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September 29, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
Complaint about rules governing liability and denied boarding compensation
File No.: M 4120/13-00661
Reply to British Airways' submissions dated September 22, 2013

Please accept the following submissions in relation to the above-noted matter as a reply pursuant to Rule 32(5) of the *Canadian Transportation Agency General Rules* and the Agency's directions dated September 26, 2013.

I. There are good reasons to doubt the answer and the data provided by British Airways

British Airways claims in response to question Q6 that:

For compensation for passengers rerouted to arrive at last destination not more than 4 hours after original STA, cash of GBP 125.00 is the amount. For compensation for passengers rerouted to arrive at last destination more than 4 hours after original STA, cash of GBP 250.00 is the amount.

The Applicant submits that there are good reasons to doubt and question the accuracy and veracity of British Airways' answer and the data British Airways provided.

(a) British Airways' own tariff

British Airways' International Tariff Rule 87(B)(3)(B) states that:

SUBJECT TO THE PROVISIONS OF PARAGRAPH (B) (3) (A) OF THIS RULE, CARRIER WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNT OF 100 PERCENT OF THE SUM OF THE VALUES OF THE PASSENGER'S REMAINING FLIGHT COUPONS OF THE TICKET TO THE PASSENGER'S NEXT STOPOVER, OR IF NONE TO HIS DESTINATION, BUT NOT LESS THAN \$50.00 AND NOT MORE THAN \$200.00 PROVIDED THAT IF THE PASSENGER IS DENIED BOARDING IN THE UNITED KINGDOM, THE AMOUNT OF COMPENSATION IN THIS SUBPARAGRAPH WILL READ NOT LESS THAN UKL 10.00 NOR MORE THAN UKL 100.00. SUCH TENDER IF ACCEPTED BY THE PASSENGER AND PAID BY CARRIER, WILL CONSTITUTE FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES INCURRED OR TO BE INCURRED BY THE PASSENGER AS RESULT OF CARRIER'S FAILURE TO PROVIDE PASSENGER WITH CONFIRMED RESERVED SPACE.

Complaint of Dr. Lukács (January 30, 2013), p. 37, Exhibit "C"

The policy set out in this rule is substantially different than the answer provided to question Q6 by British Airways, and provides for substantially lower amounts of compensation than the GBP 250.00 mentioned in British Airways' answer.

British Airways made no attempt to explain the contradiction between its Rule 87(B)(3)(B) and its answer to question Q6.

(b) Three different "extractions" from the database

British Airways provided three different versions of the list purporting to represent the amounts of denied boarding compensation it paid to individual passengers departing from Canada to the United Kingdom in 2010, 2011, and 2012.

Version No. 1 supports the Applicant's argument that British Airways has already been providing denied boarding compensation that is substantially higher than what is set out in Rule 87(B)(3)(B). Subsequently, British Airways submitted Version No. 2 of the list, which contains amounts that are still higher than Rule 87(B)(3)(B), but substantially lower than what is set out in *Regulation (EC) No. 261/2004*.

As British Airways conceded on September 5, 2013, however, Version No. 2 was the product of a serious error, resulting in the multiplication by 3 of both the amount of compensation paid and the number of passengers. Consequently, British Airways produced Version No. 3 of the same list.

Can Version No. 3 be trusted as correctly reflecting the amounts of denied boarding compensation British Airways paid to individual passengers departing from Canada to the United Kingdom in 2010, 2011, and 2012?

The Applicant submits that the answer to this question is negative. Version No. 3 contains internal inconsistencies (duplications of incident numbers) and omissions (incidents that were listed in Version No. 2 but are no longer listed in Version No. 3) that cast serious doubt on the reliability of Version No. 3.

Submissions of Dr. Lukács (September 12, 2013), pp. 3-4

British Airways' excuse for these internal inconsistencies and omissions is that:

The fact that the data extracted in Version No. 2 and Version No. 3 is not identical is a function of two different processes having been used.

Submissions of British Airways (September 22, 2013), p. 1

The Applicant respectfully disagrees, and finds this explanation unsatisfactory to say the very least. Different data extraction methods do not normally lead to different data, unless one or both of them is unreliable and inaccurate.

