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April 8, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Request for Agency to Require Party to Respond

The Applicants are hereby requesting, pursuant to Rule 32 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*"), that the Agency require Air Canada to provide a complete response to the Notice of Written Questions and Productions, dated March 18, 2016.

I. Relief sought

The Applicants are asking the Agency to order Air Canada to:

(a) produce a complete and unredacted copy of Document A-2, including the portions referring to the expenses of passengers who were involuntarily denied boarding (Q9);

(b) answer question Q12 in full; and

(c) answer question Q18 in full.

II. Summary of the facts

On December 3, 2015, the Applicants brought the within Application against Air Canada, challenging Air Canada's policy purporting to limit its liability with respect to delay of passengers to $100.00 of hotel costs per night, $7 for breakfast, $10 for lunch, and $15 for dinner (the "Impugned Policy"), and alleging among other things that:

(i) the Impugned Policy is not set out in Air Canada's International Tariff, contrary to s. 122 of the *ATR*;

(ii) the Impugned Policy is unreasonable within the meaning of s. 111 of the *ATR*, because it purports to fix a lower limit of liability than what is set out in the *Montreal Convention*; and

(iii) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff by applying the Impugned Policy and/or other unofficial policies instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *ATR*.

On December 29, 2015, the Agency opened pleadings. On January 20, 2016, Air Canada filed its answer with the Agency, but did not provide the Applicants with Document A-2, with respect to which Air Canada made a request for confidentiality.

Document A-2 is virtually the same as the Impugned Policy, and the differences are only cosmetic ones.

On February 24, 2016, in Interlocutory Decision No. LET-C-A-6-2016, the Agency granted Air Canada's request for confidentiality with respect to Document A-2, and directed that Air Canada provide it to the Applicants after they signed a non-disclosure undertaking.

On Friday, March 11, 2016, well after normal business hours, Air Canada provided the Applicants with an incomplete but legible version Document A-2.

On March 17, 2016, Air Canada acknowledged that it did not disclose a portion relating to reimbursement of expenses of passengers who are denied boarding, but argued that the withheld portion is irrelevant.

On March 18, 2016, the Applicants directed a total of 10 questions and requests for productions to Air Canada, pursuant to Rule 24(1) of the *Dispute Rules*.

On April 6, 2016, Air Canada refused to answer a number of questions, including Q12 and Q18, and refused to produce documents as requested in question Q9.

III. Arguments in support of the request

1. Air Canada objects to the questions and productions chiefly on the ground that they are irrelevant. In *R. v. Arp*, [1998] 3 SCR 339, the Supreme Court of Canada defined relevance as follows (at para. 38):

> To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". [...] As a consequence, there is no minimum probative value required for evidence to be relevant.
>
> [Emphasis added.]

2. In Decision No. LET-C-A-154-2012, the Agency established the test to use when making a determination on the relevancy of evidence as requiring the Agency to:

   (i) examine the nature of what is claimed; and then

   (ii) look at whether the question to be answered or the evidence to be produced or 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 or evidence is relevant.

3. The Applicants submits that this test is met with respect to each of the questions and productions addressed below.

(a) Production of Document A-2 in its entirety, without erasure (Q9)

(i) What is claimed

4. Air Canada erroneously argues at paragraph 6 of its April 6, 2016 answers that the Application is limited to specific causes of delay or to a specific policy that is not set out in its tariff; however, this is not the case. The Application of December 3, 2015 unambiguously states that the Applicants allege, among other things, that:

> (iii) since 2013 or earlier, Air Canada has failed to apply the terms and conditions set out in its tariff by applying the Impugned Policy **and/or other unofficial policies** instead of the provisions of the *Montreal Convention*, contrary to s. 110(4) of the *ATR*.
>
> [Emphasis added.]
>
> **Application (December 3, 2015), p. 1**

5. This allegation is relevant to the remedy of corrective measures, which is sought pursuant to s. 113.1(a) of the *ATR*. A precondition for ordering such corrective measures is a finding that Air Canada failed "to apply the [...] terms and conditions of carriage set out in the tariff that applies to that service."

6. Air Canada claims that there is no policy limiting Air Canada's reimbursement of expenses for controllable delays or cancellations, and argues that it has been complying with the provisions of the *Montreal Convention* with respect to reimbursement of expenses incurred by delayed passengers.

Air Canada's Answer (January 20, 2016), p. 6, paras. 25-26

(ii) What is being asked

7. The Applicants are seeking only disclosure of the portions of Document A-2 referring to reimbursement of expenses; the present Application does not deal with other compensation that passengers who are involuntarily denied boarding may be entitled to.

(iii) Relevance

8. Passengers can be delayed and incur expenses in a way that triggers liability under the *Montreal Convention* for a number of reasons, including by way of being denied boarding as a result of overbooking.

***Lukács v. Air Canada*, Decision No. 250-C-A-2012, para. 34**

9. The portions of the Revised Impugned Policy (Document A-2) that refer to reimbursement of expenses of passengers who are delayed as a result of being involuntarily denied boarding is relevant to the Application, because it can prove or disprove that Air Canada has "failed to apply the terms and conditions set out in its tariff by applying [...] other unofficial policies instead of the provisions of the *Montreal Convention*" (allegation (iii)).

