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July 16, 2013

VIA EMAIL

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

Attention: Ms. Shanda Frater, Analyst

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
Motion to compel answers and to set a deadline for answers to follow-up questions**

Please accept the following motion pursuant to Rules 16, 19, 20, and 32 of the *Canadian Transportation Agency General Rules*.

On January 30, 2013, as part of the application commencing the present proceeding, the Applicant directed three questions to British Airways (on page 24 of the complaint). At the time of opening the pleadings, the Agency directed British Airways to answer the three questions.

In its answer of March 22, 2013 to the complaint, British Airways answered questions Q1 and Q3, but failed to answer question Q2.

In the present motion, the Applicant is asking that:

- (a) the Agency order British Airways to provide a full and complete answer to question Q2;
- (b) the Agency set a deadline for British Airways to answer the follow-up questions directed by the Applicant to British Airways pursuant to Rule 19;
- (c) the Agency grant the Applicant 10 days from the receipt of full and complete answers to the questions to file his reply pursuant to Rule 44.

I. Should British Airways be ordered to answer question Q2?

The Applicant directed the following question, among others, to British Airways in his January 30, 2013 application (on page 24):

- Q2. Provide the list of the amounts of denied boarding compensation paid by British Airways to individual passengers departing from the United Kingdom to Canada in the years 2010, 2011, and 2012.

Relevance: These questions are relevant to the balancing test in order to establish that changing Rule 87(B)(3)(B) to reflect the denied boarding compensation amounts set out in *Regulation (EC) 261/2004* will not affect the ability of British Airways to meet its commercial obligations. Indeed, if British Airways already compensates passengers according to *Regulation (EC) 261/2004*, then making its tariff rules reflect the current practice cannot adversely affect it.

(a) British Airways' explanation for failing to answer the question is not supported by evidence and is not credible

Although the Agency directed British Airways to answer this question, it failed to do so, and stated on page 4 of its March 22, 2013 submissions that:

With respect to the list of the amounts of denied boarding compensation paid by British Airways to individual passengers departing the U.K. to Canada in the years 2010, 2011 and 2012, British Airways is unable to provide such a list because it does not record amounts paid with any reference to the destination of the passenger's flight.

British Airways has tendered no evidence in support of this claim. Moreover, there is very good reason to doubt the accuracy of this claim. Indeed, while overbooking flights is unfortunately a common practice, airlines make decisions about the rate that they oversell flights on a route-by-route basis, taking into account the cost of the resulting denied boarding of passengers. Thus, common sense dictates that keeping very detailed records of denied boardings and the compensations paid out in such circumstances is a vital piece of information for optimizing the profits of any airline.

For example, while it may be profitable to oversell flights on frequent routes (i.e., routes where British Airways operates flights several times a day) by 10%, it may not be profitable to oversell flights on infrequent routes (with one flight per day or less) by the same rate, because of the difference in the costs of denied boarding compensation.

With utmost respect, one struggles to believe that British Airways would act against its own financial interests, and not keep detailed records of its denied boardings and the compensations paid out to passengers.

(b) British Airways' additional submissions concerning question Q2

British Airways' additional submissions on page 4 of its March 22, 2013 answer are particularly puzzling:

British Airways' information technology personnel are examining the electronic data on denied boarding compensation to determine whether there is any basis on which the data can be sorted and collated to identify the amounts paid to passengers departing the U.K. for Canada during the specific years.

British Airways did not indicate when this task is expected to be completed, nor did British Airways seek an extension from the Agency to answer question Q2.

(c) Conclusion

British Airways does not dispute the relevance of question Q2, but it claims that it is unable to answer the question.

British Airways' explanation for its inability to answer question Q2 is not supported by any evidence, and it is not credible: no reasonably managed airline would fail to keep track of the amount of denied boarding compensation paid out on individual routes.

At the same time, British Airways' submissions indicate that it is still in the process of attempting to answer question Q2, but it did not indicate when that process would be completed.

In these circumstances, the Applicant is respectfully asking the Agency to order British Airways to answer question Q2 in full, and set a deadline for British Airways for doing so.

II. Follow-up questions directed to British Airways pursuant to Rule 19

The Applicant directs the follow-up questions set out below to British Airways pursuant to Rule 19 of the *Canadian Transportation Agency General Rules*. The Applicant is respectfully asking the Agency to set a deadline, pursuant to Rule 20(1), for British Airways to answer these follow-up questions.

(a) Exhibit “B” to British Airways’ March 22, 2013 submissions

Exhibit “B” to British Airways’ March 22, 2013 submissions is a list of the amounts of denied boarding compensation paid by British Airways to individual passengers departing from Canada to the United Kingdom in 2010, 2011, and 2012.

