Gábor Lukács

Winnipeg, Manitoba

December 12, 2011

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Gábor Lukács v. Air Canada
Overselling practices and denied boarding compensation rules (domestic)

This is a formal complaint under s. 67.2(1) of the *Canada Transportation Act*, 1996, c. 10 concerning Air Canada's current practices of overselling its domestic flights, as well as Air Canada's Domestic Tariff Rule 245 governing compensation for denied boarding. For greater clarity, the present complaint is confined to the terms, conditions, and practices of Air Canada in domestic carriage of passengers.

ISSUES

ARGUMENT

Legal principles: the balancing test

Under s. 67.2(1) of the CTA, the Agency may suspend, disallow, or substitute terms and conditions that are unreasonable. The well-established legal test to assess whether a term or condition of carriage is "unreasonable" is the balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. The balancing test was first established in *Anderson v. Air Canada*, and was strongly endorsed by the Federal Court of Appeal in *Air Canada v. Canadian Transportation Agency*, 2009 FCA 95. The test was most recently applied in *Lukács v. Air Canada*, 291-C-A-2011, and in *Lukács v. WestJet*, 418-C-A-2011.

The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. In *Griffiths v. Air Canada*, 287-C-A-2009, the Agency held (para. 25) that there is no presumption that a tariff is reasonable, and a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition of carriage is reasonable.

I. Is it reasonable for Air Canada to oversell its domestic flights?

"Overselling" is the act of selling more seats on a flight than the capacity of the aircraft. While in some cases, the number of seats sold beyond the aircraft's capacity is smaller than the number of last-minute cancellations and no-shows, this is not always the case. Thus, the inevitable consequence of this practice is that from time to time the carrier is unable to honor the contract of carriage and to transport all passengers holding a confirmed reservation for a particular flight. The common terminology for this situation is "denied boarding" or "involuntary denied boarding" or "bumping" of passengers. (For greater clarity, this does not include passengers who are denied transportation for want of adequate travel documents, or their unruly behaviour.)

It is common ground that Air Canada has been engaging in deliberately overselling its domestic flights to maximize its profit at the expense of bumped passenger. The present complaint raises the question of whether this practice is reasonable within the meaning of s. 67.2(1) of the CTA.

The Applicant is not aware of any statutory or operational obligations of Air Canada that would be adversely affected by Air Canada giving up its practice of overselling its domestic flights.

While overselling flights might have been an industry standard in the 20th century, this is manifestly not the case in the Canada of 2011. Air Canada's main competitor, WestJet, has an explicit policy of guaranteeing passengers their seats, and to never oversell its flights. In spite of this policy, WestJet has remained profitable. It is the Applicant's understanding that Air Canada is the only Canadian domestic carrier that engages in the practice of overselling its flights. Thus, Air Canada would not suffer any competitive disadvantage by not overselling its domestic flights.

On the other hand, the practice of overselling flights causes considerable damages to passengers affected by denied boarding. This is explicitly recognized by s. 107(1)(n)(iii) of the *Air Transportation Regulations*, SOR/88-58, which requires domestic carriers to include terms governing the compensation payable to victims of overselling of flights. It is further submitted that a deliberate practice of overbooking flights is antithetical to the carrier's contractual duty to transport passengers, and it preempts the very essence of the contract of carriage, and renders it meaningless.

Therefore, in the case at bar, the right of passengers to performance of the contract of carriage by Air Canada outweighs Air Canada's commercial benefit from the practice of overselling its domestic flights. Hence, it is submitted that it is unreasonable for Air Canada to maintain its practice of overselling its domestic flights.

II. Is Air Canada's Rule 245(E)(1)(b)(iv) reasonable?

Air Canada's Rule 245(E) governs the payment of compensation to victims of denied boarding. Rule 245(E)(1)(b)(iv) reads as follows:

> Unless passenger chooses option (D)(3) above, in addition to providing transportation in accordance with (D) (1) or (2), a passenger who has been denied boarding will be compensated by AC as follows:
>
> (1) Conditions for Payment
>
> ⋮
>
> (b) It must not have been possible to accommodate the passenger on the flight on which he held confirmed reservations and the flight must have departed without him.
> EXCEPTION: The passenger will not be eligible for compensation:
>
> ⋮
>
> (iv) if, for operational and safety reasons, his aircraft has been substituted with one having lesser capacity

It is submitted Rule 245(E)(1)(b)(iv) is effectively a blanket exclusion of liability, which exonerates Air Canada from the obligation to compensate passengers who are denied boarding as a result of Air Canada's poor planning and/or inadequate maintenance of its equipment.

For greater clarity, the Applicant does not suggest that Air Canada should risk the safety of its passengers; however, it is submitted that Air Canada is liable for the damages of its passengers whom it is unable to transport on the flights on which they hold confirmed reservations as a result of a substitution of aircraft due to "operational and safety reasons". The Applicant's position is consistent with the current state of the law in Canada as articulated in *Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, and reiterated in *D'Onofrio c. Air Transat A.T. inc.*, [2000] J.Q. no 2332. Recently, the same principles were cited with approval and applied in *Lukacs v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111):

> [32] The court held that the airline must take into consideration the possibility of mechanical failures and provide for efficient solutions to assure the service contracted with the public. I agree.

