

CANADIAN TRANSPORTATION AGENCY

BETWEEN:

GÁBOR LUKÁCS

Complainant

- and -

PORTER AIRLINES INC.

Respondent

ANSWER OF PORTER AIRLINES INC.

PART I - OVERVIEW

1. In these proceedings, the complainant Gábor Lukács asks that the Canadian Transportation Agency (the “Agency”) disallow Rules 3.4, 15 and 20 (the “Current Rules”) of Porter Airlines Inc.’s International Tariff (the “Tariff”) and direct Porter to substitute or amend those and other provisions of the Tariff to remedy any deficiencies as to the clarity and/or reasonableness thereof. As part of Mr. Lukács’s challenges to these Rules, he asks that Porter be directed to incorporate in the Tariff the voluntary *Code of Conduct of Canada’s Airlines*, and to extend various remedies to passengers affected by flight advancements.

2. Porter Airlines Inc. (“Porter”) acknowledges that the Current Rules require revisions to reflect the requirements established by the recent jurisprudence of the Agency. As such, in order to expedite the final resolution of these proceedings, Porter has delivered with this Answer proposed amendments to the Tariff (the “Proposed Rules”) for the Agency’s consideration in connection with the within Complaint. Porter’s Proposed Rules are

attached hereto as Appendix “A”, with a blacklined copy illustrating the specific revisions to the Current Rules at Appendix “B”.

3. Porter respectfully submits that its proposed amendments result in Tariff provisions that are reasonable, clear, and reflect the relevant requirements set down by the Agency. More particularly:

(a) Porter’s proposed revisions to Rules 3.4 and 15 – relating to remedies available in instances of flight cancellation, overbooking and flight advancements – reflect the circumstance-focused approach to addressing schedule irregularities affecting passengers endorsed by the Agency, allowing for passengers to elect between a number of remedies consistent with the principles of the *Montreal Convention* and the Agency’s 2012 trilogy of decisions concerning overbooking and cancellation;

(b) Entitlement to remedies under Proposed Rules 15 and 18 is expressly extended to passengers affected by flight advancements (including the right to prior notice from Porter);

(c) Proposed Rule 20 provides for denied boarding compensation to passengers on all flights irrespective of country of origin, and reflects a compensation regime which the Agency has found to be reasonable; and

(d) Porter has added express language indicating that passengers may have remedies under the *Montreal Convention* or otherwise, and has otherwise deleted any language which might suggest that acceptance of a particular remedy may limit or exhaust other remedies potentially available to the passenger under the Convention or at law.

4. In response to Mr. Lukács’s request that Porter be required to incorporate “the key points” of the *Code of Conduct of Canada’s Airlines*, Porter submits that inclusion of all such provisions is not mandatory, and that its Proposed Rules contain reasonable provisions, to the full extent required, concerning remedies available to passengers for delay.

5. Porter thus asks:

(a) that the Agency confirm that the Proposed Rules remedy any deficiencies as to clarity and reasonableness which may exist in the Current Rules; or

(b) that the Agency, to the extent that it determines that the Proposed Rules, in whole or in part, would not be found to be clear and/or reasonable: (i) where appropriate, invite further submissions from Porter (with an opportunity for reply by Mr. Lukács) to respond to such determinations, including to show cause as to why such findings ought or ought not to adhere, and/or (ii) otherwise provide further direction to Porter as to revisions which would render its Proposed Rules clear or reasonable, as the case may be.

PART II - APPLICABLE LEGAL PRINCIPLES

6. For the purposes of the within Complaint, Porter does not dispute:

(a) Mr. Lukács's submissions as to the balancing test applicable to the determination of the reasonableness of tariff provisions;

(b) that there is no presumption of reasonableness with respect to the provisions of a carrier's tariffs;

(c) Mr. Lukács's submissions as to the test applicable to the determination of the clarity of tariff provisions; and

(d) that the principles of the *Montreal Convention* regarding a carrier's liability for delays in flights are persuasive authority for the purpose of determining the reasonableness of a carrier's tariff provisions.