Q4. All entries in the column “Settlement Type Code” in Exhibit “B” state “COMP CARD”. What does “COMP CARD” mean?

Relevance: This question is aimed at clarifying a code used by British Airways in Exhibit “B”.

Q5. In what form were the compensations listed in Exhibit “B” tendered?

Q6. Exhibit “B” lists amounts ranging from \$375.00 to \$4,563.00. These amounts are substantially higher than what is set out in British Airways’ Rule 87(B)(3)(B).

What method did British Airways use to determine these amounts?

Relevance: These questions are aimed at clarifying British Airways’ current practices of denied boarding compensation. According to Exhibit “B” of British Airways, these practices substantially differ from what is set out in Rule 87(B)(3)(B). Since British Airways cannot suffer any competitive disadvantage from changing Rule 87(B)(3)(B) to reflect its current practices, answers to these questions speak to the reasonableness of the existing Rule 87(B)(3)(B).

(b) Denied boarding compensation policy of British Airways’ main competitor, Air Canada

Q7. Exhibit “A” to British Airways’ submissions is 4th Revised Page AC-22-B from Air Canada’s international tariff. Rule 80(G) on that page states that:

The rules set out in EU regulation no 261/2004 are fully incorporated herein and shall supersede and prevail over any provision of this tariff which may be inconsistent with those rules.

What competitive disadvantage would British Airways suffer, if any, by including an identical or similar provision in its International Tariff?

Q8. Exhibit “A” to the present motion is a copy of Air Canada’s Rule 89, governing denied boarding compensation, which starts as follows:

When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule, unless applicable local law provides otherwise. In particular, for flights departing from the following countries, Air Canada will apply the provisions of the following legislations:

United States: US 14 CFR part 250;

European Union: EC regulation No. 261/2004;

An Andean community country: Decision 619;

Argentina: Administrative Order PRE-CJU-002-05 (18 November 2004)

Israel: Aviation Service Law (Compensation and Assistance for flight cancellation or change of conditions) 5772-2012.

What competitive disadvantage would British Airways suffer, if any, by including an identical or similar provision in its International Tariff?

Relevance: On page 4 of its March 22, 2013 submissions, British Airways stated that “its primary competitor on the Canada/U.K. routes is Air Canada.” These questions are testing whether British Airways would suffer any competitive disadvantage by incorporating the terms of *Regulation (EC) 261/2004* into its tariff, and thus they speak to the reasonableness of the existing Rule 87(B)(3)(B).

The Applicant notes that in *Lukács v. WestJet*, LET-C-A-173-2009, the Agency itself directed certain questions related to policies of other carriers (competitors) to the airline, and these questions were similar in nature to questions Q7 and Q8 in the present case.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

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

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

10th Revised Page AC-22-C
Cancels 9th Revised Page AC-22-C

RULE AIR CANADA
SECTION I - GENERAL RULES

89 DENIED BOARDING COMPENSATION

PART 1

- C +[X]. When AC is unable to provide previously confirmed space due to there being more passengers holding confirmed reservations and tickets than for which there are available seats on a flight, AC shall implement the provisions of this rule, +[N]unless applicable local law provides otherwise. In particular, for flights departing from the following countries, Air Canada will apply the provisions of the following legislations:
United States: US 14 CFR part 250;
European Union: EC regulation No. 261/2004;
An Andean community country: Decision 619;
Argentina: Administrative Order PRE-CJU-002-05 (18 November 2004)
Israel: Aviation Services Law (Compensation and Assistance for flight cancellation or change of conditions), 5772-2012.
- C (A) +[CANCELLED]
- (B) REQUEST FOR VOLUNTEERS
(1) AC will request volunteers from among the confirmed passengers to relinquish their seats in exchange for compensation as defined in (E).
(2) Once a passenger has voluntarily relinquished his seat, he will not later be involuntarily denied boarding unless he was advised at the time he volunteered of such possibility and the amount of compensation to which he would be entitled.
(3) The request for volunteers and the selection of passengers to be denied boarding shall be in a manner solely determined by AC.
- C (C) BOARDING PRIORITIES
(1) If a flight is oversold, no passenger may be involuntarily denied boarding until AC has first requested volunteers to relinquish their seats.
(2) In the event there are not enough volunteers, other passengers may be involuntarily denied boarding in accordance with AC boarding priority policy. Passengers with confirmed reservations +[X], will be permitted to board in the following order until all available seats are occupied:
(a) Disabled passengers, unaccompanied children under 12 years of age and others for whom, in AC'S assessment, failure to carry would cause severe hardship.
(b) Passengers paying First (F), Executive (J) or full Economy (Y) class fares.
(c) All other passengers, +[X] in the order in which they present themselves for check-in and boarding.
- C +[C](D) TRANSPORTATION FOR PASSENGERS DENIED BOARDING
When a passenger has been denied boarding, either voluntarily or involuntarily, carrier will:
(1) Carry the passenger on another of its passenger aircraft or class of service on which space is available without additional charge regardless of the class of service; or, at carrier's option;
(2) Endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option;
(3) Reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower; or,
(4) If the passenger choose to no longer travel or if carrier is unable to perform the option stated in (1) thru (3) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D), or upon request, for denied boardings within Air Canada's control, return passenger to point of origin and refund in accordance with Rule 90 (D)(2)(A), as if no portion of the trip had been made (irrespective of applicable fare rules), or subject to passenger's agreement, offer a travel voucher for future travel in the same amount; or, upon passenger's request.
(5) For denied boardings within Air Canada's control, if passenger provides credible verbal assurance to Air Canada of certain circumstances that require his/her arrival at destination earlier than options set out in subparagraph (1) thru (3) above, Air Canada will, if it is reasonable to do so, taking all circumstances known to it into account and subject to availability, buy passenger seat on another carrier whose flight is scheduled to arrive appreciably earlier than the options proposed in (1) thru (3) above.

