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April 23, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. British Airways
British Airways' response to show cause order in Decision No. 10-C-A-2014
File No.: M4120-3/14-00909
Motion to reconsider Decision No. LET-C-A-25-2014

Please accept the following submissions as a motion, pursuant to section 32 of the Agency's *General Rules*, to reconsider Decision No. LET-C-A-25-2014 in part, with respect to the order requiring the Applicant to delete certain, albeit not explicitly identified, submissions from his March 26, 2014 reply.

PROCEDURAL HISTORY

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency held that British Airways' International Tariff Rule Rule 87(B)(3)(B), as it relates to the denied boarding compensation provided to passengers, may be unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*.

   Thus, the Agency issued a show cause order, providing British Airways with an opportunity to demonstrate why the Agency should not substitute Rule 87(B)(3)(B) with another regime for determining the amount of compensation payable to victims of denied boarding.

2. On January 21, 2014, the Agency issued an Erratum to Decision No. 10-C-A-2014, directing British Airways to serve on the Applicant its response to the show cause order, and allowed the Applicant 10 days "to file comments" (emphasis added).

3. On March 17, 2014, British Airways filed its response to the show cause order. The response consisted of two separate statements on two different pages of the same document:

   (a) On page 1, British Airways stated that "British Airways proposes to apply the regime proposed by Air Canada as set out in Decision No.442-C-A-2014." [sic]

   (b) On page 2, British Airways proposed a tariff wording purporting to implement the aforementioned regime.

4. On March 26, 2014, the Applicant filed a reply with respect to British Airways' submissions in which the Applicant submitted that:

   (a) the tariff wording proposed on page 2 of British Airways' March 17, 2014 submissions does not reflect the regime proposed by Air Canada, as set out in Decision No. 442-C-A-2014, and the wording is inconsistent with the obligation to provide denied boarding compensation on all flights to and from Canada;

   (b) the regime proposed by Air Canada, as set out in Decision No. 442-C-A-2014, is not reasonable in the case of British Airways, because British Airways' statutory and commercial obligations and environment substantially differ from Air Canada's;

   (c) there have been significant material changes since the proposal set out in Decision No. 442-C-A-2014 was put forward, and thus it would be unreasonable for British Airways to apply that regime.

5. On March 28, 2014, British Airways made additional submissions to the Agency, even though Decision No. 10-C-A-2014 did not invite such additional submissions.

6. On April 1, 2014, the Applicant asked the Agency to be allowed to respond to British Airways' March 28, 2014 submissions.

7. On April 16, 2014, in Decision No. LET-C-A-25-2014, the Agency ordered that:

   (a) British Airways' additional submissions dated March 28, 2014 and the Applicant submissions of April 1, 2014 will not form part of the record; and

   (b) the Applicant is to refile his reply of March 26, 2014 "with all submissions that are unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada during the course of proceedings related to Decision No. 442-C-A-2013 deleted."

8. In the present motion, the Applicant is asking the Agency to reconsider part (b) of the aforementioned order contained in Decision No. LET-C-A-25-2014.

ARGUMENT

I. Lack of procedural fairness in making Decision No. LET-C-A-25-2014

In Decision No. LET-C-A-25-2014, the Agency effectively struck out certain, albeit not explicitly identified, portions of the Applicant's reply dated March 26, 2014. The Agency did so on its own motion; British Airways did not ask the Agency to strike out portions of the Applicant's reply.

The Agency gave no notice to the Applicant of its intention to strike out certain portions of the reply, and thus the Applicant had no opportunity to make submissions to the Agency concerning why portions of his reply ought not be struck out.

Therefore, it is submitted that the process in which Decision No. LET-C-A-25-2014 was made denied the Applicant his right to be heard.

II. Decision No. LET-C-A-25-2014 deprives the Applicant of his right to make submissions

The principle of *audi alteram partem* requires tribunals to allow both parties to a dispute to make submissions and lead evidence; without these two, a party cannot meaningfully participate in a proceeding. Depriving a party of the right to be heard, that is, to make submissions and lead evidence, amounts to denial of natural justice.

In the present case, the Applicant was entitled to "file comments" with respect to British Airways' response to the show cause order both pursuant to the principle of *audi alteram partem* and in accordance with Decision No. 10-C-A-2014 of the Agency.

