Office des transports du Canada

Canadian Transportation Agency

DECISION NO. 249-C-A-2014

June 30, 2014

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No. M4120-3/14-01414

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that Rule 18, Denied Boarding Compensation, of the Domestic Tariff, CTA(A) No. 1 (Tariff) of Porter Airlines Inc. (Porter) is unreasonable within the meaning of subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) and unclear within the meaning of paragraph 107(1)(*n*) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR). Mr. Lukács requests that the Agency :

1. disallow Tariff Rule 18; and,
2. substitute Tariff Rule 18 with:
   (i) Rules 15 and 20 established by the Agency in Decision No. 31-C-A-2014 (*Lukács v. Porter*); or
   (ii) the combination of the policies set out in the Agency's Notice to Industry dated July 3, 2013 and in Decision No. 342-C-A-2013 (*Lukács v. Air Canada*).

[2] On April 1, 2014, Porter filed its answer, and on April 5, 2014, Mr. Lukács filed his reply. On April 21, 2014, Porter filed a motion, pursuant to subsection 14(3) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules), the details of which are set out below. Mr. Lukács filed an answer to the motion on April 25, 2014, and Porter filed a reply on April 29, 2014.

ISSUE

[3] Is Tariff Rule 18 unreasonable within the meaning of subsection 67.2(1) of the CTA and unclear within the meaning of paragraph 107(1)(*n*) of the ATR?

PRELIMINARY MATTERS

Should the Agency grant Porter's request to file:

(i) proposed revisions to Tariff Rule 18 for review by the Agency; and,

(ii) submissions in response to any submissions by Mr. Lukács regarding the proposed revisions?

Positions of the parties

Porter

[4] Porter submits that in recent proceedings before the Agency, Porter filed proposed amendments with its answer in an effort to expedite those proceedings. Porter argues that this approach may be prejudicial to Porter because the complainant may make submissions as of right, in a reply, concerning such draft amendments, without any right of response by Porter. Porter maintains that the Agency may therefore 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 the reply concerning any draft amendments.

[5] Therefore, to the extent that the Agency directs or otherwise permits Porter to submit draft amendments to Tariff Rule 18, Porter requests leave to provide further submissions in response to any submissions made by Mr. Lukács respecting those amendments.

Mr. Lukács

[6] Mr. Lukács asserts that Porter's concerns about the Agency's procedures do not exempt Porter from complying with those procedures and the Agency's rules and explicit directions. He submits that the General Rules establish the order of pleadings, starting with an application, followed by the respondent's answer, and ending with the complainant's reply, and that pleadings close when the reply is filed. After the close of pleadings, parties may make a motion to the Agency for permission to file additional submissions.

[7] Mr. Lukács points out that the Agency recently rendered three decisions in complaints involving Porter: Decision Nos. 16-C-A-2013, 344-C-A-2013 and 31-C-A-2014. He points out that Porter chose to propose tariff amendments in answering each complaint, and the complainant in each case filed a reply, which closed the pleadings. Mr. Lukács submits that Porter never sought to reopen pleadings in any of these proceedings, nor did it argue that the procedure was unfair.

[8] Mr. Lukács contends that the pleadings procedure is not only fair, but departing from it and allowing a respondent to have the last word would result in procedural unfairness to the complainant. He submits that in rare cases, where the reply does raise a new argument, which is not merely a response to the submissions in the answer, the appropriate remedy is to reopen the pleadings, and allow both parties to file additional submissions: first the respondent, and then the complainant, who will be permitted to file a final reply.

[9] Mr. Lukács states that Porter does not dispute that Tariff Rule 18 fails to be clear and reasonable, nor that it must be revised. He also maintains that the Agency provided Porter a fair and reasonable opportunity for meaningful participation in this proceeding; however, Porter has effectively chosen not to fully participate.

[10] Mr. Lukács asserts that the Agency ought to close pleadings in this case, and render a decision based on the pleadings of the parties. He submits that doing otherwise, and prolonging the proceeding, would unnecessarily maintain the current situation, where Porter's passengers are subject to terms and conditions that are admittedly unreasonable.