PART III - RULES 3.4 AND 15: REPROTECTION, REFUNDS AND COMPENSATION FOR SCHEDULE IRREGULARITIES

7. In Porter's Current Tariff, Rules 3.4 and 15 (see Exhibits H and I to the Lukács Complaint) are substantially identical in content. Porter concedes that these Rules require revisions.

8. To that effect, Porter proposes to replace both Rules in their entirety with Proposed Rules 3.4 and 15 as reflected in Appendix A. (As Proposed Rule 3.4 refers to Proposed

Rule 15 rather than duplicating its contents, the discussion below is concerned with the contents of Proposed Rule 15.)

9. Proposed Rule 15 reflects Porter's current practice regarding remedies offered to passengers affected by schedule changes and, it is submitted, reflects the requirements of clarity and reasonableness as set forth in the Agency's jurisprudence. It reads as follows:

(a) If the passenger's journey is interrupted due to overbooking, a flight cancellation or an advancement of a flight's scheduled departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff (each a "Schedule Irregularity"), the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices:

- i. alternative transportation, within a reasonable time and without additional charge, to the passenger's intended destination;
- ii. return transportation to the passenger's point of origin within a reasonable time and without additional charge;
- iii. a refund of the fare and charges paid by the passenger for the unused segments, and for the segments already flown if (a) they no longer serve the purpose for which the passenger undertook such travel, and (b) the Schedule Irregularity was within the control of the Carrier;
- iv. a Credit Shell in the amount described in sub-section (iii) above; and
- v. a monetary payment to the passenger for any amounts to which the passenger may be entitled pursuant to Rule 18 of this Tariff.

(b) In defining the remedy or remedies appropriate in each case arising under Rule 15(b) above, the Carrier:

- i. will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule Irregularity;
- ii. will not limit itself to considering its own services or the services of carriers with which it has interline or code-sharing agreements; and
- iii. will make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger.

(c) The provisions of this Rule are not intended to make the Carrier responsible in all cases for acts of nature or for the acts of third parties that are not deemed servants and/or agents of the Carrier under applicable law or international conventions, and all the rights set forth herein are subject to the following

exception, namely, that the Carrier shall not be liable for damage occasioned by a Schedule Irregularity if the Carrier, and its employees and agents, took all reasonable steps that could reasonably be required to avoid the damage or if it was impossible to take such measures.

- (d) The rights of a passenger against the Carrier in the event of overbooking and cancellation is, in most cases of international carriage, governed by the Montreal Convention. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it took all reasonable measures to avoid the damage or that it was impossible for it to take such measures. There are some exceptional cases of international carriage in which the rights of passengers are not governed by an international convention. In such cases, only a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

A. Clarity of Proposed Rule 15

Inconsistency between Current Rule 15 and Rule 18

10. As noted by Mr. Lukács, Current Rules 3.4 and 15 are inconsistent with Current Rule 18 insofar as they indicate that Porter shall not be liable in connection with schedule changes, howsoever caused, while Rule 18 expressly makes Porter liable for damages resulting from delays consistent with Article 19 of the *Montreal Convention*, and requires Porter to make efforts to give passengers notice of schedule changes.

11. Proposed Rule 15 resolves this inconsistency by removing the exclusionary language in Current Rule 15 and, in Proposed Sub-Rule 15(a)(iv), expressly indicating that passengers affected by Schedule Irregularities may be entitled to reimbursement for damages for delays under Rule 18. As determined by the Agency in *Lukács v. Air Transat*, 248-C-A-2012, *Lukács v. WestJet*, 249-C-A-2012 and *Lukács v. Air Canada*, 250-C-A-2012 (the “2012 Trilogy”), situations of overbooking and cancellation that are within the carrier’s control constitute delays entitling passengers to relief, and such relief may, in certain circumstances, also apply where overbooking and cancellation are within the carrier’s control. By expressly indicating that relief under Rule 18 may be available to passengers affected by Schedule Irregularities, Proposed Rule 15 harmonizes the two Rules.

