



March 12, 2012

File No. M 4120-3/11-06673

BY FACSIMILE: 514-422-5839

BY E-MAIL:

Air Canada
Law Branch
P.O. Box 7000, Airport Station
Dorval, Québec
H4Y 1J2

Gábor Lukács
Halifax, Nova Scotia

Attention : Julianna Fox
Counsel Regulatory and International

Dear Sir/Madam:

Re: Overselling practices and denied boarding compensation (domestic)

This refers to the complaint dated December 12, 2011 filed by Gábor Lukács with the Canadian Transportation Agency (Agency), alleging that Air Canada's current practice of overselling domestic flights, and Rule 245 appearing in Air Canada's Canadian Domestic General Rules Tariff No. CDGR-1, governing compensation for denied boarding, are unreasonable. Pleadings respecting this matter were initiated on December 16, 2011. Air Canada's answer was filed on January 16, 2012, and Mr. Lukács' reply on January 24, 2012.

The following preliminary matters were raised by the parties in their submissions:

1. whether Mr. Lukács' request that certain references and documents, appearing in Air Canada's answer, should be struck from the record, pursuant to paragraph 14(3)(b) of the Canadian Transportation Agency General Rules (General Rules), as being irrelevant and prejudicial.
2. whether Air Canada's request to dismiss Mr. Lukács' complaint, on the basis that the complaint is in the abstract, should be granted.
3. whether Mr. Lukács' request to be awarded costs relating to Air Canada's request to dismiss his complaint should be granted.
4. whether the Agency should find that certain statements in Air Canada's submissions are misleading or unsupported by evidence. Mr. Lukács claims that these statements are inadmissible as evidence, and that the Agency should draw an adverse inference respecting these statements.

Issue 1. Whether Mr. Lukács' request that certain references and documents, appearing in Air Canada's answer, should be struck from the record as being irrelevant and prejudicial.

POSITION OF THE PARTIES

Air Canada submits that Mr. Lukács' complaint follows a threat he had made to file a complaint with the Agency respecting Air Canada's denied boarding tariff provision as the result of an incident occurring on November 23, 2011. With its answer, Air Canada provided a copy of exchanges of correspondence between itself and Mr. Lukács relating to that incident.

Mr. Lukács maintains that the incident to which Air Canada refers, and the submission made by Air Canada relating thereto, are irrelevant to the present matter, and that the manner in which Air Canada portrayed that incident is prejudicial to him. Mr. Lukács notes that he intends to file a complaint regarding the November 23, 2011 incident, but independently and separately from the present complaint. Mr. Lukács has requested that references to the aforementioned incident, appearing in Air Canada's reply, and related documents filed with that reply, be struck from the record as being irrelevant and prejudicial.

ANALYSIS/FINDINGS

The complaint currently before the Agency concerns Air Canada's practice of overselling domestic flights and certain domestic tariff provisions relating to denied boarding, including the compensation tendered by Air Canada for denied boarding. Mr. Lukács has indicated in his pleadings that he intends to bring a separate complaint in relation to the November 23, 2011 incident, and that he does not wish to make that incident part of the present complaint.

The Agency notes that pursuant to section 21 of the Canadian Transportation Agency General Rules, it may formulate the issues to be considered in any proceeding. The Agency has determined that the November 23, 2011 incident is not relevant to this proceeding and will not form part of the issues addressed by the Agency. Air Canada is required, within 3 days of the present decision, to re-file with the Agency, copied to Mr. Lukács, Air Canada's submission dated January 16, 2012, with all references and material relating thereto deleted respecting the November 23, 2011 incident involving Mr. Lukács.

Issue 2. Whether Air Canada's request to dismiss Mr. Lukács' complaint, on the basis that the complaint is in the abstract, should be granted.

POSITION OF THE PARTIES

Air Canada submits that Mr. Lukács' allegations are not based on any specific facts, but rather on simple allegations of unreasonableness. Air Canada maintains that there is no evidence, let alone any allegation, to support Mr. Lukács' conclusion that Rules 245(E)(1)(b)(iv) or Rule 245(E)(2) are unreasonable. Air Canada asserts that it cannot respond to Mr. Lukács' allegations of unreasonableness since the evaluation of what is reasonable simply cannot be made *in abstracto*.

