, WHICH WAS INCLUDED IN AIR CANADA'S ANSWER DATED JANUARY 16, 2012?

Positions of the parties

[75] Mr. Lukács submits that a preliminary motion filed by Air Canada to dismiss his complaint on the basis of it being abstract was merely an attempt to derail and/or delay the proceedings. He maintains that the issue raised by Air Canada has already been determined by the Agency in previous decisions, and that Air Canada's attempt to relitigate the matter constitutes abuse of process. Mr. Lukács therefore argues that the unique circumstances of this case warrant an award of costs against Air Canada with respect to the preliminary motion.

Analysis and findings

[76] In Decision No. LET-C-A-47-2012, the Agency noted that costs are generally compensatory in nature and are awarded at the end of the proceeding, and that although the Agency was not prepared to issue an interim order on costs, it would consider the issue of costs at the conclusion of its investigation of Mr. Lukács' complaint.

[77] The Agency's practice has been to award costs only in special or exceptional circumstances. In making such a determination, the Agency considers a combination of factors such as the nature of the application, the length and complexity of the proceeding, whether the Agency held an oral hearing, whether parties have acted efficiently and in good faith or if a party has incurred extraordinary costs to prepare and defend its application. The Agency notes that notwithstanding the preliminary motion filed by Air Canada on January 16, 2012, Air Canada also filed its answer to the complaint as it had been directed to by the Agency. In other words, Air Canada's preliminary motion did not delay the proceedings in this case.

[78] The Agency has considered the above factors, and finds that the circumstances of the preliminary motion do not warrant an award of costs against Air Canada.

CONCLUSION

[79] The Agency makes the following final determinations:

- Issue 1: The practice of overbooking is reasonable.
- Issue 2: Rule 245(E)(1)(b)(iv) of the Tariff is unreasonable.
- Issue 3: Rule 245(E)(2) of the Tariff is unreasonable.
- Issue 4: The motion to award costs against Air Canada following a preliminary motion filed on January 16, 2012 is denied.

ORDER

[80] The Agency, pursuant to subsection 67.2(1) of the CTA, disallows the following provisions of the Tariff:

- Rule 245(E)(1)(b)(iv); and,
- Rule 245(E)(2).

[81] Further, the Agency provides Air Canada with an opportunity to show cause, within 30 days from the date of this Decision, why:

1. with respect to Rule 245(E)(1)(b)(iv), the revised provision should not contain language consistent with the finding in this Decision that, in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers; and,

2. with respect to the disallowed Rule 245(E)(2), Air Canada should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács.

[82] Air Canada's response must also be served on Mr. Lukács, who will have 10 days from receipt of that response to file comments, if any, with a copy to Air Canada.

[83] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Rules 245(E)(1)(b)(iv) and 245(E)(2) shall come into force when Air Canada includes provisions in its Tariff that are determined to be reasonable by the Agency.

(signed)

J. Mark MacKeigan
Member

(signed)

Geoffrey C. Hare
Member