12. Similarly, Proposed Rule 15 omits the language in Current Rule 3.4 indicating that Porter is not required to give notice of Schedule Irregularities to passengers, consistent

with the requirement in Rule 18 that Porter make efforts to notify passengers in advance of any such changes. (As discussed further below, Proposed Rule 18 also expressly extends the notice and other carrier obligations therein to situations of flight advancement.)

13. Porter submits that its proposed revisions to Rules 3.4 and 15 thus render them consistent with Rule 18, and clear in that regard.

Clarity of Proposed Rule 18 re: Identification and Choice of Remedies

14. Proposed Rule 18 reflects an approach similar to those adopted by Air Transat and WestJet in their corresponding tariff rules concerning remedies for Schedule Irregularities, filed in response to the Agency's decisions in 248-C-A- 2012 and 249-C-A-2012.

15. Consistent with the circumstance-focussed approach endorsed by the Agency in the 2012 Trilogy, Proposed Rule 15 sets out those remedies which are potentially available in cases of Schedule Irregularities – including alternative transport within a reasonable time and at no additional cost, refund, credit and remedies under the principles of Article 19 of the *Montreal Convention* (set forth in Porter's Sub-Rule 18.1).

16. Proposed Rule 15 clearly states that Porter (a) "will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule Irregularity", (b) will not limit its consideration of alternative transportation to its own services, and (c) will "make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger" (Proposed Sub-Rule 18(b)).

17. In this manner, Proposed Rule 15 clearly sets forth the range of potential remedies arising from Scheduling Irregularities, and indicates that Porter will, acting in good faith and in light of all relevant circumstances, offer a remedy or remedies designed to "appropriately mitigate the impact of the Schedule Irregularity", including remedies available under Rule 18. The clarity of Air Transat's similarly structured rule was confirmed by the Agency in 248-C-A-2012:

[28] The Agency agrees with Air Transat's submission that the context must be considered in determining the clarity of the phrase "will consider". As explained by Air Transat, its Proposed Tariff Rules compel the carrier to consider certain

circumstances relating to a delay or cancellation of a flight, with respect to available transportation services and the particular circumstances of the passenger affected by a delay or cancellation. This requirement reflects the circumstance-focused approach which the Agency states in the Show Cause Decision is appropriate. The Proposed Tariff Rules, as noted by Air Transat, clearly establish the alternatives that Air Transat must offer to affected passengers.

[...]

[30] ... the Agency is of the opinion that the Proposed Tariff Rules are unambiguous in that the provisions of Proposed Tariff Rule 21(2), when read together, and proposed Tariff Rule 5.2(e)(i), clearly state that Air Transat, when determining the amount of the cash payment or travel credit to be offered a passenger will consider all circumstances of the case, including expenses which the passenger, acting reasonably, may have incurred. Air Transat states that the amount of compensation will be set with a view to reimbursing the passenger for all such reasonable expenses. It is clear that a circumstance-focussed approach will be applied.

[...]

[41] ... [Air Transat's proposed tariff rules] clearly state that Air Transat will consider the known circumstances of the passenger in determining which options will be appropriate in a particular case. The language chosen by Air Transat is consistent with the circumstance-focussed approach set out in the Show Cause Decision.

[42] The Agency has determined that [Air Transat's proposed tariff rules], as it relates to the circumstances under which each option will be made available to a passenger, would be considered clear within the meaning of paragraph 122(c) of the ATR if it were filed with the Agency.

(emphasis added)

18. Finally, Proposed Rule 18 clearly indicates that it is the passenger who bears “the choice” among the remedies offered, including as between a refund (15(a)(iii)) and a credit (15(a)(iv)).

19. Porter submits that its Proposed Sub-Rules 15(a) and 15(b) are similar to that of Air Transat in all material respects, and thus similarly meets the requirement of clarity.

Clarity of Proposed Sub-Rules 15(c) and 15(d)

20. Proposed Sub-Rules 15(c) and 15(d) are consistent with Rules filed by WestJet (see Rules 70(A) and 70(F), respectively, of Exhibit D to the Lukács Complaint) as a result of the 2012 Trilogy.

