



September 29, 2014

File No. M 4120-3/14-02973

BY E-MAIL:
lmackenzie@westjet.com

BY E-MAIL:
lukacs@AirPassengerRights.ca

WestJet

Gábor Lukács

Attention: Lorne Mackenzie, Director
Government & Regulatory Affairs

Dear Sirs:

Re: Complaint concerning WestJet's policies and practices relating to baggage claims

On June 3, 2014, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that WestJet has been systematically refusing to process and settle baggage-related claims in cases where WestJet is the first carrier in successive carriage, and instead, has insisted that passengers communicate with the last carrier, citing IATA Resolution 780 to support its position. Mr. Lukács contends that WestJet's policies and practices in this regard are not set out in WestJet's international tariff, and are inconsistent with the Montreal Convention, and are therefore unreasonable.

On July 11, 2014, WestJet filed its answer. Mr. Lukács, on July 18, 2014, among other matters, directed questions to WestJet pursuant to sections 19 and 20 of the *Canadian Transportation Agency General Rules* (General Rules), and filed a Notice to Produce Documents (directed to WestJet) pursuant to section 16 of the General Rules. On July 21, 2014, the Agency opened pleadings respecting, among other matters, the questions posed and the Notice to Produce Documents filed by Mr. Lukács. On August 11, 2014, WestJet filed its response to Mr. Lukács' submission dated July 18, 2014. On August 17, 2014, Mr. Lukács expressed dissatisfaction with WestJet's response, and requested the Agency to compel WestJet to fully respond to his questions and to produce the documents requested. WestJet, on August 28, 2014, responded to Mr. Lukács' submission dated August 17, 2014. On September 1, 2014, Mr. Lukács again requested the Agency to order WestJet to provide full responses to his questions and to provide the documents requested.

ISSUES

1. Should the Agency, pursuant to subsection 20(3) of the General Rules, compel WestJet to fully respond to Mr. Lukács' Questions Q1 and Q2, and, pursuant to subsection 16(2) of the General Rules, to produce the documents requested under Question Q3 regarding the payment allegedly tendered by British Airways Plc carrying on business as British Airways (British Airways) to him?

2. Should the Agency, pursuant to subsection 16(2) of the General Rules, compel WestJet to produce the documents requested by Mr. Lukács under Questions Q4 and Q7, and to fully respond to Mr. Lukács' Questions Q5 and Q6, regarding the alleged systematic refusal by WestJet to process and settle baggage claims?
3. Should the Agency, pursuant to subsection 20(3) of the General Rules, compel WestJet to fully respond to Mr. Lukács' Questions Q8 to Q11, relating to WestJet's claim that it will not rely on IATA Resolution 780?

As provided for in the General Rules, a party to a proceeding may direct questions to any other party if the party files with the Agency, and serves on the other party, a copy of the questions along with the reasons for them and their relevance to the proceeding. A party to whom questions have been directed may then provide answers or make arguments as to relevancy, confidentiality or availability of the information requested. After that, the party who directed the questions may ask the Agency, if that party is not satisfied with the answers provided, to order that the questions be answered in full. The Agency may order that the questions be answered in full or in part, or not at all. Similarly, a party may give notice to another party to produce a document that relates to any matter in dispute that is in the possession or control of the other party. If the party fails to produce the document, the Agency may order the production of the document, or permit the party who gave the notice to submit secondary evidence of the contents of the document.

ISSUE 1: SHOULD THE AGENCY, PURSUANT TO SUBSECTION 20(3) OF THE GENERAL RULES, COMPEL WESTJET TO FULLY RESPOND TO MR. LUKÁCS' QUESTIONS Q1 AND Q2, AND, PURSUANT TO SUBSECTION 16(2) OF THE GENERAL RULES, TO PRODUCE THE DOCUMENTS REQUESTED UNDER QUESTION Q3 REGARDING THE PAYMENT ALLEGEDLY TENDERED BY BRITISH AIRWAYS TO HIM?

Submissions

Mr. Lukács maintains that he did not receive any payment from British Airways, and disputes any contention by WestJet that he did so. He states that WestJet's failure to settle his claim demonstrates that WestJet's past and current policies and practices result in non-payment of claims.