Mr. Lukács argues that Air Canada's request should be dismissed on the grounds of issue estoppel and/or *res judicata* and/or abuse of process. He submits that, in a previous proceeding (*Lukács v. Air Canada* re: domestic tariff provisions reflecting Flight Rights Canada, Decision No. LET-C-A-155-2009), the Agency dismissed an identical request by Air Canada, and that the present request represents an attempt to derail and/or delay proceedings.

ANALYSIS/FINDINGS

In Decision No. LET-C-A-155-2009, the Agency addressed a request by Air Canada to dismiss certain elements of the complaint. In its motion, Air Canada submitted that Mr. Lukács' allegations respecting the reasonableness of the aforementioned tariff provisions were based on neither fact nor supposition, and that Air Canada could not respond to Mr. Lukács' "imagined scenarios, since the evaluation of what is reasonable simply cannot be made *in abstracto*."

The Agency, while noting in Decision No. LET-C-A-155-2009 that Air Canada had previously filed similar requests in respect of other complaints before the Agency, stated that:

Air Canada has not provided the Agency with any evidence demonstrating that it does not have enough information to respond to Mr. Lukács' complaint. The test for determining whether a term or condition of carriage applied by a domestic carrier is "unreasonable" requires that a balance be struck between the rights of the passenger to be subject to reasonable terms and conditions of carriage and the particular air carrier's statutory, commercial and operational obligations (*Del Anderson v. Air Canada*, Decision No. 666-C-A-2001).

Air Canada knows what tariff provisions are at issue; it has been provided with the complainant's submissions to that end and it is reasonable to assume that Air Canada has all the information relating to its statutory, commercial and operational obligations: the factors to be submitted by air carriers for consideration by the Agency in its determination of reasonableness.

[...]

In light of the above, the Agency denies Air Canada's motion to dismiss and will proceed with the consideration of the complaint.

Accordingly, the Agency denies Air Canada's request to dismiss Mr. Lukács' complaint on the basis that is in the abstract.

Issue 3. Whether Mr. Lukács' request to be awarded costs relating to Air Canada's request to dismiss his complaint should be granted.

POSITION OF THE PARTIES

Mr. Lukács maintains that, given that Air Canada has repeatedly filed motions seeking to dismiss complaints filed by him as being *in abstracto*, all of which the Agency has dismissed, unique circumstances exist in this particular matter to merit the awarding of costs.

ANALYSIS/FINDINGS

The Agency is of the opinion that costs are generally compensatory in nature and are awarded at the end of a proceeding. Although the Agency is not prepared to issue an interim order on costs it will however consider the issue of costs at the conclusion of its investigation into Mr. Lukács' application.

Issue 4. Whether the Agency should find that certain statements in Air Canada's submissions are misleading or unsupported by evidence. Mr. Lukács claims that these statements are inadmissible as evidence, and that the Agency should draw an adverse inference respecting these statements.

POSITION OF THE PARTIES

Mr. Lukács claims that Air Canada made a misleading statement in its answer in saying that all WestJet fares are non-refundable. To counter this statement, he points to WestJet's Domestic Tariff Rule 9.2, which provides for transportation credits.

Mr. Lukács further argues that Air Canada has made several statements in its answer which are unsupported by documentary evidence, even though this evidence is within its control. These include statements that: Air Canada's overbooking levels are half of what they are for United States carriers; that Air Canada engages in overbooking to absorb risk and to benefit customers; and that only 0.09% of Air Canada passengers are subject to denied boarding on domestic flights.

Mr. Lukács claims that these statements are not admissible as evidence and that the Agency should draw adverse inferences with respect to these statements

ANALYSIS/FINDINGS

The Agency has determined that the evidence provided by Air Canada in its answer should not be dismissed on a preliminary basis; instead, the Agency will address the evidence tendered by Air Canada and the weight to be given such evidence in a decision on the merits.

Should you have any questions regarding this matter, you may contact Mike Redmond by telephone at 819-997-1219, facsimile at 819-953-7910, or e-mail at mike.redmond@otc-cta.gc.ca.

Sincerely,



 Cathy Murphy
Secretary

BY THE AGENCY:

J. MARK MACKEIGAN

Member

Geoffrey C. Hare

Member