21. While the Agency took issue with a similar formulation of the former by WestJet on the basis that it suggested WestJet may never be liable for acts of nature or third parties, it is apparent that a revision to reflect that these provisions “are not intended to make the carrier responsible in all cases for the acts of nature, or for the acts of third parties” addressed this concern to the satisfaction of the Agency.

22. As for Proposed Sub-Rule 15(d), identical provisions appear in the tariffs of both WestJet and Air Transat resulting from the 2012 Trilogy. Porter submits that the provision is clear.

23. Porter thus submits that Proposed Rule 15, including each of its Sub-Rules, thus meets the requirement of clarity.

B. Reasonableness of Proposed Rule 15

24. As stated above, Porter’s Proposed Rule 15 is materially similar in structure and content to the corresponding rules of WestJet and Air Transat filed in response to the 2012 Trilogy, as accepted by the Agency, and is reasonable.

25. More particularly, Proposed Rule 15:

- (a) Does not contain any blanket exclusions of liability;
- (b) Recognizes that passengers affected by Schedule Irregularities are entitled, at their option, to:

- (i) alternative transportation to their destination within a reasonable time at no additional charge; or
- (ii) where the flight is interrupted at a connection point, return to the point of origin and a refund or credit for unused segments or the full ticket in the indicated circumstances; and
- (iii) compensation for resulting damages under Rule 18, which incorporates the principles of Article 19 of the *Montreal Convention* per the Agency's decision in 16-C-A-2013;

(c) confirms that Porter considers all circumstances known to it and will act in good faith in identifying a set of remedies designed to mitigate the impact of the Schedule Irregularity on affected passengers; and

(d) indicates that, in identifying alternative transportation options, Porter will not limit its consideration to transportation on its own services or that of its interline partners.

26. Again, Porter submits that its Proposed Rule 15 is materially similar to those of Air Transat and WestJet resulting from the 2012 Trilogy in the foregoing respects.

[81] The Agency concludes that Air Transat has not taken a restrictive approach to determining how it will compensate a passenger for delay. It is clear from the Proposed Tariff Rules that Air Transat will consider the circumstances of the passenger's situation. Proposed Tariff Rule 21(2)(iii) also states that Air Transat will take all measures that can reasonably be required to avoid or mitigate the damages caused by overbooking or cancellation. The Agency is of the opinion that these provisions reflect the circumstance-focussed approach set out in the Show Cause Decision and would therefore be considered reasonable if filed with the Agency.

Proposed Sub-Rules 15(c) and 15(d)

27. Proposed Sub-Rule 15(c) does not purport to exclude any liability on Porter's part, but rather confirms that the intention of Rule 15 is not to create an absolute liability regime.

That is, as determined by the Agency in the 2012 Trilogy, there may be instances whereby Schedule Irregularities resulting from matters beyond the carrier's control do not necessarily result in the carrier's liability under the principles of Article 19 of the *Montreal Convention*. In 249-C-A-2012, the Agency stated:

[93] Whether a carrier will be held liable under Article 19 of the Convention will depend on whether it or its servants and agents took all measures that could reasonably be required to avoid damage occasioned by delay, or that it was impossible for them to take such measures. Rather than setting out broad exclusions from liability such as acts of nature or of third parties, a case by case approach is warranted which looks, for example, at the predictability of an event in determining whether the carrier is exonerated under Article 19 of the Convention.

[...]

[96] Accordingly, while WestJet may be able to relieve itself from liability for acts of third parties or acts of nature, it is not certain that this will always be the case.

[97] Although it is clear from the submissions of WestJet that Proposed Tariff Rule 15.1 was not drafted to exclude WestJet's responsibility for acts of nature of third parties, the Agency is of the opinion that the proposed provision is not reasonable as it leaves the impression that WestJet is never responsible for such acts.