(iv) Procedural fairness to Air Canada

10. Air Canada was fully aware of what was being alleged, including allegation (iii) set out in the Application. Air Canada, which is represented by counsel, made a deliberate choice to respond only to a specific aspect of the Application, and ignore the rest.

11. Air Canada could have also directed questions to the Applicants to further clarify the allegations, but chose not to do so. Thus, Air Canada is responsible for its own choice of litigation strategy.

12. Having said that, if Air Canada discloses Document A-2 in its entirety, the Applicants do not object to Air Canada making supplementary submissions to address whether the portions of Document A-2 that deal with reimbursement of expenses to passengers who are involuntarily denied boarding are consistent with the *Montreal Convention*.

(b) Air Canada's policy with respect to expenses in the case of a "schedule change" (Q12)

(i) What is claimed

13. The Applicants reiterate paragraphs 4-6 above.

(ii) Relevance

14. The Impugned Policy (Document A-1), which is virtually identical to the Revised Impugned Policy (Document A-2), limits liability for accommodation of passengers who are delayed as a result of what Air Canada calls a "schedule change" to $100.00 (or $175.00 in some cases). Moreover, it states that:

> All compensation is goodwill and costs should never exceed amounts above.
>
> [Emphasis added.]

Document A-1

15. So far, Air Canada has chosen to evade addressing this portion of the policy, which does limit the reimbursement of expenses to a fraction of the liability limits set out in the *Montreal Convention*, and actually labels them as "goodwill."

16. Question Q12 seeks clarification about Air Canada's position, and the answer will tend to show that Air Canada failed to apply the provisions of the *Montreal Convention* as required by its tariff, and instead it applied an unofficial policy.

(iii) Procedural fairness to Air Canada

17. The Applicants reiterate paragraphs 10 and 11 above.

18. Having said that, given that the present request seeks to clarify Air Canada's position with respect to its liability for the expenses of passengers who are delayed as a result of "schedule change," Air Canada will have ample opportunity to remedy any shortcomings of its Answer to the Application by providing a full and detailed answer to Question Q12.

(c) The statement of Ms. Robinson (Q18)

(i) What is claimed

19. As acknowledged by Air Canada at paragraph 31 of its Answers of April 6, 2016, Air Canada alleges that the amounts set out in the Impugned Policy and the Revised Impugned Policy (Document A-2) are mere recommendations and that in reality, passengers are compensated in accordance with the *Montreal Convention*, and that the amounts set out in the Impugned Policy and the Revised Impugned Policy "are often exceeded." The statement of Ms. Robinson (Document A-6) was tendered in support of Air Canada's allegations.

20. The Applicants dispute these allegations, and maintain that Air Canada has systematically failed to apply the provisions of the *Montreal Convention*, and was applying the Impugned Policy and subsequently the Revised Impugned Policy instead of compensating passengers in accordance with the *Montreal Convention*.

(ii) What is being asked

21. Air Canada mischaracterizes at paragraph 30 of its Answers of April 6, 2016 what is being asked in Question Q18. The question has nothing to do with "Air Canada's Passenger Refund Request" at all. Refund requests deal with unused service, and not with reimbursement for expenses.

22. The question is asking Air Canada "to provide particulars" of the statement of Ms. Robinson at paragraph 10 of Document A-6:

> In the case of a delay which is within Air Canada's control, the recommended limit is often exceeded as per the Lead's authorization [...]

(iii) Relevance

23. The Applicants are seeking corrective measures pursuant to s. 113.1(a) of the *Air Transportation Regulations*. A precondition for ordering such corrective measures is a finding that Air Canada failed "to apply the [...] terms and conditions of carriage set out in the tariff that applies to that service."

24. There is a live dispute between the parties as to whether Air Canada has systematically failed to apply the provisions of the *Montreal Convention*.

Application, p. 1, items (ii) and (iii); paras. 12-13 and 40-41

25. Answers to question Q18 and/or its subquestions are capable of showing that

    (1) even in cases that Air Canada considers controllable, it follows the maximums set out in the Impugned Policy and/or the Revised Impugned Policy, and does not provide compensation in accordance with Article 19 of the *Montreal Convention*; and

    (2) Air Canada labels most delays as "uncontrollable" to evade liability.

(iv) Procedural fairness to the Applicants

26. The Applicants are entitled, as a matter of procedural fairness, to test Air Canada's bold and blanket claim that it has been compensating passengers in accordance with the liability limits of the *Montreal Convention*, and not in accordance with the Impugned Policy and/or the Revised Impugned Policy.

27. Denying the Applicants the opportunity to inform themselves about the details of the vague statement put forward by Ms. Robinson at paragraph 10 of Document A-6 would deprive them of a meaningful way to counter or contradict what is being alleged by Air Canada.

(v) Availability

28. For the reasons below, the Applicants submit that Air Canada is falsely claiming to not have the requested information.