In response, WestJet provided details respecting the cheque issued to Mr. Lukács by British Airways, and advises that British Airways confirmed to WestJet that payment had been made to Mr. Lukács. WestJet states that it has received no records, such as account statements, transaction confirmations, from British Airways as these are confidential records between British Airways and the recipient of the funds.

Mr. Lukács argues that WestJet's answer to the question is evasive and fails to answer the thrust of the question, which is aimed at the basis for WestJet's allegation that he received the payment in question. He asserts that he is entitled to know all details of the alleged payment and WestJet's basis for alleging that such a payment was received by him. Mr. Lukács maintains that if WestJet received evidence of the payment, then WestJet must produce it to provide him with a fair opportunity to respond to it.

Mr. Lukács states that there is no doubt that WestJet is entitled to receive from British Airways all records that can confirm that the alleged payment has indeed been made, because WestJet and British Airways are jointly and severally liable for making the payment. He argues that it is important to note that WestJet has made no effort to obtain the documents, and has provided no evidence of British Airways' refusal to provide them.

Mr. Lukács contends that WestJet's arguments based on confidentiality are meritless as the alleged recipient of the funds is requesting the disclosure of the information.

Mr. Lukács therefore requests the Agency to order WestJet to produce the records in question, with a particular emphasis on any records that the cheque allegedly sent by British Airways to him was allegedly cashed. He states that information concerning when and where the alleged cheque was allegedly cashed is essential to determining whether such payment was indeed received, and is essential to allow him a fair opportunity to refute such allegations.

WestJet advises that it can confirm that British Airways issued a cheque to Mr. Lukács, and that it was mailed to the address on file, presumably the address provided by him. WestJet states that British Airways has indicated that it does not as a matter of process follow up with each claim to ensure payment was received, thus British Airways is unable to provide WestJet any documentation confirming receipt of payment. WestJet notes that it has asked British Airways to re-issue and re-send the cheque to Mr. Lukács due to his implied position that he has not received the cheque, and to follow up directly with him to ensure the address information is correct.

Mr. Lukács argues that his questions and the documents requested are relevant to the complaint because they speak to WestJet's credibility, and demonstrate the nature of the problem that WestJet's conduct creates for the travelling public: passengers incurring expenses in relation to delay of their baggage and not being compensated for many months.

Mr. Lukács asserts that the question is quite simple: if WestJet is correct that he was paid by a cheque, then British Airways must have a copy of the endorsed cheque, and must be able to provide evidence as to when and where the cheque was cashed. He maintains that if WestJet and/or British Airways are unable to produce such evidence, then clearly no such payment occurred.

Analysis and findings

In Decision No. LET-C-A-154-2012 dated October 24, 2012 (*Lukács vs Air Canada*), the Agency established the test to use when making a determination on the relevancy of evidence. The Agency noted that in order to make a determination on the relevancy of evidence, the Agency must:

1. examine the nature of what is claimed; and then
2. look at whether the question to be answered or the evidence that is to be produced/disclosed shows, or at least tends to show, or increases or diminishes the probability of the existence of the fact related to what is claimed.

if the answer to the second question is positive, the question/evidence is relevant. At this point, the Agency retains discretion to decide to disallow a relevant question/document where responding to it would place undue hardship on the answering party, where there is any other alternative information, or where the question forms part of a “fishing expedition.”

Questions – Payment allegedly tendered by British Airways

WestJet alleges that British Airways settled the claim for the applicant’s delayed baggage and paid him CAD25.70 on May 9, 2014, three days after the irregularity report was filed.

Q1. What method was used for making the aforementioned alleged payment (wire, money order, Interac, cheque, etc.)?

Q2. What method was used to confirm that the alleged payment has been received by the Applicant?

Q3. Please produce all records (such as, but not limited to, account statements, transaction confirmations, etc.) regarding the making of the alleged payment.

The Agency will now address the relevancy of the questions posed by Mr. Lukács in the Agency’s consideration of the present matter on the basis of whether those questions show or at least tend to show, or increase or diminish the probability that WestJet’s practices respecting baggage are inconsistent with the Montreal Convention, and are therefore unreasonable.