28. As noted above, the Agency ultimately accepted the filing of this provision upon WestJet clarifying that it was not intended that it be liable for acts of nature or third parties "in all cases", which clarification is reflected in Porter's Proposed Sub-Rule 15(c).

Proposed Sub-Rule 15(d)

29. Also in the 2012 Trilogy, the Agency considered provisions indicating that acceptance by a passenger of an offered remedy would, in certain cases, act as a release by the passenger in favour of the carrier which would in turn extinguish other remedies the passenger may have had under the *Montreal Convention* or otherwise at law. The Agency found such provisions to be unreasonable, and further found that carriers ought to include positive statements advising passengers that other remedies may, in fact, be available. For

example, in its final decision in the WestJet case, 249-C-A-2102, the Agency summarized its finding on this point in its preceding “Show Cause Decision” as follows:

[10] ... Tariff Rule 15.2 is unreasonable as it does not give any indication of which rights and remedies a passenger might have under the applicable provisions of the Convention in the event of overbooking or cancellation and it does not indicate that passengers may have rights and remedies at law outside the Conventions.

30. In the result, WestJet ultimately filed a provision to put passengers on notice of the potential availability of such other remedies. This provision is reproduced as Porter’s Proposed Sub-Rule 15(d).

C. Inclusion of Flight Advancements

31. Porter acknowledges the Agency’s recent finding in *Lukács v. Air Transat*, 327-C-A-2013, that passengers affected by flight advancements are entitled to protection in a manner similar to those affected by other irregularities such as flight delays (at para. 28).

32. For this reason, Porter’s obligation to identify and offer remedies under Proposed Rule 15 extends to passengers affected by flight advancements (among other irregularities), and in particular “an advancement of a flight’s scheduled departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff”. This qualification merely indicates that *de minimis* flight advancements which do not prevent a passenger from flying are excluded, as they do not result in adverse impact on passengers.

33. Porter has also extended the remedies for delay under the *Montreal Convention* to passengers affected by such flight advancements in its Proposed Rule 18, discussed further below.

D. Revisions to Relevant Definitions in Rule 1.1

34. In light of the proposed deletion of the reference in Current Rule 15 to an “Event of Force Majeure”, Porter proposes to delete that definition from Current Rule 1.1.

35. In addition, Porter proposes to supplement the definition of “Credit Shell” – which is referenced in Proposed Rule 15 – to reflect the terms and restrictions on the use thereof.

(It must be noted that the passenger retains the right to choose a refund over a Credit Shell in any event.)

E. Conclusion

36. In light of the foregoing, Porter submits that its Proposed Rule 15 is materially similar in structure and content in all relevant respects to the Rules filed by WestJet and Air Transat in response to the 2012 Trilogy, which were accepted by the Agency. Indeed, Mr. Lukács has acknowledged in his Complaint that the similar tariff rules filed by those respondents “giv[e] effect to” the required rights set out by the Agency in the Trilogy.

37. Porter submits that its Proposed Rule 15 would accordingly be found clear and reasonable if filed with the Agency.

PART IV - RULE 18: DAMAGES RESULTING FROM FLIGHT DELAYS AND ADVANCEMENTS

38. Porter’s Current Rule 18 was filed as a result of the Agency’s decision in *Lukács v. Porter*, 16-C-A-2013, with the Agency’s approval. In response to issues raised in the instant complaint, Porter has made further revisions, reflected in Proposed Rule 18, which:

(a) Extends the rights set forth therein, including concerning advance notice, to passengers affected by flight advancements (Proposed Sub-Rules 18(c) and 18.1); and

(b) Confirms Porter’s practices concerning on-board flight delays, consistent with the voluntary *Code of Conduct of Canada’s Airlines*.

A. Rights and Remedies Available to Passengers Affected by Flight Advancements

39. As indicated above, Proposed Rule 18.1 entitles passengers affected by Flight Advancements to resulting damages to the same extent as such are available to passengers affected by delays pursuant to Article 19 of the *Montreal Convention*. It is submitted that, taken together with the remedies available to such passengers under Proposed Rule 15, the Tariff would provide clear and reasonable recourse for such passengers which accord with the requirements set forth by the Agency.

