



August 24, 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
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Gábor Lukács
Halifax, Nova Scotia

Attention: Julianna Fox
Counsel, Regulatory and International

Dear Madam/Sir:

Re: Overselling practices and denied boarding compensation (domestic)

BACKGROUND

This refers to the complaint by Gábor Lukács dated December 12, 2011 alleging that Air Canada's current practice of overselling its domestic flights, and certain portions of Rule 245 of Air Canada's domestic tariff governing compensation for denied boarding, are unreasonable. On December 16, 2011, the Canadian Transportation Agency (Agency) opened pleadings respecting Mr. Lukács' complaint. On January 16, 2012, Air Canada filed its answer, and on January 24, 2012, Mr. Lukács filed his reply.

In Decision No. LET-C-A-105-2012 dated July 19, 2012, the Agency posed questions to Air Canada regarding Mr. Lukács' complaint. On August 15, 2012, Air Canada filed its response with the Agency, and requested that, pursuant to section 23 of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules), certain information be considered confidential. On the same date, Air Canada provided Mr. Lukács with its submission, with the confidential information redacted. Air Canada requested that, prior to transmitting the confidential information to Mr. Lukács, he sign a Confidentiality and Non-Disclosure Undertaking (Undertaking).

On August 16, 2012, Mr. Lukács wrote directly to Air Canada and questioned it as to whether the Undertaking was the same document that he had signed pursuant to Decision No. LET-C-A-226-2010 in File No. M 4120-3/09. In reply to Air Canada's affirmative answer on August 17, 2012, Mr. Lukács again wrote to Air Canada directly and advised that he had no objection to signing such an Undertaking. Mr. Lukács then filed with the Agency, on August 17, 2012, a request, pursuant to subsection 28(3) of the General Rules, that the information for which Air Canada claims confidentiality be disclosed. Later on the same date, Air Canada provided to Mr. Lukács an Undertaking for signature, which he signed and returned to Air Canada. On August 20, 2012, Air Canada wrote to Mr. Lukács directly and provided him with its unredacted response to Decision No. LET-C-A-105-2012. Mr. Lukács, on August 21, 2012, then wrote to Air Canada directly and posed certain questions to Air Canada respecting that response.

MATTERS TO BE ADDRESSED

The Agency will address the following matters in this Decision:

1. Air Canada's request for confidentiality
2. Confidentiality and Non-disclosure Undertaking
3. Mr. Lukács' request for disclosure
4. Communications between the parties

1. Air Canada's request for confidentiality

In support of its request for confidentiality respecting certain information appearing in its response to Decision No. LET-C-A-105-2012, Air Canada submits that such information includes internal confidential information that is extremely commercially sensitive and that this information has consistently been treated in a confidential manner by Air Canada. Air Canada maintains that if the information at issue were to be disclosed, it could significantly affect Air Canada's competitive position in the marketplace, and may result in unquantifiable damages which will affect Air Canada's reputation.

Pursuant to subsection 24(2) of the General Rules, the Agency must first determine whether the document in respect of which a claim for confidentiality is made is relevant to the proceeding.

If it is determined that the document is not relevant, then pursuant to subsection 24(3) of the General Rules the Agency may order that the document be withdrawn and will not order its disclosure. However, if the Agency determines that the document is relevant, then pursuant to subsection 24(2) of the General Rules, it must assess whether any specific direct harm would likely result from its disclosure or whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.

Should it determine that the document is relevant and that the specific direct harm likely to result from disclosure justifies a claim for confidentiality, then pursuant to subsection 24(4) of the General Rules, the Agency has a range of disclosure options from ordering that the document not be placed on the public record to ordering that it be kept confidential but allowing for partial disclosure or disclosure to specific parties or their representatives to ordering full public disclosure.

The issues to be determined in this particular case are:

(i) whether the confidential information for which Air Canada requests confidentiality is relevant to the proceeding; and

(ii) if so, if any specific direct harm would likely result from the disclosure of the confidential information; and,

(iii) if so, whether the specific direct harm is sufficient to outweigh the interest in disclosing the said information.

Issue (i): Relevance of the confidential information filed by Air Canada

The confidential information filed by Air Canada involves data relating to: the number of times, over the most recent two-year period for which data are available, Air Canada substituted a smaller aircraft for a larger aircraft for operational and safety reasons; the number of passengers over the same period who were denied boarding because of the substitution, and the number of passengers during the same period who were denied boarding, both voluntarily and involuntarily.

The relevance of any particular information requested to be disclosed in a proceeding is determined, in large measure, by considering whether that information relates to the matter in dispute, and whether the information might usefully advance a party's position on a particular issue.

In this case, the Agency finds that the information is relevant and is of assistance in the determination of this matter as such information directly pertains to the questions posed by the Agency in Decision No. LET-C-A-105-2012.

Given this finding, the Agency will now consider if any specific direct harm would likely result from the disclosure of the confidential information and, if so, whether any demonstrated specific direct harm is sufficient to outweigh the public interest in having it disclosed.

Issues (ii) and (iii): Specific direct harm

Specific direct harm is clear, identifiable harm to a party's public reputation and/or commercial interests which results directly from disclosure to the public. As per the test for confidentiality established by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, it requires the presence of a real and substantial risk which is well grounded in the evidence.

Air Canada maintains that the information for which it requests confidentiality is extremely commercially sensitive and has consistently been treated in a confidential manner by Air Canada. Air Canada submits that if that information were to be disclosed, it could significantly affect Air Canada's competitive position in the marketplace, and may result in unquantifiable damages which will affect Air Canada's reputation.

The Agency finds that, given the nature of the information at issue, placing of that information on the public record would affect Air Canada's competitive position relative to other carriers, and would represent an unfair disadvantage to Air Canada. The Agency notes that Mr. Lukács, the party who requested disclosure, is not a competitor in the air transport industry. The Agency is of the opinion that the disclosure to Mr. Lukács of the information for which Air Canada claims confidentiality will not result in specific direct harm to Air Canada, provided that appropriate disclosure parameters are in place so that competitors in the marketplace will not have access to the information at issue.

Given the foregoing, the Agency grants Air Canada's request for confidentiality, and will not place the information at issue on the public record.

2. Confidentiality and Non-Disclosure Undertaking

In its response to Decision No. LET-C-A-105-2012, Air Canada requested that, prior to transmitting the confidential information to Mr. Lukács, he sign an Undertaking. The Agency notes that, on August 17, 2012, such an Undertaking was signed by Mr. Lukács and submitted to Air Canada, and that on August 20, 2012, Air Canada provided to him an unredacted version of Air Canada's response to Decision No. LET-C-A-105-2012.

3. Mr. Lukács' request for disclosure


On August 17, 2012, Mr. Lukács requested, pursuant to subsection 28(3) of the General Rules, that the information for which Air Canada claims confidentiality be disclosed. Given that, as described above, Air Canada has provided the information at issue to Mr. Lukács, his request is now moot.

4. Communications between the parties

The Agency notes that Air Canada and Mr. Lukács have exchanged communications between each other, while copying the Agency on those communications, and that among those communications was one dated August 21, 2012 from Mr. Lukács to Air Canada in which he posed questions concerning Air Canada's response to Decision No. LET-C-A-105-2012. The Agency reminds Air Canada and Mr. Lukács that, in the interest of clarity, the efficient and effective management of the file, and to ensure that the Agency has a complete record of all information provided by the parties within this proceeding, all communications should be conducted through the Agency.

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

Sincerely,


Cathy Murphy
Secretary

BY THE AGENCY:

J. MARK MACKEIGAN
Member

Geoffrey C. Hare
Member