[11] Mr. Lukács concludes that as Porter has indicated that it would prefer that Tariff Rule 18 be replaced with the provisions established in Decision No. 31-C-A-2014, the Agency ought to substitute the Rule with the language of Rules 15 and 20 of Porter's International Tariff, established by the Agency in that Decision, with appropriate modifications to reflect domestic carriage.

Analysis and findings

[12] Although certain carriers, including Porter, have elected to propose tariff revisions in answer to a complaint, therefore providing an opportunity to the complainant to reply to those revisions, it is not obligatory for carriers to do so. It is ultimately left to the Agency's sole discretion to determine whether proposed tariff revisions are reasonable and clear. A complainant does not assume any role in the Agency's review of the revisions to arrive at that determination.

[13] The Agency will not make a determination on this preliminary matter as the proposed tariff revisions are addressed under the substantive portion of this Decision.

[14] Given that Mr. Lukács will not be filing submissions or participating in any way in the Agency's consideration, Porter's request to file submissions in response to any submissions by Mr. Lukács relating to proposed tariff revisions is rendered moot.

Should Mr. Lukács' reply respecting his complaint be struck in whole or in part as being scandalous, vexatious and unduly prejudicial to Porter, and should the Agency direct Mr. Lukács to desist from making further alleged scandalous, inflammatory and prejudicial statements in matters before the Agency?

Positions of the parties

Porter

[15] Porter submits that Mr. Lukács' reply is replete with unfounded attacks on Porter, including allegations that Porter has acted illicitly with "deliberate and calculated" intent, and has adopted improper and abusive tactics with the alleged aim of undermining and subverting the Agency's authority and procedures. Porter argues that Mr. Lukács' submissions are unsupported by facts, irrelevant to the matters at issue, and extremely prejudicial to Porter and to the fair adjudication of this proceeding.

[16] Porter contends that the content of Mr. Lukács' reply, besides being vexatious and prejudicial, is unhelpful in determining the complaint, and should be struck in its entirety, without leave to amend as there are no facts to support the sweeping allegations of improper conduct.

[17] Porter argues that given the degree to which Mr. Lukács has taken his allusions and outright accusations of impropriety on Porter's part in his reply, it is appropriate that the Agency direct Mr. Lukács to refrain from similar conduct in future matters relating to the Agency and within its jurisdiction.

[18] Porter points out that while there appears to be limited Agency jurisprudence dealing with motions to strike out pleadings and submissions, guidance may be sought from the determinations of similar matters by other Canadian tribunals and courts. In this regard, Porter refers to Rule 221 of the *Federal Courts Rules*, SOR/98-106 (Federal Courts Rules) and Rule 25.11 of the Ontario *Rules of Civil Procedure* R.R.O. 1990, Regulation 194 (Rules of Civil Procedure). Porter also refers to certain caselaw on the subject.

Mr. Lukács

[19] Mr. Lukács submits that Porter's motion is a troublesome attempt to deprive him of his most fundamental procedural right of making submissions, and to suppress his reply dated April 5, 2014 that exposed legitimate and serious concerns about Porter's failure to comply with the ATR and to amend the Tariff in a timely manner to reflect the principles articulated in Decision No. 342-C-A-2013.

[20] Mr. Lukács maintains that Porter's submissions relating to this motion contain a litany of irrelevant complaints and allegations that attack him personally, i.e., his character and his conduct. He argues that the motion is devoid of any merit, and is arguably a further attempt by Porter to delay the proceeding.

[21] Mr. Lukács contends that paragraphs 9 to 19 and Exhibits 1 to 13 of Porter's motion address previous proceedings before the Agency and the Federal Court of Appeal, that these proceedings have concluded, and that the Agency is *functus officio* with respect to them. Mr. Lukács argues that paragraphs 9 to 19 and Exhibits 1 to 13 of Porter's motion are irrelevant, and ought not to be considered by the Agency.

