

**CANADIAN TRANSPORTATION AGENCY**

**B E T W E E N :**

**GÁBOR LUKÁCS**

Complainant

- and -

**PORTER AIRLINES INC.**

Respondent

**ANSWER OF PORTER AIRLINES INC.**

**PART I - OVERVIEW AND BACKGROUND**

1. Rule 18 of Porter Airlines Inc.'s Domestic Tariff (the "Tariff") sets out the remedies for passengers who are involuntarily denied boarding as a result of overbooking. In these proceedings, the complainant Gábor Lukács asks that the Canadian Transportation Agency (the "Agency") disallow Rule 18 and substitute either (a) Rules 15 and 20 from Porter's International Tariff, or (b) "the combination of policies" set out in the Agency's July 3, 2013 Notice to Industry and Decision No. 342-C-A-2013.

2. The principles and requirements applicable to denied boarding compensation ("DBC") regimes have been the subject of recent decisions by the Agency, including most notably Decisions No. 342-C-A-2013 and No. 31-C-A-2014. Among other things, these decisions reaffirm that passengers who are denied boarding due to overbooking are entitled to receive compensation, and endorse as reasonable two compensation regimes: a regime

substantively similar to that prescribed by the U.S. Department of Transportation, and an alternative regime proposed by Mr. Lukacs in the former proceeding.

3. Porter acknowledges that its Rule 18 requires revisions to reflect the requirements established by the above-referenced jurisprudence of the Agency. Indeed, prior to 2013, Porter did not engage in the practice of overbooking at all, such that its Rule 18 addressing DBC existed solely to satisfy the requirement of Section 107 (n)(iii) of the *Air Transportation Regulations*.

4. As Porter began to implement overbooking on a test basis in the summer of 2013, it followed with interest the *Lukacs v. Air Canada* proceedings which ultimately resulted in Decision No. 342-C-A-2013. Pending the outcome of those proceedings, Porter adopted the interim practice of providing a \$500 travel voucher to passengers denied boarding due to overbooking on its Canadian routes.

5. The Agency released its Decision No. 342-C-A-2013 in *Lukacs v. Air Canada* on August 29, 2013. Soon thereafter, on September 24, 2013, Mr. Lukacs delivered a formal complaint to Porter and to the Agency challenging, among other things, the DBC regime then set out in Rule 20 of Porter's International Tariff. In light of this intervening challenge, Porter suspended any further updates to its DBC procedures pending the conclusion of those proceedings and the concomitant instructions of the Agency as to what requirements would apply. The Agency's resulting Decision No. 31-C-A-2014 was released on January 31, 2014, and ordered revisions to Porter's International DBC Rule to be implemented by February 28, 2014.

6. On March 9, 2014, Mr. Lukacs delivered the within Complaint to Porter and to the Agency challenging Porter's Domestic DBC Rule.

7. As noted above, Porter acknowledges that its Domestic Rule 18 requires revisions to incorporate the principles laid out by the above-referenced jurisprudence of the Agency. For the reasons discussed herein, Porter requests:

(a) that it be permitted to deliver proposed amendments to Rule 18 for review and consideration by the Agency as to clarity and reasonableness; and

(b) leave to deliver submissions in response to any submissions Mr. Lukacs may deliver concerning any proposed amendments hereafter delivered by Porter pursuant to (a) above.

### **Procedural Issue**

8. Whereas Porter has, in recent proceedings before the Agency, filed proposed amendments together with its Answer with a view to expediting the final resolution of the proceedings, Porter considers that this procedure may operate to its prejudice to the extent that the complainant may make submissions as of right, in his Reply, concerning the contents of such draft amendments, without any right of response by Porter. Accordingly, Porter respectfully submits that the Agency may be denied a full hearing of the issues, to the extent that Porter will not, without the Agency's leave, be afforded the right to respond to any new arguments the complainant may raise in his Reply concerning any draft amendments submitted.

9. Thus, to the extent that the Agency directs or otherwise permits Porter to deliver draft amendments to its impugned Rule 18, Porter requests leave to deliver further submissions as specified in paragraph 7(b) above.

