
DECISION NO. 249-C-A-2013

June 26, 2013

**COMPLAINT by Gábor Lukács against Sunwing Airlines Inc.
concerning the carrier's domestic baggage liability policy.**

File No. M4120-3/13-01289

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) on February 28, 2013, alleging that the following provisions in the Domestic Tariff (Tariff) for Sunwing Airlines Inc. (Sunwing) are unreasonable within the meaning of subsection 67.2(1) of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended (CTA):

1. Rule 10a), setting out the limit of liability applied by Sunwing for loss of or damage to baggage at \$250 per passenger; and
2. Rule 10b)(iv), setting out Sunwing's limit of liability for delayed baggage at \$25 a day per bag or up to a maximum of \$75.

[2] Sunwing filed its answer on April 3, 2013, and Mr. Lukács submitted his reply on April 10, 2013. In its answer, Sunwing solely proposed certain revised Tariff provisions.

ISSUES

[3] With respect to the Existing Tariff Rules:

- 1) Is Existing Tariff Rule 10a) unreasonable within the meaning of subsection 67.2(1) of the CTA? and
- 2) Is Existing Tariff Rule 10b)(iv) unreasonable within the meaning of subsection 67.2(1) of the CTA?

[4] With respect to the Proposed Tariff Rules:

- 1) Is Proposed Tariff Rule 10a) unreasonable within the meaning of subsection 67.2(1) of the CTA? and
- 2) Is Proposed Tariff Rule 10b)(iv) unreasonable within the meaning of subsection 67.2(1) of the CTA?

RELEVANT STATUTES AND TARIFF EXTRACTS

- [5] The existing and proposed tariff provisions and the CTA provision relevant to this matter are set out in the Appendix.

REASONABLENESS

- [6] 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. 204-C-A-2013 (*Lukács v. Air Canada*).
- [7] The terms and conditions of carriage are set out by an air carrier unilaterally without input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which are primarily based on commercial requirements.
- [8] 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.

EXISTING TARIFF RULES

Issue 1: Is Existing Tariff Rule 10a) unreasonable within the meaning of subsection 67.2(1) of the CTA?

- [9] Mr. Lukács states that Article 22(2) of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention) provides a monetary limit for the carrier’s liability in case of destruction, loss, damage or delay of baggage. He notes that the limit was established at 1,000 Special Drawing Rights (SDR) at the time the Convention was drafted, and that it was increased in 2009 to 1,131 SDR. Mr. Lukacs indicates that in Decision No. 483-C-A-2010 (*Lukács v. WestJet*), the Agency used the Convention as a persuasive authority for determining the reasonableness of WestJet’s domestic tariff provisions. Mr. Lukács submits that Sunwing’s existing limit of liability should be disallowed and substituted with a liability limit equivalent to that set out in the Convention.
- [10] Mr. Lukács maintains that Sunwing’s liability limit of \$250 is substantially below both international and Canadian standards. He submits that the existing liability limit fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions and Sunwing’s statutory, commercial and operational obligations.

[11] Mr. Lukács refers to Decision No. 313-C-A-2010 (*Lukács v. WestJet*) in which the Agency held that WestJet's original baggage liability limit of \$250 was unreasonable and ordered WestJet in Decision No. 483-C-A-2010 to increase its domestic liability limit to 1,131 SDR.

[12] Mr. Lukács submits that Sunwing will not suffer any commercial or competitive disadvantage by raising its liability limit, as Air Canada, Porter Airlines Inc. (Porter) and WestJet all apply a significantly higher baggage liability limit, and that Sunwing's liability limit ought to be equivalent to that set out in the Convention.

Analysis and findings

[13] Mr. Lukács submits that Sunwing's existing limit of liability compares unfavourably to certain other carriers, and that Sunwing will not suffer any commercial or competitive disadvantage should Sunwing increase its limit of liability to levels similar to those carriers, which levels reflect the limit established by the Convention. Sunwing did not specifically answer Mr. Lukács' submission.

[14] With respect to applying the principles of the Convention to domestic tariff provisions, the Agency stated in Decision No. LET-C-A-129-2011 (*Lukács v. Air Canada*) that:

[...] it is clear that the Agency is, and has been, of the view that the Convention is a useful interpretive tool to which the Agency may refer when applying its "reasonableness" test and striking the balance between passengers' rights and the statutory, commercial and operational obligations of a carrier. In doing so the Agency takes into account the principles of the Convention rather than applying the Convention itself.