It is submitted that the scope of the phrase "operational and safety reasons" in Rule 245(E)(1)(b)(iv) can be arbitrarily stretched, and it reflects an airline-centred view, which considers only the carrier's interests, and it fails to strike a balance between the airline's statutory, commercial, and operational obligations, and the passengers' right to be subject to reasonable terms and conditions.

Therefore, it is submitted that Rule 245(E)(1)(b)(iv) is unreasonable.

III. Is Air Canada's Rule 245(E)(2), governing the amount of denied boarding compensation, reasonable?

Air Canada's Rule 245(E)(2) reads as follows:

> Subject to the provisions of (E)(1), AC will tender liquidated damages in the amount of $100.00 cash or a Credit Voucher or MCO (good for future travel on Air Canada) in the amount of $200.00, to the passenger's option for travel within Canada or to the USA and Mexico. If accepted by the passenger, such tender will constitute full compensation for all actual and anticipatory damages incurred or to be incurred.

It is unclear to the Applicant how Air Canada reached the conclusion that a cash payment of $100.00 adequately compensates passengers for the inconvenience and consequential damages caused by being denied boarding involuntarily. It is the Applicant's understanding that this amount has never been updated to reflect inflation and/or increase in the consumer price index. Whatever the case may be, the Applicant submits that the compensation of $100.00 is extraordinarily low compared to the industry standard in the United States or the European Union, as explained below.

On April 25, 2011, the Department of Transportation of the United States released final ruling 76 FR 23110, in which it amended regulations 14 CFR 250.5(a) governing the amount of denied boarding compensation for passengers denied boarding involuntarily to read as follows:

> (1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight;
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> (2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of $650, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and
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> (3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of $1,300, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination less than two hours after the planned arrival time of the passenger's original flight.

(Under 14 CFR 250.1, "fare" means the price paid for air transportation including all mandatory taxes and fees.) This new "200%/400% and $650/$1300" rule was introduced to replace the former "100%/200% and $400/$800" rule. In the reasons for the decision, the Department of Transportation held (pp. 23135-6):

> With respect to the DBC limits increase, we have come to the conclusion that the proposed $650/ $1,300 amounts are not only reasonable but also necessary.
>
> ⋮
>
> The Department believes that DBC amounts based on 100%/200% of the base fare are no longer adequate, under many circumstances, to address the inconvenience and consequential damages suffered by passengers who are denied boarding involuntarily, especially passengers who purchased the most deeply discounted fares, and who, by virtue of the low fares, are most likely to be selected as the candidates for involuntary denied boarding. Realistic DBC rates are also a necessary incentive to encourage careful overbooking practices on the part of carriers. Precisely for these reasons, we are raising the 100%/200% rates in the involuntary DBC calculation to 200%/ 400%. In our opinion, this new formula, in conjunction with the raised DBC limits of $650/$1,300, strikes a balance between permitting carriers to continue to overbook flights, but limiting the carriers' financial burden from compensating passengers due to oversales, and adequately protecting passengers' interests in oversales situations.

In the European Union, denied boarding compensations are governed by Article 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004, which reads as follows:

> 1. Where reference is made to this Article, passengers shall receive compensation amounting to:
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> (a) EUR 250 for all flights of 1500 kilometres or less;
>
> (b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;
>
> (c) EUR 600 for all flights not falling under (a) or (b).
>
> In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.
>
> 2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked
>
> (a) by two hours, in respect of all flights of 1500 kilometres or less; or
>
> (b) by three hours, in respect of all intra-Community flights of more than 1500 kilometres and for all other flights between 1500 and 3500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.

It is submitted that both the American and the European industry standards reasonably compensate victims of denied boarding without being punitive for the carriers, and they adequately take into consideration the length of the delay and the length of the trip affected by the denied boarding.

It is further submitted that Air Canada's denied boarding compensation of $100.00 is unreasonably low compared to the industry standards in developed countries, is based entirely on an airline-focused view, and fails to strike a balance between the right of passengers to be subject to reasonable terms and conditions and Air Canada's statutory, commercial, and operational obligations.

RELIEF SOUGHT

For the aforesaid reasons, the Applicant prays the Agency that:

A. the Agency direct Air Canada to cease and desist the practice of overselling its domestic flights;

B. the Agency disallow Rule 245(E)(1)(b)(iv) as being unreasonable;

C. the Agency substitute Rule 245(E)(2) with the "200%/$400% and $650/$1300" rule recently established by the Department of Transportation of the United States.

All of which is most respectfully submitted.

Gábor Lukács
Applicant

Cc: Julianna Fox, Counsel, Regulatory and International, Air Canada