(Continued on next page)

+ - Effective August 16 Decision per CTA decision 250 - C - A - 2012

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: August 15, 2012

EFFECTIVE: September 29, 2012 (Except as Noted)

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

7th Revised Page AC-22-D
Cancels 6th Revised Page AC-22-D

RULE AIR CANADA
SECTION I - GENERAL RULES

89 DENIED BOARDING COMPENSATION (Continued)
PART 1 (Continued)

(E) COMPENSATION

In addition to providing transportation in accordance with (D), a passenger who has been denied boarding involuntarily will be compensated by AC as follows:

(1) Conditions for Payment

- (a) The passenger must present himself for carriage at the appropriate time and place in accordance with this tariff: having complied fully with AC applicable reservation, ticketing, check-in and boarding; and,
(ii) [X].

- (b) It must not have been possible to accommodate the passenger on the flight on which he held confirmed reservations and the flight must have departed without him.

EXCEPTION: The passenger will not be eligible for compensation:

- (i) if he is offered accommodation or is seated in a compartment of the aircraft other than that specified on his ticket at no extra charge to him. (Should he be seated in a compartment for which a lower fare applies, he shall be entitled to the appropriate refund); or,
(ii) when the flight on which he holds a confirmed and ticketed reservation is cancelled or space has been requisitioned by the government; or,
(iii) (Applicable to AC connector carrier ZX only) if the passenger can be accommodated on another flight which departs within one hour of the scheduled departure of the flight on which boarding has been denied.

(2) Amount of Compensation

Subject to the provisions of (E)(1)(a) AC will tender liquidated damages in the amounts in cash or a credit voucher good for travel on AC as follows: Caribbean/Bermuda to Canada, compensation by cash is equal to the value of coupons remaining to an online or interline destination, or next stopover points, maximum is CAD 200.00. Compensation by MCO (credit voucher), is equal to twice the value of coupons remaining to an online or interline destination or next stopover point, minimum is CAD 100.00, maximum is CAD 500.00. From Venezuela, compensation to passengers must equal 25% of the value of the ticket to be paid by cash, by electronic bank transfer, cheque, or in accordance with an agreement signed with the passenger, with travel vouchers or other services.

	Draft	MCO (credit voucher)
Canada to Mexico/Mexico to Canada	CAD 100.00	CAD 200.00
Canada to all other destinations	CAD 200.00	CAD 500.00
Asia to Canada (excluding Japan and Korea)	CAD 300.00	CAD 600.00
Japan to Canada (compensation is offered in cash only)	JPY 30,000	not applicable
	(paid by bank transfer)	
Seoul to Canada	Y class USD 400.00	not applicable
(compensation is offered in cash only)	J class USD 600.00	not applicable
	not applicable	
South America/South Pacific to Canada	CAD 200.00	CAD 500.00
exceptions		
From Sao Paulo to Toronto	USD 750.00	USD 1500.00

(3) Time of Offer of Compensation

- (a) Compensation will be offered to, and if accepted, receipted by the passenger on the day and at the place where the denied boarding occurs.
(b) In the event the alternate transportation departs before the offer can be made, it shall be made by mail or other means within 24 hours after the time the failure to accommodate has occurred.

(F) NOTICE PROVIDED TO PASSENGERS

[CANCELLED]

(Continued on next page)

† - Effective August 16 Decision per CTA decision 250 - C - A - 2012

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

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