The Agency is of the view that passengers should expect and be entitled to consistency in treatment irrespective of whether they are on a domestic or international flight. To that end, the principles set out in the Convention provide insight into what is reasonable to apply in a domestic context.

[15] The Agency finds Mr. Lukács' submission, in particular, that the Convention establishes a limit of liability of 1,131 SDR, which is equivalent to approximately \$1,750, to be compelling. Also, the Agency determined in Decision No. 313-C-A-2010, that a limit of \$250 for a carrier's liability was unreasonable. The Agency agrees with Mr. Lukács' submission that Sunwing's existing limit of liability fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions and Sunwing's statutory, commercial and operational obligations. Accordingly, the Agency finds that Existing Tariff Rule 10a) is unreasonable within the meaning of subsection 67.2(1) of the CTA.

Issue 2: Is Existing Tariff Rule 10b)(iv) unreasonable within the meaning of subsection 67.2(1) of the CTA?

- [16] Mr. Lukács asserts that Sunwing’s existing limit of liability is no more than a token that has the purpose of relieving Sunwing from almost any liability for delay of checked baggage. He submits that relieving carriers from liability for delay of checked baggage is inconsistent with the legal principles of the Convention and, as such, is unreasonable. As passengers can reasonably expect Sunwing to deliver their baggage to them at the time of their arrival at a destination, Mr. Lukács submits it is unreasonable for Sunwing to limit its liability for delay of baggage to \$25 per day, to a maximum of \$75, as it deprives passengers of compensation for reasonable expenses incurred as a result of the delay.
- [17] In regards to the liability limit of \$75, Mr. Lukács cites Decision No. 483-C-A-2010 in which \$1,000 was not determined to be a reasonable limit of baggage liability. In regards to the liability limit of \$25 per day, Mr. Lukács refers to Decision No. 107-C-A-2007 (*Dandoy v. Corsair*) in which the Agency rejected a Corsair policy that limited liability in the case of delay to EUR24 per day to a maximum of seven days, and noted that “[...] the Convention does not set out a maximum of EUR24 per day per late baggage or a restriction requiring a passenger to purchase only “essential” items.”
- [18] Mr. Lukács also refers to Decision No. 16-C-A-2013 (*Lukács v. Porter*) in which the Agency held that a tariff provision limiting Porter’s liability for delay of baggage to \$25 per day was unreasonable.
- [19] Mr. Lukács asserts that often passengers incur the greatest expenses in the first 24-48 hours of the delay. He submits that in Decision No. 353-C-A-2012 (*Shetty v. Air Canada*) the Agency found Ms. Shetty was entitled to compensation in the amount of \$800.52 in relation to a 14-hour delay of baggage in domestic carriage.
- [20] Mr. Lukács concludes that Existing Tariff Rule 10b)(iv) is unreasonable because it fails to strike the balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and Sunwing’s statutory, commercial and operational obligations.

Analysis and findings

- [21] Mr. Lukács submits that Sunwing’s existing limit of liability deprives passengers from being compensated for reasonable expenses arising from a delay in the delivery of baggage, and identified several Agency decisions where the Agency addressed the matter of similar limits applied by other carriers. Sunwing did not specifically answer that submission.

- [22] The Agency finds Mr. Lukács' submission to be compelling. In particular, the Agency agrees that \$25 per day, up to a maximum of \$75, is inconsistent with the principles of the Convention. As indicated in Decision No. 107-C-A-2007 (*Dandoy v. Corsair*), the wording of the Convention provides that the liability of a carrier is limited to 1,000 SDR (now 1,131 SDR) and establishes no other limits. Sunwing's existing limit of liability fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions and Sunwing's statutory, commercial and operational obligations. Accordingly, the Agency finds that Existing Tariff Rule 10b)(iv) is unreasonable within the meaning of subsection 67.2(1) of the CTA.

PROPOSED TARIFF RULES

Issue 1: Is Proposed Tariff Rule 10a) unreasonable within the meaning of subsection 67.2(1) of the CTA?

- [23] In its answer to the complaint, Sunwing proposes a revised Tariff Rule 10a), featuring an increase in Sunwing's limit of liability to 1,131 SDR for the loss of or damage to baggage.
- [24] Mr. Lukács "[...] acknowledges that Sunwing Airlines' intention to increase its domestic baggage liability from \$250 to \$1,750 as being a very positive change."