As explained below, the Applicant's March 26, 2014 reply falls squarely within the scope of "comments" on British Airways' submissions that the Agency invited in Decision No. 10-C-A-2014; furthermore, with the possible exception of section IV, it does directly respond to British Airways' submissions:

1. British Airways proposed to apply the regime that was proposed by Air Canada during the proceeding leading to Decision No. 442-C-A-2013.

   Consequently, the Applicant was entitled to comment on this choice of British Airways. The Applicant did properly exercise his right to comment on this choice of British Airways by making the submission that this choice was unreasonable for British Airways because:

   (a) British Airways' statutory and commercial obligations and environment substantially differ from Air Canada's (section III(b) of the Applicant's reply).

   (b) There have been significant material changes since the proposal set out in Decision No. 442-C-A-2014 was put forward, and these material changes render the regime in question unreasonable in the case of British Airways (section III(c) of the Applicant's reply).

It is impossible to address British Airways' statutory and commercial obligations and environment without mentioning British Airways' competitors, such as Lufthansa and Air France, and the compensation regimes adopted by these competitors.

Similarly, it is impossible to address the material changes that have occurred since the proposal set out in Decision No. 442-C-A-2014 was put forward without mentioning the compensation regime that most major Canadian airlines have adopted, which happens to be the US compensation regime, and the drastic changes in the exchange rates.

2. British Airways did not simply propose to adopt the regime of Air Canada, but also proposed specific tariff wording purporting to implement Air Canada's regime (page 2 of British Airways' March 17, 2014 submissions).

   Consequently, the Applicant was entitled to comment on the specific tariff wording proposed by British Airways; and indeed, the Applicant did so, by objecting to the tariff wording proposed by British Airways on the grounds that:

   (a) British Airways' proposed wording does not adequately implement the regime proposed by Air Canada as set out in Decision No. 442-C-A-2013 (section II of the Applicant's reply).

   (b) British Airways' proposed wording is inconsistent with the obligation (found in subsection 122(c)(iii) of the *Air Transportation Regulations*) to establish denied boarding compensation for flights both from and to Canada (section I of the Applicant's reply).

3. Given that the Applicant submits that both British Airways' choice of regime and proposed tariff wording are unreasonable, the Applicant went on to propose an alternative denied boarding compensation regime as a way of also providing constructive comments (section IV of the Applicant's reply).

   While this portion of the Applicant's reply may go beyond a traditional reply, it must be remembered that the Agency invited "comments" from the Applicant and not simply a "reply" in Decision No. 10-C-A-2014. Thus, it is submitted that these submissions were also appropriate.

Therefore, all submissions found in sections I, II, and III of the Applicant's reply directly address either the regime proposed by British Airways or the actual tariff wording proposed by British Airways. Hence, the Applicant submits that deleting any portion of sections I, II, or III of his March 26, 2014 reply would deprive the Applicant of the opportunity to make a meaningful reply to British Airways' response to the show cause order, and would amount to denial of the Applicant's most fundamental procedural rights.

With respect to section IV of the reply, the Applicant submits that it falls within the reasonable limits of "comments" that were invited by the Agency, and that Decision No. 10-C-A-2014 created the legitimate expectation that such comments would be accepted by the Agency.

III. Decision No. LET-C-A-25-2014 is unclear and vague

The Applicant is struggling to understand what portions of sections I, II, and III of his March 26, 2014 reply are unrelated, in the Agency's opinion, to the March 17, 2014 response of British Airways. Indeed, as noted earlier, the Applicant sincerely believes that all his submissions in sections I, II, and III of his reply are directly related and respond to either the regime proposed by British Airways or the actual tariff wording proposed by British Airways.

Thus, the Applicant submits that Decision No. LET-C-A-25-2014 is unclear and vague in that it does not explicitly identify the portions of the Applicant's reply the Agency orders to have struck.

Therefore, the Applicant submits that although he can make a good faith effort to comply with the decision by deleting section IV of his reply, it is unclear whether this is what the Agency expects him to do.

IV. Relief sought

The Applicant is respectfully asking the Agency to reconsider its Decision No. LET-C-A-25-2014 in part, and rescind the order requiring the Applicant to delete portions from his reply.

In the alternative, the Applicant is asking the Agency to clarify Decision No. LET-C-A-25-2014 by confirming that the Applicant is required to delete only section IV of his reply.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Ms. Carol E. McCall, counsel for British Airways