Mr. Lukács' complaint alleges that certain WestJet policies and practices relating to claims for delay, damage and loss of baggage are unreasonable for being inconsistent with Article 36(3) of the Montreal Convention. Questions Q1- Q3 and the submissions relating thereto pertain more to whether Mr. Lukács received compensation for his delayed baggage. As such, the Agency is of the opinion that, with reference to the Agency's test for relevancy, the questions being posed and the evidence being sought by Mr. Lukács fail to show or at least tend to show, or increase or diminish the probability that WestJet's practices respecting baggage are inconsistent with Article 36(3) of the Montreal Convention, and are therefore unreasonable. The Agency therefore finds that Questions Q1 to Q3 are not relevant, and are therefore disallowed.

ISSUE 2: SHOULD THE AGENCY, PURSUANT TO SUBSECTION 16(2) OF THE GENERAL RULES, COMPEL WESTJET TO PRODUCE THE DOCUMENTS REQUESTED BY MR. LUKÁCS UNDER QUESTIONS Q4 AND Q7, AND TO FULLY RESPOND TO MR. LUKÁCS' QUESTIONS Q5 AND Q6, REGARDING THE ALLEGED SYSTEMATIC REFUSAL BY WESTJET TO PROCESS AND SETTLE BAGGAGE CLAIMS?

Submissions

Mr. Lukács states that WestJet has neither admitted nor denied his allegation that WestJet systematically refuses to process and settle baggage-related claims where WestJet is the first carrier in successive carriage, that WestJet's policy and practice has been to insist that passengers communicate with the last carrier, and that WestJet has referred to IATA Resolution 780 in support of its position. He argues that his questions and requests to produce documents are designed to ascertain the facts pertaining to his allegation.

WestJet does not challenge the fact that it followed the guidance of IATA Resolution 780 and has stated as much in all of WestJet's responses. WestJet advises that it systematically directs passengers to resolve their issue with the last carrier at the passengers' final destination. WestJet reiterates that this is not a refusal to process and settle baggage-related claims, rather it is the most practical and efficient process to resolve these types of issues.

WestJet argues that Questions Q4 through Q7 will naturally confirm what WestJet has already stated, and that providing past records to prove something WestJet does not deny adds little value to the current proceedings. WestJet states that it is not producing other passengers' claims as Mr. Lukács has no standing to represent other passengers.

Mr. Lukács maintains that WestJet's argument concerning relevance is based on a misstatement of the issue and the disputed matters. He argues that the issue is not which pretext WestJet cited to refuse to process and settle baggage-related claims, but rather the systematic refusal itself. Mr. Lukács maintains that WestJet has shifted its position in its August 11, 2014 submissions by stating that: "WestJet reiterates that it is not a refusal to process and settle baggage-related claims rather it is the most practical and efficient process to resolve these types of issues." He therefore contends that there is a very real and substantial dispute between the parties about how WestJet responds to certain types of baggage-related claims: he contends that WestJet refuses to process them, while WestJet denies that it refuses to process them. Mr. Lukács states that the only

method for deciding this dispute is by reviewing WestJet's internal policies, manuals, guidelines or other internal documents governing such baggage-related claims (Question Q4), and communications between WestJet and passengers related to those claims (Question Q7).

With respect to the matter of standing, Mr. Lukács argues that WestJet's argument appears to be a collateral attack to challenge his standing to bring the present complaint, which is improper. He states that the purpose of policy-based complaints to the Agency is not merely to provide a remedy for the individual complainant, but rather to seek corrective measures for the benefit of the travelling public at large. Mr. Lukács notes that he is alleging a systemic behaviour of WestJet that affects not only him individually, but also the travelling public at large, and he is seeking corrective measures as a remedy. He advises that as WestJet disputes the alleged systemic behaviour, he is seeking production of documents capable of determining the dispute, and that production of communications between WestJet and passengers does not require standing to represent other passengers.

WestJet argues that, contrary to Mr. Lukács' assertions, it agrees to settle proven claims when a demand is made and then works with other carriers to have the claims paid in an efficient manner that minimizes any potential delay due to disputes between successive carriers over ultimate liability. WestJet states that British Airways' attempts and WestJet's assistance to ensure that Mr. Lukács was paid in the present case demonstrates a willingness to settle compensable claims.

