

October 10, 2013

File No. M 4120-3/13-00661

BY E-MAIL: cmccall@pmlaw.com

BY E-MAIL: lukacs@AirPassengerRights.ca

British Airways Plc c/o British Airways
c/o Carol McCall
Paterson MacDougall Law
Barristers and Solicitors
1 Queen Street East Suite 900
Toronto, Ontario
M5C 2W5

Gábor Lukács
Halifax, Nova Scotia

Dear Madam/Sir,

Re: Complaint about rules governing liability and denied boarding compensation

This refers to the above-noted complaint dated January 30, 2013 filed by Gábor Lukács with the Canadian Transportation Agency (Agency).

Background

In a submission dated July 16, 2013, Mr. Lukács posed several questions to British Airways Plc carrying on business as British Airways, one of which was to data submitted by British Airways respecting the denied boarding compensation tendered to individual passengers as set out below:

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?

On August 23, 2013, British Airways responded to Mr. Lukács’ question, and on August 26, 2013, submitted additional information respecting that question. British Airways then filed a further submission on September 5, 2013 in which British Airways indicated that it had provided inaccurate information in its submission dated August 26, 2013, and provided data that British Airways describes as being more accurate. In his submission dated September 12, 2013, Mr. Lukács challenged some of the data filed by British Airways, and requested the Agency to order British Airways to:

- produce data directly from the “Nirvana” system concerning the amounts of denied boarding compensation British Airways paid to passengers departing from Canada to the United Kingdom;
- produce unredacted copies of the “Nirvana” screenshots, or alternatively, make a claim for confidentiality as set out in section 23 of the *Canadian Transportation Agency General Rules* (General Rules);

- answer Question Q9;
- provide a full and complete answer to Question Q6

Mr. Lukács also posed the following additional questions:

Q9. On September 5, 2013, British Airways submitted (redacted) screenshots of its “Nirvana” system. The following questions refer to these printouts:

- a) What does “Evoucher” mean?
- b) What is the meaning of “Evoucher expiry date”?
- c) How is the “Evoucher expiry date” determined?
- d) What is the reason that the “Card Status” of a number of cards is shown as “EXPIRED”?

On September 22, 2013, British Airways filed its response to Mr. Lukács’ submission dated September 12, 2013. Mr. Lukács, on September 29, 2013 filed his reply.

Issues

Whether British Airways should be ordered to:

1. produce: (i) denied boarding compensation data directly from “Nirvana”; and/or (ii) unredacted copies of “Nirvana” screenshots;
2. provide a full and complete response to Question Q6, and
3. respond to Question Q9.

Test for the relevancy of evidence

The Agency has established a test to determine the relevancy of evidence. This test, which was most recently applied in Decision No. LET-C-A-76-2013, *Lukács v. United*, means that the Agency will:

1. examine the nature of what is claimed, and then
2. look at whether the question to be responded to 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.”

The Agency will now address the relevancy of Mr. Lukács' requests to the Agency's consideration of this matter.

In his complaint, Mr. Lukács alleges, among other matters, that British Airways' tariff provision governing denied boarding compensation is unreasonable.

Issue 1: Whether British Airways should be ordered to produce: (i) denied boarding compensation data directly from "Nirvana"; and/or (ii) unredacted copies of "Nirvana" screenshots.

Submissions

Mr. Lukács submits that the accuracy and veracity of British Airways' response regarding the compensation British Airways tenders to passengers who are denied boarding are in doubt because:

- the denied boarding compensation set out in British Airways' tariff rule is substantially lower than that quoted by British Airways in its response
- British Airways has provided three different extractions from British Airways' database relating to the compensation paid to passengers affected by denied boarding.

Mr. Lukács argues that given British Airways' inability to correctly extract data, the only alternative is to retrieve the data directly from "Nirvana", without any intermediary extraction process.

As for the redacted documents provided by British Airways, Mr. Lukács argues that British Airways must abide by the General Rules, which provide complete and adequate procedures for protecting confidential information submitted in a proceeding before the Agency. He submits that British Airways ought to either disclose unredacted versions of the document in question or make a claim for confidentiality in accordance with the General Rules.

British Airways maintains that its response to the question as to how much British Airways compensates passengers who are denied boarding remains as follows:

For compensation for passengers rerouted to arrive at last destination not more than 4 hours after original STA, cash of GBP 125.00 is the amount. For compensation for passengers rerouted to arrive at last destination more than 4 hours after original STA, cash of GBP 240.00 is the amount.