29. First, Air Canada tendered no evidence in support of its allegation that the information requested does not exist. Allowing a party to evade its obligation to answer questions and produce documents based on blanket statements of unavailability that are not supported by any evidence would render Rule 24 of the *Dispute Rules* meaningless.

30. Second, Ms. Robinson made a statement that the "recommended limit is often exceeded" (emphasis added). The main part of Question Q18 is asking Air Canada "to provide particulars" of the statement put forward by Ms. Robinson, who is an employee of Air Canada, and thus must be available to Air Canada at any time.

31. Unless Ms. Robinson was merely speculating, she must have had some factual basis for making the statement in question. Question Q18 is seeking disclosure of the facts from which Ms. Robinson concluded that the "recommended limit is often exceeded" (emphasis added).

32. Thus, Air Canada, through its employee, is clearly in possession of the information requested, namely, the particulars relating to the claim of "often exceeded."

33. Third, the expenses of an airline relating to reimbursing passengers for delay-related expenses is significant data regarding the airline's operations that any reasonable business would collect and analyze in great detail. It is highly improbable that Air Canada, unlike all other airlines, would not conduct a meticulous analysis of such vital data relating to its expenses.

34. Fourth, section 230 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) requires corporations to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate:

> **230.** (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.
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> (4) Every person required by this section to keep records and books of account shall retain
>
> i. the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and
>
> ii. all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.
>
> (4.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection 230(4).
>
> [Emphasis added.]

35. Section 248 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) defines a "record" as follows:

> "record" includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan,

> a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form;
>
> [Emphasis added.]

36. Since Air Canada is a Canadian corporation that is subject to the *Income Tax Act*, it must have retained every "record" relating to expenses it incurred in regard to the reimbursement of expenses of delayed passengers, including each and every cheque issued to passengers and the documents in support of each passenger's claim.

37. It is highly improbable that Air Canada discarded any records that it was required to retain for six years under s. 230 of the *Income Tax Act*. Thus, in the absence of evidence to the contrary, such as Air Canada explicitly and clearly declaring that it engaged in contravention of s. 230 of the *Income Tax Act*, the Agency ought to assume and find that Air Canada has always fully complied with the *Income Tax Act* in general, and with its s. 230 in particular.

38. Therefore, all "records" of Air Canada within the meaning of the *Income Tax Act* have been retained by Air Canada, and are available for the past six taxation years, that is, for 2009, 2010, 2011, 2012, 2013, 2014, and of course for 2015.

(vi) **Proportionality**

39. First, Air Canada exaggerates by a factor of 1000 the number of passengers it carries yearly by claiming that it transports 35 billion passengers, which is five times the population of the Earth. The correct statement is, at best, that it carries 35,000,000 (i.e., 35 million) passengers yearly.

40. Second, there is no need to review and analyze the file of each and every passenger, unless Air Canada claims that each one of its passengers is affected by a delay that would reasonably give rise to claims.

41. Third, according to "An Assessment of Air Passenger Level of Service Indicators in Canada," a background research paper by the Industry Regulation and Determinations Branch of the Agency, the number of complaints received by Canadian airlines is between 20,000 and 50,000 per year, and only 20-25% of these relates to flight disruptions; that is, 4,000 to 10,000 complaints per year to all Canadian airlines are related to flight disruptions (i.e., delays).

42. Fourth, the requested information can be obtained from Ms. Robinson and/or through a standard query of Air Canada's electronic databases.

43. The Federal Court of Appeal held that:

> [...] a non-existent record that can be produced from an existing machine readable record is deemed to be a record to which the respondent is entitled access.

***Yeager v. Canada (Correctional Service)*, 2003 FCA 30, para. 33**

44. On the same issue, the Ontario Court of Appeal held that re-formatting information that already existed in a recorded form does not constitute "creating" a record.

***Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20, para. 35**

45. Consequently, the Applicants are not asking Air Canada to "create" records, but rather to retrieve information from its databases.

46. Fifth, in Decision No. LET-C-A-173-2009, the Agency itself directed the airline (WestJet) to answer a wealth of questions relating to the amount of compensation tendered to individual passengers for damage to, loss or delay of checked baggage over a period of 6 months.

    Since the Agency made that order, it was clearly viewed as proportional, and as such there is no reason to conclude in the present case that answering questions of the same nature would be disproportional for Air Canada.

47. Finally, the Application relates to the period of 2013-2015 and alleges systemic failure to apply the terms and conditions set out in the tariff. The issue raised affects thousands of passengers who were likely shortchanged as a result of Air Canada's unlawful conduct.

48. Hence, the request that Air Canada answer questions with respect to this period is both reasonable and proportionate. Indeed, there is no evidence before the Agency capable of supporting a finding that answering Question Q18 would cause Air Canada undue hardship.

IV. Documents relied on

The Applicants rely on all materials that have been served and filed with the Agency in the present proceeding, including, but not limited to:

1. the Application, dated December 3, 2016;

2. Air Canada's Answer of January 20, 2016;

3. Notice of Written Questions and Production of Documents directed to Air Canada, dated March 18, 2016; and

4. Air Canada's Response to the Notice of Written Questions, dated April 6, 2016.

All of which is most respectfully submitted.

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