40. Concerning Porter's obligation to provide prior notice of flight advancements, Porter has proposed to make "best efforts" to inform passengers of flight advancements in Proposed Rule 18(c). While Porter notes Mr. Lukács's position that Porter should be required to "undertake" to inform passengers of flight advancements, the fact is that Porter is not in a position to guarantee that notice will reach the passenger despite any efforts it may take. Indeed, as concerns Porter, it is submitted that it would be required to take the same steps on a "best efforts" basis as pursuant to an "undertaking"; the distinction being, however, one of result: As Porter cannot guarantee the passenger will receive the message, it cannot "undertake" to ensure that the passenger is informed.

41. Alternatively, should the Agency determine that this distinction is of no moment, Porter is prepared to revise Proposed Rule 18(c) to reflect an undertaking obligation.

B. The Voluntary *Code of Conduct* and Meal, Hotel and Transportation Vouchers

42. Despite Mr. Lukács's acknowledgement that the *Code of Conduct of Canada's Airlines* is "voluntary", he asks that the Agency direct Porter to incorporate its provisions in full in its Tariff. Porter submits that there is nothing in the *Air Transport Regulations* requiring it to do so, and that any failure to prescribe a right to such vouchers in no way limits the rights of passengers in a manner inconsistent with the *Montreal Convention*.

43. Current Sub-Rule 18.1 already indicates that Porter "may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or a Flight Advancement", and in fact Porter distributes such vouchers in situations of schedule irregularities on a case-by-case basis. This provision was accepted by the Agency as part of Porter's response to the complaint underlying 16-C-A-2013, which specifically engaged the entitlements of passengers under the ATR and *Montreal Convention*.

44. As noted by the Agency in 252-C-A-2012: "While subparagraph 107(1)(n) of the ATR requires the carrier to clearly state its policy in respect of a number of matters, it does not specifically require the carrier to stipulate the value of a meal voucher in its tariff." In fact, there is no requirement that carriers distribute such vouchers at all.

45. While it is open to carriers to offer vouchers in appropriate circumstances (as Porter does), they are not required to do so under the ATR or the *Montreal Convention*. While

taking such steps may exonerate a carrier from liability for costs caused by delays – including meals, hotels and ground transport – the taking of such steps is a defence to liability rather than a positive obligation. In other words, while the provision of, for example, a meal voucher may militate against the carrier being compelled to compensate a passenger for a meal under Article 19, the failure to do so in no way limits the right of the passenger as against the carrier.

46. The particulars of a carrier's policies concerning distribution of vouchers is not engaged explicitly or implicitly by the ATR or the *Convention*, and Porter respectfully submits that the Agency accordingly lacks jurisdiction to prescribe such requirements. In any event, Porter observes that its practice of distributing vouchers on a case-by-case basis is reflected in Rule 18.1 (both Current and Proposed), and is not unreasonable.

Conclusion

47. In Porter's submission, the explicit extension of the remedies under Proposed Rule 18, together with the availability of remedies under Proposed Rule 15, satisfies the Agency's prescribed requirements as to relief that must be made available in the case of flight advancements. In light of the Agency's recent acceptance of the balance of Rule 18 as reasonable, Porter asks that the clarity and reasonableness of Proposed Rule 18 be similarly endorsed.

PART V - RULE 20: DENIED BOARDING COMPENSATION

48. Until recently, Porter has not engaged in the practice of overbooking its flights. The inclusion in its Tariff of provisions setting out a regime of denied boarding compensation on U.S.-originating flights has been included at the insistence of the United States Department of Transportation, and reflect the requirements of DOT Rule 250.