Analysis and findings

- [25] The Agency notes that Sunwing's Proposed Tariff Rule 10a) would make Sunwing's baggage liability limit consistent with what is required under the Convention. The Agency therefore finds that the Proposed Tariff Rule would strike a balance between the rights of passengers to be subject to reasonable terms and conditions and Sunwing's statutory, commercial and operational obligations. As such, the Agency finds that Sunwing's Proposed Tariff Rule 10a) would be found to be reasonable, if it were to be filed with the Agency.

Issue 2: Is Proposed Tariff Rule 10b)(iv) unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions

- [26] Sunwing's Proposed Tariff Rule 10b)(iv), among other things, eliminates the limit of liability for delayed baggage, but now includes a 24-hour time period limit following the purchase of the replacement items.
- [27] Mr. Lukács submits that Proposed Tariff Rule 10b)(iv) remains unreasonable because the compensation in relation to the delay of baggage focuses only on the activity of passengers in the 24 hours following the purchase for replacement items. He submits that the restriction ought to be disallowed.

- [28] Mr. Lukács contends that it is impractical for passengers to go back to stores on a daily basis and each time purchase more clothing for the next 24-hour period, or otherwise run the risk of not being reimbursed for their purchases. He submits that this requirement would have a devastating effect on passengers who travel for hiking and who could not purchase replacement items relevant to their activities beyond the next 24 hours and perhaps the entire trip. Mr. Lukács asserts that the proposed provision is unreasonable and would aggravate the stress and inconvenience suffered by passengers and would have the effect of depriving passengers of being adequately compensated for the reasonable expenses they incur in relation to the delay of their baggage.
- [29] In addition, Mr. Lukács argues that there is no provision in the Convention that allows a carrier to limit liability to purchases of replacement items that relate only to the intended activities of the passenger in the next 24 hours.

Analysis and findings

- [30] Mr. Lukács submits that Proposed Tariff Rule 10b)(iv) remains unreasonable because of the inclusion of a provision that relates the purchase of necessary items to the intended activities of the passenger during the 24-hour period following the purchase of the replacement items. He pointed out that such a provision does not appear in the Convention.
- [31] The Agency agrees with Mr. Lukács' submission. In particular, the Agency agrees that the Proposed Tariff Rule contains a blanket exclusion of liability and limits the ability of the passenger to recover expenses incurred as a result of the delay of their baggage. Also, such a provision does not appear in the Convention. The Agency therefore finds that Proposed Tariff Rule 10b)(iv) fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions and Sunwing's statutory, commercial and operational obligations. As such, the Agency finds that Sunwing's Proposed Tariff Rule 10b)(iv) would be found to be unreasonable, if it were to be filed with the Agency.

CONCLUSION

- [32] In light of the foregoing, the Agency concludes the following:

Existing Tariff Rules:

1. With respect to the reasonableness of Existing Tariff Rule 10a)

- [33] The Agency has determined that Existing Tariff Rule 10a) is unreasonable within the meaning of subsection 67.2(1) of the CTA.

2. With respect to the reasonableness of Existing Tariff Rule 10b)(iv)

- [34] The Agency has determined that Existing Tariff Rule 10b)(iv) is unreasonable within the meaning of subsection 67.2(1) of the CTA.

Proposed Tariff Rules

1. With respect to Proposed Tariff Rule 10a)

[35] The Agency has determined that if Proposed Tariff Rule 10a) were to be filed with the Agency, that Rule would be determined to be reasonable within the meaning of subsection 67.2(1) of the CTA.

2. With respect to Proposed Tariff Rule 10b)(iv)

[36] The Agency has determined that if Proposed Tariff Rule 10b)(iv) were to be filed with the Agency, that Rule would be determined to be unreasonable within the meaning of subsection 67.2(1) of the CTA.

ORDER

[37] The Agency, pursuant to subsection 67.2(1) of the CTA, disallows Sunwing's Existing Tariff Rules 10a) and 10b)(iv).

[38] The Agency orders Sunwing, by no later than July 29, 2013, to file Proposed Tariff Rule 10a) and to revise Existing Tariff or Proposed Rule 10b)(iv) to conform to the findings set out in this Decision.

[39] Pursuant to paragraph 28(1)(b) of the CTA, this Order shall come into force when Sunwing complies with the above, but no later than July 29, 2013.

(signed)

J. Mark MacKeigan
Member

(signed)

Sam Barone
Member