In the present case, the internal inconsistencies (duplication of incident numbers) of Version No. 3 are sufficient to demonstrate that the data extraction method used for producing Version No. 3 is simply not reliable. This shortcoming is further compounded by the absence of any declaration or affidavit of an employee of British Airways with adequate IT expertise in the area of databases, who can confirm that she/he verified the accuracy of the data extracted.

II. The need for data from “Nirvana” directly

In light of British Airways' demonstrated inability to correctly extract the data recorded in its “Nirvana” system, the only alternative for obtaining reliable evidence is by retrieving the data from the “Nirvana” system directly, without any intermediary extraction process.

The data recorded in the “Nirvana” system is not “corporate records” as British Airways claims, but rather data recorded in the ordinary course of business, whose evidentiary value is recognized by s. 30 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5.

The screenshots submitted together with British Airways' September 5, 2013 submissions clearly demonstrate that the data is available, and can be obtained from the “Nirvana” system directly. These screenshots, however, are only part of the recorded data. Section 30(5) of the *Canada Evidence Act* states that:

Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of

the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Although the *Evidence Act* refers to “court,” section 25 of the *Canada Transportation Act* confers on the Agency all powers vested in a superior court with respect to evidence and production of documents:

25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Therefore, it is submitted that British Airways ought to produce all data directly from the “Nirvana” system concerning the amounts of denied boarding compensation British Airways paid to passengers departing from Canada to the United Kingdom in the years 2010, 2011, and 2012.

III. Partial redaction by British Airways – Rule 23

When British Airways is party to a proceeding before the Agency, it must abide by the Agency’s *General Rules*, which is a complete code of procedure. The *General Rules* provide complete and adequate procedures for protecting confidential information submitted in a proceeding before the Agency.

Rule 23 of the *General Rules* does not distinguish between documents that are produced in response to a production order and documents that are submitted by a party in support of its submissions. Thus, Rule 23 is applicable to all documents filed with the Agency, and it governs all claims of confidentiality a party intends to make.

Rule 23(4)(b) requires a party making a claim for confidentiality to file with the Agency an unredacted copy of the document that identifies the portions that were redacted from the document. Rule 23(5) also requires a party to set out the reason for making the claim for confidentiality.

Subsection 7(3)(c) of *PIPEDA* clearly states that no consent is required for disclosure in order to comply with the rules of the court, or as in the present case, the *General Rules* of the Agency. Thus, *PIPEDA* does not exempt British Airways from complying with Rule 23, which is the proper avenue for making a claim for confidentiality.

In Decision No. LET-C-A-67-2013, the Agency directed both parties who filed redacted documents to either file unredacted copies, or make a claim for confidentiality as prescribed by Rule 23. The Applicant submits that there is no reason for reaching a different conclusion in the present case.

Therefore, British Airways ought to either disclose unredacted versions of the document in question, or make a claim for confidentiality in accordance with Rule 23 of the *General Rules*.

IV. Follow-up questions

The screenshots from the “Nirvana” system submitted by British Airways on September 5, 2013 raise very serious concerns about the accuracy and veracity of British Airways’ answer to question Q4, concerning the method British Airways uses to pay denied boarding compensation. While British Airways insists that it provides a form of payment that is equivalent to cash, the reference to expiry dates and records indicating that some compensations “EXPIRED” strongly suggest to the contrary, because cash cannot expire.

In light of British Airways’ difficulties providing coherent and consistent answers to other aspects of its denied boarding compensation practices, it is important to clarify and, if necessary, correct the record with respect to British Airways’ answer to question Q4, related to the method of payment. This issue is relevant and intimately related to the question of denied boarding compensation, as the Agency’s decision in *Lukács v. Air Canada*, 342-C-A-2013 demonstrates.

Since it is plain and clear that British Airways’ denied boarding compensation practices substantially differ from its written policy set out in International Tariff Rule 87(B)(3)(B), it is important to have a full understanding of how British Airways currently compensates victims of denied boarding in reality.

Therefore, the follow-up questions Q9(a)-(d) are relevant, because they seek information with respect to British Airways’ current method of payment of denied boarding compensation, and they can correct the record with respect to possible erroneous information that British Airways provided in response to question Q4, whose relevance is undisputed.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways