



DECISION NO. 420-C-A-2014

November 20, 2014

**COMPLAINT by Gábor Lukács respecting certain WestJet policies
and practices relating to claims for delay, damage and loss of baggage.**

File No. M4120-3/14-02973

INTRODUCTION

- [1] On June 3, 2014, Gábor Lukács filed a complaint alleging that certain WestJet policies and practices relating to claims for delay, damage and loss of baggage are:
- (i) not set out in WestJet's international tariff, and
 - (ii) inconsistent with paragraph 3 of Article 36 of the Convention for the Unification of Certain Rules for International Carriage by Air - Montreal Convention (Montreal Convention).
- [2] He requests that the Agency order WestJet to amend its practices and procedures, and its tariff, if necessary, to comply with paragraph 3 of Article 36 of the Montreal Convention.
- [3] On July 11, 2014, WestJet filed its answer, and on October 14, 2014, Mr. Lukács filed his reply.

ISSUE

- [4] Has WestJet properly applied Rule 60(B) of its international tariff as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR)?

POSITIONS OF THE PARTIES

- [5] Mr. Lukács submits that the liability for delay, damage, and loss of baggage in the case of successive carriage is governed by paragraph 3 of Article 36 of the Montreal Convention, which imposes joint and several liability on the following carriers:
- a) first carrier;
 - b) carrier that performed the segment during which the loss, damage, or delay occurred;
 - c) last carrier.

- [6] Mr. Lukács contends that WestJet has been systematically refusing to process and settle baggage-related claims in cases where WestJet is the first carrier. Mr. Lukács advises that WestJet, while citing IATA Resolution 780, Form of Interline Traffic Agreement – Passenger, to support its position, insists that passengers communicate with the last carrier.
- [7] Mr. Lukács maintains that WestJet has been using the following template text to implement the practices and policies at issue:
- WestJet in accordance with our partner [FINAL CARRIER], will respectfully follow IATA Resolution 780, which states that the airline on which the passenger travelled to final destination shall be responsible for raising the Property Irregularity Report (PIR).
- Therefore, it remains the responsibility of [FINAL CARRIER] to settle your claim and reach resolution.
- [8] Mr. Lukács argues that joint and several liability means that each carrier is independently liable for the entire amount of the damage caused, and the passenger may collect the full amount from any one of the carriers identified in paragraph 3 of Article 36. Mr. Lukács contends that it is therefore left to the passenger to decide which of the carriers it will be seeking compensation from.
- [9] Mr. Lukács states that given paragraph 3 of Article 36 of the Montreal Convention, WestJet cannot refuse to process and settle claims, nor can it insist that passengers seek compensation from the last carrier. He further states that WestJet’s current policies and practices in this regard are inconsistent with the Montreal Convention, and are therefore null and void pursuant to Article 26 of that Convention.
- [10] Mr. Lukács submits that IATA Resolution 780 may bind IATA members, but has no legal effect on third parties, such as passengers.
- [11] WestJet states that the claim for compensation that actually prompted the complaint was settled by the last carrier involved in Mr. Lukács’ carriage.
- [12] WestJet indicates that it has never suggested or implied that it was not liable, or attempted to relieve itself from liability, and that it recognizes that a claimant can pursue action under Article 36 of the Montreal Convention against any of the carriers involved in the successive carriage. WestJet contends that it directs passengers to the final carrier because it is the most appropriate and efficient means to seek a settlement.
- [13] WestJet submits that it will not rely on IATA Resolution 780 as it is not a “guest-facing agreement”, and is not part of WestJet’s international tariff.

- [14] Mr. Lukács argues that WestJet has provided no evidence to establish that it processed and/or settled the baggage-related claims of any passenger in cases where WestJet was not the last carrier. He submits that WestJet acknowledges that it has stated that it remains the responsibility of the last carrier to settle the passenger's claim, and systematically directs passengers to resolve their issue with the last carrier at their final destination.
- [15] Mr. Lukács maintains that the claimant's discretion as to how to apportion the liability, and how to pursue any claim arising from the liability, is central to the notion of "joint and several liability" that drafters of the Montreal Convention chose to put in place. He contends that such liability prevents carriers from pointing at each other, as WestJet has admitted doing; it also allows passengers to enforce their rights against the carrier from which they consider it is the easiest to collect, and thus increases the protection offered to passengers.
- [16] Mr. Lukács submits that if WestJet is the first carrier or the carrier that performed the carriage during which the destruction, loss, damage, or delay of checked baggage occurred, then it is jointly and severally liable to the passenger pursuant to paragraph 3 of Article 36. He argues that this means that it is left to the passenger, and not WestJet, to decide whether to make a claim against WestJet or the last carrier, or perhaps against both, and that WestJet cannot lawfully dictate to passengers against which carrier a claim may be made.

ANALYSIS AND FINDINGS

- [17] Rule 60(B) of WestJet's international tariff provides:

The liability rules set out in the Montreal Convention are fully incorporated herein, and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

- [18] Paragraph 3 of Article 36 of the Montreal Convention provides:

As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

- [19] By virtue of Rule 60(B), paragraph 3 of Article 36 is considered as forming part of WestJet's international tariff.
- [20] Subsection 110(4) of the ATR provides:

Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed, or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

- [21] WestJet acknowledges that it systematically directs claimants to the last carrier in situations of successive carriage. In doing so, WestJet is depriving the claimant from selecting one of the options regarding the carrier against which a claim may be filed. As such, WestJet is departing from paragraph 3 of Article 36 of the Montreal Convention. The Agency therefore finds that WestJet has failed to apply Rule 60(B) of its international tariff, and has contravened subsection 110(4) of the ATR.
- [22] Notwithstanding the foregoing, the Agency is of the opinion that, in the case of successive carriage, the “right of action” identified in paragraph 3 of Article 36 of the Montreal Convention does not mean that the carrier with which the claim has been filed is the carrier that must settle the claim. Any of the carriers involved in the successive carriage may perform that function.

CONCLUSION

- [23] Based on the above finding, the Agency directs WestJet to apply Rule 60(B) of its international tariff by acting in a manner consistent with paragraph 3 of Article 36 of the Montreal Convention.

(signed)

Sam Barone
Member