49. However, by the time a decision is rendered in these proceedings, Porter will have begun overbooking flights on routes originating in Canada, and Proposed Rule 20 reflects the policies Porter has developed concerning compensation payable to passengers who are involuntarily denied reservations due to an oversold flight. It reads as follows:

General

If a passenger has been involuntarily denied a reserved seat in case of an oversold flight on Porter Airlines, the Carrier will provide the passenger with:

- (a) a remedy or remedies in accordance with Rule 15 above; and
- (b) denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or,
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

Compensation for Involuntary Denied Boarding

If you are denied boarding involuntarily on a flight, you are entitled to a payment of "denied boarding compensation" from Carrier unless:

- you have not fully complied with the Carrier's ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the Carrier's usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons, and the events prompting such substitution were beyond the Carrier's control and the Carrier took all reasonable measures to avoid the substitution or it was impossible for the Carrier to take such measures; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or

- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers with a reserved seat on Porter Airlines who are denied boarding involuntarily from an oversold flight are entitled to:

- (a) No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
- (b) No less than 200% of the fare to the passenger's destination or first stopover, with a maximum of \$650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and
- (c) No less than 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay	No compensation.
1 to 4 hour arrival delay	At least 200% of one-way fare (but no more than \$650 USD).
Over 4 hours arrival delay	At least 400% of one-way fare (but no more than \$1,300 USD).

For the purpose of calculating compensation under this Rule 20, the “fare” is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger’s destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger’s convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment, provided:

- (a) the value of such voucher(s) is no less than 300% of the value of the cash compensation to which the passenger would otherwise have been entitled;
- (b) the Carrier has disclosed to the passenger all material restrictions applicable to the use of such vouchers;
- (c) the passenger agrees in writing to accept vouchers in lieu of cash or cheque payment; and
- (d) The passenger may in any event refuse to accept such vouchers and insist on the cash/cheque payment, including that any passenger who accepts vouchers in lieu of cash or cheque payment at the time of involuntary denied boarding may, within 30 days, elect to exchange such vouchers for the cash or cheque payment she would have been entitled to receive had the passenger not accepted vouchers, provided that the vouchers have not been redeemed by the passenger in whole or in part.

50. In developing its denied boarding compensation policies, Porter has had regard to the Agency's recent decisions including in *Lukács v. Air Canada*, 204-C-A-2013, *Lukács v. WestJet*, 227-C-A-2013 and *Anderson v. Air Canada*, 666-C-A-2013, and has incorporated the requirements set out therein in its Proposed Rule 20, which:

- (a) Does not purport to exclude any other remedies that may be available to passengers by reason of their acceptance of denied boarding compensation (including under Rules 15 and 18);
- (b) Provides for compensation amounts consistent with the U.S. regime, which the Agency has found to be reasonable;
- (c) Entitles passengers to the same compensation amounts irrespective of whether their flight originates in the U.S. or Canada (in all cases based on length of delay);
- (d) Allows for the offer of travel vouchers in lieu of cash compensation at a ratio of \$3:\$1, subject always to the passenger's acceptance in writing of vouchers instead, and subject to Porter disclosing all material restrictions on vouchers;
- (e) Allows any passenger accepting vouchers to reverse his or her decision within 30 days; and

(f) Qualifies the exemption for substitution of lower-capacity equipment with the proviso that the carrier must have taken all reasonable steps to avoid such substitution.

A. Reprotection of Passengers Involuntarily Denied Boarding

51. To the extent that Mr. Lukács has raised concerns regarding reprotection of passengers affected by overbooking, such passengers are now expressly entitled to such remedies under Proposed Rule 15, including that they are entitled to choose among reprotection and refund, and Porter is not limited to offering alternative service on its own flights or the “same or lower booking code” on another carrier’s flights.

52. Porter repeats and relies on its submissions above concerning the clarity and reasonableness of those provisions as they apply to passengers affected by overbooking.

B. Denied Boarding Compensation is Available on All Flights

53. While Current Rule 20 provides distinct remedies depending on whether a flight departs from the U.S. or Canada (the only two countries serviced by Porter), Proposed Rule 20 removes this distinction, applying the same rules on all flights under the Tariff.

C. Amount of Denied Boarding Compensation

54. Porter proposes to implement the same ‘grid’ of compensation amounts, depending on length of the delay in the passenger’s arrival at his or her destination, as currently applies to its U.S.-originating flights.

