
DECISION NO. 327-C-A-2013

August 22, 2013

COMPLAINT by Gábor Lukács against Air Transat.

File No. M4120-3/13-02438

INTRODUCTION

[1] On April 24, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions appearing in Rule 5.2, Responsibility for Schedules and Operations, of Air Transat's international tariff are:

(i) inconsistent with the *Convention for the Unification of Certain Rules for International Carriage by Air - Montreal Convention* (Convention) because they represent a blanket exclusion from liability; and,

(ii) unreasonable because they fail to provide the same protection to passengers affected by flight advancements as that provided to passengers who are subject to flight delays.

[2] On May 21, 2013, Air Transat filed its answer, and Mr. Lukács filed his reply on May 27, 2013. In its answer, Air Transat proposed certain revisions to Rules 5.2, 21.2 and 21.3, Additional Passenger Service Commitments. On May 29, 2013, Air Transat filed a submission after pleadings had closed. On the same date, Mr. Lukács requested the Agency to either expunge Air Transat's submission from the record, or alternatively, allow him to respond to that submission. On June 18, 2013, the Agency provided Mr. Lukács with the opportunity to respond to Air Transat's submission, and on the same date, Mr. Lukács submitted his response.

PRELIMINARY MATTER

[3] On May 26, 2013, Mr. Lukács filed a motion, pursuant to paragraph 14(3)(b) and section 32 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, requesting that the Agency expunge paragraphs 2 to 5 of Air Transat's answer, and an e-mail attached thereto, as being irrelevant and prejudicial to him. He submits that the paragraphs at issue describe the communications that Air Transat had with him prior to his filing of the complaint, and involve an attack on him. He further submits that the e-mail attached to Air Transat's answer, sent to him previously by the carrier, includes false and defamatory allegations, and is therefore scandalous.

[4] Air Transat maintains that, in error, it failed to include in the attachment to Air Transat's answer the version of the e-mail which retracted statements regarding Mr. Lukács' personal motives and previous employment.

- [5] The issue before the Agency in this matter is whether certain existing and proposed tariff provisions are consistent with the Convention and are reasonable. Air Transat's submissions respecting Air Transat's interaction with Mr. Lukács and the motives that may underlie the filing of his complaint are irrelevant to the Agency's consideration of the issue. As such, they have not been considered by the Agency in reaching its determinations.
- [6] With respect to Mr. Lukács' request that certain material be expunged from the record, as the Agency does not expunge its public record of irrelevant material, the motion of Mr. Lukács to expunge the record is denied.

ISSUES

Existing Rules 5.2(a) and (b)

- [7] Are Existing Rules 5.2(a) and (b) inconsistent with the Convention, and not reasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR)?

Proposed Rules 5.2, 21.2 and 21.3

- [8] Would Proposed Rules 5.2, 21.2 and 21.3 be considered not reasonable within the meaning of subsection 111(1) of the ATR if they were filed with the Agency?

RELEVANT STATUTORY AND TARIFF EXTRACTS

- [9] The Existing and Proposed Rules and the statutory extracts relevant to this Decision are set out in the Appendix.

REASONABLENESS OF TARIFF PROVISIONS

- [10] To assess whether a term or condition of carriage is "unreasonable", the Agency has traditionally applied a balancing test, which requires that a balance be struck between the right of a passenger to be subject to reasonable terms and conditions of carriage, and the particular carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision Nos. 227-C-A-2013 (*Lukács v. WestJet*) and 264-C-A-2013 (*Azar v. Air Canada*).
- [11] The terms and conditions of carriage are set out by a carrier unilaterally without any input from passengers. The carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

- [12] When balancing the passenger's rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

EXISTING TARIFF RULES

Issue: Are Existing Rules 5.2(a) and (b) inconsistent with the Convention, and not reasonable within the meaning of subsection 111(1) of the ATR?

- [13] Mr. Lukács submits that Article 19 of the Convention provides that a carrier can only exonerate itself from liability for a flight delay if the carrier demonstrates that it and its servants and agents took all reasonable steps necessary to avoid the delay. He submits that Existing Rules 5.2(a) and (b) are inconsistent with Article 19 as they purport to exonerate Air Transat from every and any liability associated with a failure to operate and/or failure to operate on schedule, and in particular, exempt Air Transat from any liability for out-of-pocket expenses incurred by passengers because of a flight delay.

- [14] Mr. Lukács observes that the impugned tariff provisions are almost identical to tariff provisions applied by Porter Airlines Inc., which the Agency found in Decision No. 16-C-A-2013 (*Lukács v. Porter Airlines Inc.*) to be inconsistent with Article 19 of the Convention. He submits that, while Existing Rules 5.2(a) and (b) permit passengers to request a refund in the event of a change from a direct to a connecting service, they appear to be silent on the rights of passengers affected by flight advancements. Mr. Lukács maintains that the absence of any protection for passengers affected by flight advancements is unreasonable, and that Air Transat should be directed to provide the same protection to those passengers as that provided to passengers affected by flight delays.

Analysis and findings

- [15] Mr. Lukács submits that the provisions at issue in Existing Rules 5.2(a) and (b) represent exemptions from liability relating to flight operations, and that those Rules are inconsistent with Article 19 of the Convention in that they fail to recognize that a carrier is liable for certain operations if it cannot demonstrate that it took all reasonable measures to avoid the damage or that it was impossible to take those measures. The Agency agrees with Mr. Lukács' submission that Existing Rules 5.2(a) and (b) are inconsistent with the Convention. The Agency also agrees with Mr. Lukács' assertion respecting protection afforded to passengers affected by flight advancements as, in the Agency's opinion, such occurrences may impact as negatively on those passengers as is the case with passengers whose flight is delayed.
- [16] In light of the foregoing, the Agency finds that the right of a passenger to be subject to reasonable terms and conditions of carriage outweighs Air Transat's statutory, commercial and operational obligations, and that the provisions at issue are therefore not reasonable within the meaning of subsection 111(1) of the ATR.