British Airways submits that no amount of further information and documentation from British Airways is going to change that response. British Airways points out that it voluntarily provided the screenshots from "Nirvana" to indicate the information on actual compensation paid to passengers as recorded in the database. British Airways submits that the "Nirvana" database contains the records of payment, and that the names of the passengers to whom the payments

were made is irrelevant. British Airways argues that Mr. Lukács' request for production of all the data recorded in the "Nirvana" system is extravagant and is unnecessary for the resolution of the issues in this matter, and is disproportionate in requiring the production of corporate records to prove how much British Airways has been paying passengers as compensation. British Airways submits that based on the documentation already provided, it is clear on a balance of probabilities that British Airways has been paying denied boarding compensation in the above-stated amounts.

Analysis and findings

The Agency has considered the submissions respecting this matter, and agrees with British Airways that Mr. Lukács' request that British Airways produce all of the data relating to denied boarding compensation appearing in the "Nirvana" system is extravagant and unnecessary to determine whether British Airways' compensation levels are reasonable. The Supreme Court of Canada made it clear, in *R. v. Chaplin*, [1995] 1 S.C.R. 727, that "fishing expeditions and conjecture must be separated from legitimate requests for disclosure." The Agency therefore finds that the evidence sought by Mr. Lukács would not show, or at least tend to show, or increase or diminish the probability of the existence of the fact related to what is claimed.

As for the request for unredacted copies of the "Nirvana" screenshots, the Agency acknowledges that these documents were provided by British Airways voluntarily. In fact, these documents, whether redacted or not, are not necessary for the Agency to make its determination.

Accordingly, the Agency will not order British Airways to produce denied boarding compensation data directly from "Nirvana", nor will it order British Airways to produce unredacted copies of the "Nirvana" screenshots.

Issue 2: Whether British Airways should be ordered to provide a full and complete response to Question Q6.

Submissions

Mr. Lukács submits that there are good reasons to doubt and question the accuracy and veracity of British Airways' response and the data provided.

Analysis and findings

With respect to the request that British Airways furnish a full and complete answer to Question Q6, the Agency is of the opinion that British Airways has already provided such an answer, and that Mr. Lukács is now attempting to cross-examine British Airways on its answer. Although it is true that the General Rules provide that a party to a proceeding may direct questions to and request the production of documents by any other party, it does not mean that this proceeding can then be turned into a commission of inquiry.

In Decision No. LET-C-A-76-2013, the Agency indicated that the purpose of questions/interrogatories is different than the purpose of cross-examination. The Agency noted that:

[25] [...] three purposes are generally attributed to cross-examination:

- (1) to weaken, qualify or destroy the opponent's case;
- (2) to support the party's own case through the testimony of the opponent's witnesses;
- (3) to discredit the witness.

[26] One thing is clear, questions/interrogatories are used to narrow and focus the issues in the case, and cross-examination is to "weaken, qualify or destroy" the other party's case. Considerable latitude is given when cross-examining and restrictions placed on the questions are rare; this latitude is however not permitted when it comes to questions/interrogatories. Although the line that exists between the two is fine, it nonetheless exists.

With that in mind, Mr. Lukács cannot ask a question for the sole purpose of cross-examining British Airways on its response.

The Agency is satisfied with the response provided by British Airways to Question Q6.

Issue 3: Whether British Airways should be ordered to answer Question Q9.

Submissions

In support of his additional questions, Mr. Lukács submits that British Airways' answers will shed light on British Airways' current denied boarding practices, and may correct inaccurate information that British Airways may have provided in response to Question Q4. Question Q4, which was posed in Mr. Lukács' submission dated July 16, 2013 relates to British Airways' Exhibit "B" and reads:

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

Mr. Lukács submits that those questions are relevant, because they seek information with respect to British Airways' current method of payment of denied boarding compensation.

British Airways indicates that the responses to the four questions posed under Q9 are not relevant to the issue of whether the compensation actually paid by British Airways by way of a COMPCARD, the equivalent of what in Canada is known as a debit card, that is the equivalent of cash in the United Kingdom.

Analysis and findings

The Agency has considered the submissions regarding this matter, and finds that Question Q9 is irrelevant in determining whether British Airways' denied boarding compensation is reasonable. The Agency finds that the question Mr. Lukács requests British Airways to respond to would not show, or at least tend to show, or increase or diminish the probability of the existence of the fact related to what is claimed. Accordingly, the Agency will not order British Airways to answer Question Q9.

The Agency provides Mr. Lukács with the opportunity to file his final reply respecting his complaint by not later than October 21, 2013, which will then conclude pleadings respecting that complaint.

Should you have any questions regarding the foregoing, you may contact Mike Redmond at facsimile number 819-953-7910 or by e-mail at mike.redmond@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

Geoffrey C. Hare
Member

(signed)

Sam Barone
Member