55. In 204-C-A-2013 at para. 74, the Agency found that the U.S. compensation regime and an alternative regime proposed by Mr. Lukács were both reasonable options. Porter has thus elected to implement the U.S. DOT regime to all of its international flights including those originating in Canada. Porter believes the adoption of a single compensation regime will be less confusing to passengers – who will not have to refer to two formulas depending on which direction they are flying – and the implementation of a single, uniform regime across all of its stations will ensure consistency and facility of implementation for its own personnel.

56. It will be noted that Porter has modified the U.S. regime slightly to provide for compensation of “at least” the amount prescribed by the DOT, up to the stipulated maximums. While this will not prejudice passengers, it will allow Porter some flexibility during the rollout of its broader denied boarding compensation program as overbooking is tested on more routes, whereby it may simply offer the maximum amount to passengers during initial rollout until it can confidently implement a compensation regime based on actual fares paid by each individual passenger. In no event, however, will Porter pay any passenger less than the minimum amount prescribed in Proposed Rule 20, which amounts the Agency has found to be reasonable.

D. Form of Compensation

57. Current Rule 20 is already clear that the choice between cash or voucher lies solely with the passenger, and this discretion on the passenger’s part is maintained with the broadening of the denied compensation regime to Canada-originating flights.

58. Further, consistent with the Agency’s ruling in 342-C-A-2013, Porter may only tender vouchers in lieu of cash:

- (a) At a value ratio of 3:1; i.e. vouchers offered must be redeemable at three times the value of cash compensation the passenger would otherwise be entitled to;
- (b) Upon disclosing to the passenger all material restrictions applicable to the vouchers;
- (c) If the passenger agrees in writing to accept the vouchers in lieu of cash.

59. Finally, in recognition that passengers accepting vouchers will be making decisions affecting their legal rights in a relatively short time frame, passengers are permitted to reverse their decisions and exchange their vouchers for cash within 30 days of the denied boarding incident, in accordance with the Agency’s finding at para. 49 of 342-C-A-2013.

60. To the extent that Mr. Lukács has advanced subjective assertions regarding the “disadvantages” of vouchers as compared to cash, these statements unsupported by evidence and are entitled to little weight if any, besides which they are irrelevant in light of (a) the disclosure to passengers of all restrictions on their use, (b) the 300% ratio of the

voucher's value, found to be reasonable by the Agency; and (c) the passengers' ability to reverse their decisions within 30 days.

E. Substitution of Smaller Aircraft

61. Porter has taken note of the Agency's ruling at para. 44 of 204-C-A-2012, narrowing the DOT exemption from liability for denied boarding resulting from the substitution of a smaller aircraft to circumstances in which the carrier has taken all reasonable steps to avoid such downgrade or could not take such steps.

62. It should be noted that the inclusion of this exemption is academic in the case of Porter, which operates a single-aircraft fleet.

F. No Release or Exclusion of Other Remedies

63. Finally, Porter has removed the provisions of Current Rule 20 which suggested that passengers, by accepting denied boarding compensation, were precluded from pursuing any other remedies as a result of the overbooking incident.

G. Conclusion

64. In light of the foregoing, Porter submits that Proposed Rule 20 incorporates all relevant requirements of the Agency's jurisprudence concerning denied boarding compensation, and is clear and reasonable.

PART VI - CONCLUSION

65. In summary, Porter respectfully submits that its Proposed Rules collectively remedy any deficiencies as to clarity and reasonableness appearing in its Current Rules 3.4, 15, 18 and 20 and otherwise sufficiently address all concerns raised in Mr. Lukács's complaint.

66. Porter asks that the Agency confirm the reasonableness of the Proposed Rules 16 or, alternatively, that it provide directions as to further revisions which may be required prior to its formal filing with the Agency or request that Porter show cause with respect to any preliminary determinations on which the Agency requires additional submissions.

All of which is respectfully submitted,

Greg Sheahan
Porter Airlines Inc.