### **PART II - APPLICABLE LEGAL PRINCIPLES**

10. For the purposes of the within Complaint, Porter does not dispute:

(a) Mr. Lukács's submissions as to the test applicable to the determination of the clarity of tariff provisions (at section I(a) of the Complaint);

(b) Mr. Lukács's submissions as to the balancing test applicable to the determination of the reasonableness of tariff provisions and the absence of a presumption of reasonableness with respect to the provisions of a carrier's tariffs (at section II(a) of the Complaint).

11. Further, Porter accepts that passengers who are denied boarding due to overbooking are entitled to:
- (a) their choice of remedies for delay offered pursuant to the circumstance-focussed approach endorsed by the Agency in *Lukács v. Air Transat*, 248-C-A-2012, *Lukács v. WestJet*, 249-C-A-2012 and *Lukács v. Air Canada*, 250-C-A-2012 (the “2012 Trilogy”), which approach is substantively summarized in the Agency’s Notice to Industry dated July 3, 2013 (see Exhibit “B” to the Complaint);
  - (b) compensation for any expenses resulting from the delay in accordance with Porter’s Domestic Rule 16;<sup>1</sup> and
  - (c) cash or equivalent compensation in accordance with one of the two DBC regimes endorsed as reasonable by the Agency in Decisions No. 342-C-A-2013 and No. 31-C-A-2014, or travel vouchers subject to the restrictions set out in the offering and provision thereof in the aforesaid Decisions.
12. Subject to any further guidance or order by the Agency, Porter’s intention is to deliver proposed amendments reflecting the foregoing principles.

### **PART III - RULE 18: CLARITY**

13. Mr. Lukacs has raised two issues as to the clarity of Rule 18:
- (a) that it is unclear as to whether the choice of the indicated remedies lies with the passenger or with the carrier; and
  - (b) that it is not sufficiently clear whether the reference to “the posted check-in cutoff time” refers to the check-in time set out in Rule 20.
14. Porter does not dispute that, where a passenger is denied boarding due to overbooking, the choice between re-protection and refund lies with the passenger and not

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<sup>1</sup> Rule 16 reflects the liability regime of the *Montreal Convention* as ordered by the Agency pursuant to Decision No. 344-C-A-2013.

with the carrier. Further, Porter does not object to revising any reference to check-in deadlines to include a reference to the tariff Rule prescribing such deadlines (here, Rule 20).

15. Subject to any contrary order of the Agency, Porter shall accordingly endeavour to clarify these matters in its forthcoming draft amendments.

#### **PART IV - RULE 18: REASONABLENESS**

16. As indicated above, Porter's current Rule 18 reflects:

- (a) its historical practice of not overbooking domestic flights;
- (b) the statutory requirement that a Rule addressing DBC be included in a carrier's tariff (whether or not overbooking is actually undertaken); and
- (c) the succession of intervening proceedings relating to DBC rules contemporaneous with Porter's rollout of selective overbooking on certain of its routes since mid-2013, and the resulting ongoing uncertainty concerning the requirements thereof.

17. Porter acknowledges that Rule 18 does not reflect its interim practice of providing DBC in the form of a \$500 travel voucher to affected passengers, nor yet the regimes endorsed by the Agency in its Decisions No. 342-C-A-2013 and No. 31-C-A-2014 or the principles set out in paragraph 11 above.

18. Porter requests the opportunity to deliver for the Agency's consideration and review a draft amended Rule 18 (a) incorporating a DBC regime substantively similar to that in its International Tariff, being the U.S.-analogous regime endorsed by the Agency in No. 31-C-A-2014, and (b) otherwise providing for the passenger to choose among remedies presented in accordance with the circumstance-focussed approach.

#### **PART V - CONCLUSION**

19. Porter welcomes the opportunity to obtain the Agency's input, guidance and directions concerning its domestic DBC Rule, and would be pleased to deliver draft

amendments for consideration. Porter further requests leave to respond to any submissions Mr. Lukacs may be permitted to make concerning such draft amendments, in order to ensure that Porter have a fair opportunity to respond to any such arguments and that the Agency make its decision having obtained a full hearing of each party's position.

All of which is respectfully submitted,

Greg Sheahan  
Porter Airlines Inc.