WestJet maintains that Mr. Lukács' assertion that WestJet has a systemic policy to refuse claims is inconsistent with his assertion that the basis for this policy is WestJet's improper reliance on IATA Resolution 780 to do so. WestJet states that the policy itself expressly addresses the industry norm for settlement of claims among successive carriers, and that it is the propriety of WestJet's reliance on IATA Resolution 780, and how any such reliance is communicated to the travelling public that has been raised in the present complaint. WestJet notes that any issue over communication with the travelling public has been resolved by WestJet's removal of a reference to IATA Resolution 780 in WestJet's correspondence with the travelling public regarding claims involving successive carriage.

WestJet maintains that, in light of the foregoing, Mr. Lukács' request for broad ranging production of personal information and documents related to claims made by other passengers is irrelevant and disproportionate. WestJet contends that such information will ultimately be of little or no assistance in determining the propriety of reliance on IATA Resolution 780 to settle claims where there are successive carriers. WestJet states that Mr. Lukács ostensibly seeks such production to prove an alleged policy, yet no such production is required to establish the existence of IATA Resolution 780.

WestJet argues that there are also significant policy concerns related to disclosures to the applicant of personal information belonging to third parties, with specific reference to the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

WestJet disagrees with Mr. Lukács' apparent position that the only method for deciding the dispute over whether WestJet refuses to process claims is through the provision of historic communications with passengers related to baggage-related claims, and provision of internal documents to increase or decrease the probability of his allegations. WestJet states that the provision of historic information merely confirms that WestJet has historically advised passengers to make their initial claim with the final carrier (as per IATA Resolution 780).

Mr. Lukács maintains that the issue is not merely what pretext WestJet used in refusing to process and settle baggage-related claims, but rather the outcome: that, without any lawful excuse, certain types of claims were neither processed nor settled by WestJet. He reiterates that the only means to resolve the dispute as to whether or not WestJet has been systematically refusing to process and settle certain baggage-related claims is through the production of documents.

Mr. Lukács argues that WestJet's claim that a production order "will merely confirm WestJet has historically advised guests to make their initial claim with the final carrier" is mere speculation as to what findings the Agency may make about evidence that WestJet has yet to produce and place before the Agency.

Mr. Lukács notes that, in a previous case, the Agency ordered WestJet to provide full answers to certain questions that related not only to the complainant himself, but to other passengers as well, and that answers to these questions included communications between WestJet and other passengers. He further notes that, as WestJet conceded, PIPEDA permits the disclosure of such information if the production is ordered by the Agency. Mr. Lukács maintains that the privacy of the passengers involved can be adequately protected by way of a carefully crafted confidentiality order limiting the public disclosure of the contents of the documents.

Analysis and findings

Questions – Systemic refusal to process and settle claims

Q4. Please produce WestJet's internal policies, manuals, guidelines or any other documents that were used by Ms. Susie Felker of WestJet in deciding to decline to process the claims of the applicant and a specific individual (Exhibits "A" and "B").

Q5. In the past 12 months, in how many baggage-related claims did WestJet refuse to process in situations where WestJet was not the last carrier?

Q6. In the past 12 months, in how many communications with passengers did WestJet refer to IATA Resolution 780?

Q7. Please produce all communications from the past 12 months between passengers and WestJet that meet at least one of the following criteria:

- i. making reference to IATA Resolution 780;
- ii. relating to WestJet's refusal to process baggage-related claims in situations where WestJet was not the last carrier.

The Agency will now address the relevancy of the questions posed by Mr. Lukács in the Agency's consideration of the present matter on the basis of whether those questions show or at least tend to show, or increase or diminish the probability that WestJet's practices respecting baggage are inconsistent with the Montreal Convention, and are therefore unreasonable.

In its submissions, WestJet acknowledges that it is guided by IATA Resolution 780 in addressing baggage claims, and systematically directs passengers to the final carrier to resolve those claims. WestJet adds that:

Questions 4 through 7 will naturally confirm what WestJet has already stated as a fact that WestJet has directed guests to work with the final carrier and thus verification of such is not disputed. Providing past records to prove something WestJet does not deny adds little value to the current proceedings [...]

