



DECISION NO. 49-C-A-2016

February 18, 2016

REDETERMINATION of Decision No. 201-C-A-2014 respecting an application filed by Gábor Lukács against British Airways Plc carrying on business as British Airways (British Airways).

Case No. 15-05535

INTRODUCTION

- [1] On November 27, 2015, the Federal Court of Appeal (FCA), in Docket No. A-366-14, allowed the appeal filed by Gábor Lukács respecting Decision No. 201-C-A-2014, and remitted the matter back to the Canadian Transportation Agency (Agency) for re-determination.

BACKGROUND

- [2] On January 30, 2013, Mr. Lukács filed an application with the Agency, alleging, in part, that Rule 87(B)(3)(B) (Rule) of British Airways' Tariff was unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). The impugned Rule, which applied to carriage between Canada and the United Kingdom, established the compensation tendered to passengers who were denied boarding. Mr. Lukács submitted that the Tariff should reflect British Airways' legal obligations under European Union Regulation (EC) No. 261/2004, which prescribes compensation levels for denied boarding for flights departing from every European Union country, and for flights operated by a European Union carrier destined to a European Union country.
- [3] In Decision No. 10-C-A-2014 dated January 17, 2014, the Agency determined, in part, that the Rule, insofar as it related to denied boarding compensation, may be unreasonable within the meaning of subsection 111(1) of the ATR. The Agency also determined that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation.
- [4] In Decision No. 10-C-A-2014, the Agency provided British Airways with the opportunity to show cause why the Agency should not require the carrier, with respect to the denied boarding compensation tendered to passengers, to apply either:
1. The regime applicable in the United States of America;
 2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*);

3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*); or
4. Any other regime British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

- [5] On March 17, 2014, British Airways responded to the show cause, proposing to apply the regime advanced by Air Canada in the proceedings related to Decision No. 442-C-A-2013, which regime applied to travel from Canada to the European Union only, and stating that British Airways applies this Regulation where applicable. It should be noted that Air Canada's tariff incorporates by reference Regulation (EC) No. 261/2004.
- [6] By revised submissions dated May 8, 2014, Mr. Lukács objected to British Airways' election, arguing that the Tariff should include denied boarding compensation for flights both to and from Canada.
- [7] In Decision No. 201-C-A-2014, the Agency ordered British Airways to file a revised Tariff provision to reflect the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, and which applies to carriage from Canada to the European Union. On June 6, 2014, British Airways filed the revised Tariff provision for effect June 7, 2014.
- [8] In its judgment, the FCA noted that the regime selected by British Airways, which only related to flights from Canada, reflected the framework proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, but that Air Canada's tariff included a provision incorporating by reference Regulation (EC) No. 261/2004, which addressed flights departing from the European Union. The FCA also found it instructive that British Airways' existing Tariff applied to carriage between both Canada and the United Kingdom.
- [9] The majority of the FCA panel concluded that there was an apparent tension between Decision No. 201-C-A-2014, which appears to have implicitly found that British Airways need not include in the Tariff a denied boarding compensation provision that pertains to carriage both to and from Canada, and previous Agency decisions that required such a provision.
- [10] The FCA therefore found that Decision No. 201-C-A-2014 lacks clarity, and that the Agency should directly address the aforementioned tension. The FCA stated that the Agency must clearly explain how British Airways can meet its obligation to clearly state the carrier's policy governing denied boarding compensation when the Tariff is silent with respect to compensation for flights from the European Union to Canada. In particular, the FCA concluded that the Agency must clarify whether the Tariff must include provisions relating to flights both to and from Canada, or whether the fact that British Airways is bound by Regulation (EC) No. 261/2004 is sufficient.

ISSUE

- [11] Can the Tariff be said to clearly state British Airways' policy regarding denied boarding compensation when that Tariff is silent with respect to flights from the European Union to Canada?

ANALYSIS AND FINDINGS

- [12] Subparagraph 122(c)(iii) of the ATR requires a carrier to clearly state in its tariff the carrier's policy relating to denied boarding compensation. If the tariff is considered to be a means by which a person learns of rights and obligations, as they relate to both the person and the carrier, then it is difficult to justify the tariff's silence with respect to some of those rights and obligations.
- [13] In the circumstances of this case, British Airways elected to apply the compensation regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. The denied boarding compensation regime appearing in Air Canada's tariff clearly establishes the carrier's policy, which includes not just the specific compensation that was proposed, but also incorporates by reference Regulation (EC) 261/2004. Therefore, British Airways' election of the compensation regime proposed by Air Canada includes not just the specific amounts of compensation proposed for outbound flights, but the context in which these amounts are set out, which includes a tariff provision that incorporates by reference Regulation (EC) 261/2004.
- [14] The Agency notes that in submissions during the proceedings related to Decision No. 10-C-A-2014, British Airways stated that it complies with Regulation (EC) 261/2004.
- [15] In Decision No. 10-C-A-2014, the Agency noted that in Decision No. 432-C-A-2013 (*Nawrots v. Sunwing*) the Agency stated, in reference to a submission that Sunwing's tariff neglected to reflect the carrier's obligations under Regulation (EC) No. 261/2004:
- As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.
- [16] The legal basis for not enforcing foreign legislation or regulations is lack of jurisdiction. The Agency is a creature of statute, namely, the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, *and must exercise its powers according to that statute*. The *Canada Transportation Act* does not empower the Agency to enforce foreign instruments.
- [17] With respect to the specific directions from the FCA, British Airways does not meet its tariff obligation of clarity when the Tariff is silent with respect to part of British Airways' policy regarding denied boarding compensation. As noted above, previous Agency decisions have stated that the Agency will not require a carrier to include a reference to foreign law in the carrier's tariff; however, the carrier's policy must be clearly stated. In this case, British Airways chose to include in its Tariff the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013. It is not sufficient that passengers travelling from the European Union to Canada are covered by Regulation (EC) 261/2004. The Tariff must clearly state the carrier's policy with respect to these flights.

CONCLUSION

- [18] In light of the foregoing, the Agency orders British Airways, in accordance with its election to reflect the regime proposed by Air Canada in the proceedings related to Decision No. 442-C-A-2013, including the incorporation by reference of Regulation (EC) 261/2004, to amend its Tariff by March 10, 2016.

(signed)

Sam Barone
Member