PROPOSED TARIFF RULES

Issue: Would Proposed Rules 5.2, 21.2 and 21.3 be considered not reasonable within the meaning of subsection 111(1) of the ATR if they were filed with the Agency?

- [17] Air Transat submits that the revisions to the tariff provisions at issue are consistent with the findings in Decision No. 16-C-A-2013, and provide undertakings to passengers, who have had their scheduled departure times advanced in certain circumstances that are similar to those in the event of overbooking, cancellation or delay.
- [18] Mr. Lukács submits that the revisions proposed by Air Transat to Rules 5.2 and 21 address the issue raised in his complaint, with the exception of Proposed Rule 21(2)(i), which he asserts is excessively restrictive in protecting passengers affected by flight advancements. He states that he fails to understand the rationale for not protecting passengers whose flight is advanced by less than six hours, or who are notified more than 48 hours in advance.
- [19] Mr. Lukács maintains that Proposed Rule 21(2)(i) does not take into account previous Agency decisions respecting Air Transat's tariffs, notably, Decision Nos. LET-C-A-112-2003 and 212-C-A-2004 (*Lipson v. Air Transat*). He asserts that passengers should be entitled to protection if their departure time is advanced by more than 45 minutes, irrespective of the length of advance notice that Air Transat provides, and that passengers should also be entitled to choose between alternative transportation and a refund.
- [20] Air Transat submits that, contrary to Mr. Lukács' submission, in Decision No. 212-C-A-2004 the Agency expressly accepted a provision in Air Transat's tariff which provided that remedies were only available for scheduling irregularities, including advancements, of not less than six hours. Air Transat indicates that Mr. Lukács has failed to provide any facts or evidence that would militate in favour of the Agency reversing itself in this respect, as he has essentially requested.
- [21] Mr. Lukács submits that he has difficulty understanding Air Transat's assertion that he has misstated the Agency's determination in Decision No. 212-C-A-2004, and quotes relevant text in that Decision to support his position.
- [22] With respect to the substance and merits of his position, Mr. Lukács refers to submissions appearing in his reply dated May 27, 2013.

Analysis and findings

- [23] Mr. Lukács submits that, with the exception of Proposed Rule 21(2)(i), Proposed Rules 5.2, 21.2 and 21.3 are reflective of the requirements of the Convention and previous Agency decisions.

- [24] With respect to Proposed Rule 21(2)(i), Mr. Lukács maintains that it fails to provide protection to passengers affected by flight advancements, and it is not consistent with previous Agency decisions, including Decision No. 212-C-A-2004. He also submits that passengers should be entitled to protection if their departure time is advanced by more than 45 minutes, irrespective of the advance notice that Air Transat provides, and that affected passengers should be entitled to choose between alternative transportation and a refund.
- [25] Air Transat argues that, contrary to Mr. Lukács' submission regarding Decision No. 212-C-A-2004, the Agency, in that Decision, expressly accepted an Air Transat tariff provision providing that remedies were only available for scheduling irregularities, including advancements, of not less than six hours.
- [26] The Agency agrees with Mr. Lukács' submission that with the exception of Proposed Rule 21(2)(i), Proposed Rules 5.2, 21.2 and 21.3 are reflective of the requirements of the Convention and previous Agency Decisions.
- [27] The Agency also agrees with Mr. Lukács' submission regarding Decision No. 212-C-A-2004. Contrary to Air Transat's submission, the Agency, in that Decision, did not make any determinations relating to the advancement of flights of not less than six hours. The tariff provision at issue was solely related to advancements greater than the minimum period established for check-in, that is, 45 minutes prior to the scheduled departure of the flight.
- [28] With regard to the matter of flight advancements, the Agency is of the opinion that such advancements may impact as negatively on those passengers as is the case with passengers whose flight is delayed, and that affected passengers should be able to avail themselves of the same remedies as those available to passengers whose flight is delayed. Therefore, the Agency finds that the absence of protection for all passengers affected by flight advancements fails to strike a balance between a passenger's right to be subject to reasonable terms and conditions of carriage and Air Transat's statutory, commercial and operational obligations. As such, Proposed Rule 21(2)(i) would not be considered reasonable within the meaning of subsection 111(1) of the ATR if it were included in the Tariff on file with the Agency.

CONCLUSION

- [29] In light of the foregoing, the Agency concludes the following:

Existing Rules:

- [30] The Agency has determined that Existing Rules 5.2(a) and (b) are not reasonable within the meaning of subsection 111(1) of the ATR.

Proposed Rules:

- [31] The Agency has determined that, with the exception of Proposed Rule 21(2)(i), Proposed Rules 5.2, 21.2 and 21.3 are reasonable within the meaning of subsection 111(1) of the ATR.

ORDER

- [32] The Agency, pursuant to paragraph 113(a) of the ATR, disallows Existing Rules 5.2(a) and (b).
- [33] The Agency orders Air Transat, by no later than September 23, 2013, to file Proposed Rules 5.2, 21.2 and 21.3, with the exception of Proposed Rule 21(2)(i), and a revised Proposed Rule 21(2)(i) that conforms to the findings in this Decision.
- [34] Pursuant to paragraph 28(1)(b) of the CTA, this Order shall come into force when Air Transat complies with the above, but no later than September 23 , 2013.

(signed)

Geoffrey C. Hare
Member

(signed)

J. Mark MacKeigan
Member