The Agency agrees with WestJet's position, and is of the opinion that, with reference to the Agency's test for relevancy, the questions being posed and the evidence being sought by Mr. Lukács fail to show or at least tend to show, or increase or diminish the probability that WestJet's practices respecting baggage are inconsistent with Article 36(3) of the Montreal Convention, and are therefore unreasonable. The Agency therefore finds that Questions Q4 to Q7 are not relevant, and are therefore disallowed.

ISSUE 3 : Should the Agency, pursuant to subsection 20(3) of the General Rules, compel WestJet to fully respond to Mr. Lukács' Questions Q8 to Q11, relating to WestJet's claim that it will not rely on IATA Resolution 780?

Submissions

Mr. Lukács contends that the answers to his questions can demonstrate the need for the Agency to order corrective measures, notwithstanding WestJet's submission that it will no longer rely on IATA Resolution 780.

WestJet states that Questions Q8 to Q11 relate to a specific individual's claim, and that WestJet would need her consent to provide those details in this response. WestJet also challenges the relevance of this information, given that WestJet has already committed to refrain from any reference to IATA Resolution 780 in its correspondence with passengers.

Mr. Lukács argues that there is no legislative impediment to allow WestJet to answer questions directed to it pursuant to the rules of the Agency. He also argues that although WestJet maintains that it is committed to no longer relying on IATA Resolution 780, the case of a specific individual may demonstrate that WestJet's commitment is worthless, and that WestJet continues to engage in the same conduct that led to the present complaint in spite of its commitment to refrain from that conduct.

WestJet states that if the Agency feels there is value added to Mr. Lukács' allegations to provide the requested information, WestJet will do so; however, WestJet remains of the position that the status of a specific individual's claim has no bearing on the present case and WestJet will commit to assist a specific individual by contacting the applicable carrier to encourage timely settlement of the claim as needed.

Mr. Lukács maintains that the fact that WestJet has failed to process and settle a specific individual's claim in spite of her repeated demands is capable of demonstrating that WestJet is effectively refusing to process and settle claims of this type.

Analysis and findings

Questions - WestJet's claim that "it will not rely on IATA Resolution 780"

On June 10, 2014, a specific individual advised WestJet that her claim remains outstanding, and reiterated her request that WestJet compensate her for the loss of her bicycle in accordance with the Montreal Convention

Q8. Did WestJet send a specific individual any correspondence after its June 25, 2014 email

Q9. Did WestJet advise a specific individual that WestJet would no longer rely on IATA Resolution 780?

Q10. Has WestJet began the processing the claim of a specific individual?

Q11. Has WestJet settled the claim of a specific individual?

The Agency will now address the relevancy of the questions posed by Mr. Lukács in the Agency's consideration of the present matter on the basis of whether those questions show or at least tend to show, or increase or diminish the probability that WestJet's practices respecting baggage are inconsistent with the Montreal Convention, and are therefore unreasonable.

Mr. Lukács' complaint dated June 3, 2014 alleges that certain WestJet policies and practices relating to claims for delay, damage and loss of baggage are unreasonable for being inconsistent with Article 36(3) of the Montreal Convention. The information that Mr. Lukács is soliciting via Questions Q8 to Q11 relates to a specific claimant. The Agency is not convinced that such information would demonstrate that WestJet engages in certain practices respecting baggage claims. As such, the Agency is of the opinion that, with reference to the Agency's test for relevancy, the questions being posed by Mr. Lukács fail to show or at least tend to show, or increase or diminish the probability that WestJet's practices respecting baggage are inconsistent with Article 36(3) of the Montreal Convention, and are therefore unreasonable. The Agency therefore finds that Questions Q8 to Q11 are not relevant, and are therefore disallowed.

CONCLUSION

The Agency concludes that questions Q1 to Q11 are disallowed.

The Agency provides Mr. Lukács with the opportunity to file his final reply respecting his complaint by not later than October 14, 2014, which will then conclude pleadings regarding this matter.

Should you have any questions regarding this matter, you may contact Mike Redmond, the Analyst assigned to this case, at 819-997-1219, or by e-mail at secretariat@otc-cta.gc.ca

BY THE AGENCY:

(signed)

Sam Barone
Member