[22] Mr. Lukács points out that at paragraph 26 of its submission, Porter takes exception to his post on Twitter. He submits that reviewing the propriety of "tweets" or other public expressions of citizens is not within the mandate or jurisdiction of the Agency, and to the best of his knowledge, not within the mandate or jurisdiction of any other governmental body in Canada.

[23] Mr. Lukács contends that his reply dated April 5, 2014 does not "prejudice, hinder or delay the fair conduct of the proceeding", and only contains submissions that are relevant and necessary to adequately respond to Porter's procedural requests set out in Porter's answer dated April 1, 2014.

[24] Mr. Lukács submits that in the alternative, even if the Agency finds that certain portions of his reply are not relevant, these portions should not be struck because Porter has failed to demonstrate how the reply may prejudice Porter or hinder the fair determination of the issues in the proceeding. Mr. Lukács states that even if the Agency finds that some of these submissions are not relevant, the Agency's practice, as articulated in Decision No. 327-C-A-2013 (*Lukács v. Air Transat*), is to not strike irrelevant materials, but simply to not consider them.

[25] Mr. Lukács maintains that his submissions are far from being scandalous, and are supported by the admissions Porter made in its answer dated April 1, 2014. He contends that whether these admissions are sufficient to conclude that Porter has abused the process is for the Agency to decide; however, failure to persuade the Agency that, on a balance of probabilities, Porter has engaged in an abuse of process does not render the allegations scandalous, nor should such allegations be struck.

[26] Mr. Lukács argues that Porter's request that the Agency direct him to "refrain from further scandalous, inflammatory and prejudicial statements" is not only devoid of any merit, but is also a vexatious and unduly prejudicial attempt to intimidate and muzzle him, and to interfere with his ability to make submissions to the Agency.

[27] Mr. Lukács submits that while the Agency can strike out documents on a case-by-case basis, it is unclear whether the Agency has jurisdiction to make such a direction as sought by Porter. He maintains that even if the Agency has jurisdiction to do so, such a pre-emptive, sweeping, but vague directive would inappropriately interfere with the ability of a party to make submissions freely, without fear of retribution.

[28] Mr. Lukács points out that the wording of paragraph 14(3)(*b*) of the General Rules differs from Rule 221 of the Federal Courts Rules or Rule 25.11 of the Ontario's Rules of Civil Procedure, and that the Agency applied this rule differently than the courts.

Porter

[29] Porter submits that a party may thoroughly address all issues relevant to a complaint without resorting to pejorative remarks and implications, allegations of disrespect for the Agency and the law, or baseless imputations of wrongful intent. According to Porter, the motion, if granted, would not have the effect of depriving Mr. Lukács of the right to make relevant submissions in this proceeding or any future proceedings before the Agency.

[30] In response to Mr. Lukács' submission that Porter has failed to demonstrate how his reply may prejudice Porter, Porter states that the reply depicts Porter as disrespectful of the Agency, heedless of the Agency's procedures and orders, and unwilling to comply with the law, all of which are unsupported. Porter maintains that the prejudice resulting from these allegations is self-evident.

[31] In response to Mr. Lukács' reliance on Decision No. 327-C-A-2013 to support his position that the Agency should strike out or otherwise expunge his reply, Porter argues that the Decision is distinguishable, as the applicable portion of the record was deemed to be irrelevant, but not scandalous and prejudicial, and appears to have been easily "excisable" from the Agency's consideration of the record as a whole. Porter asserts that the Agency has seen fit to expunge portions of the submissions filed by a party, and in this case, the prejudicial allegations are pervasive throughout the reply, and fit squarely within the Agency's power to strike out prejudicial pleadings as contemplated by subsection 14(3) of the General Rules.

[32] Porter states that it is not requesting the Agency to scrutinize Mr. Lukács' tweets, but is suggesting that the Agency may take into account the prejudicial conduct and statements as further demonstrating Mr. Lukács' unnecessarily combative approach to his dealings with Porter.

Analysis and findings

[33] The Agency previously addressed a motion filed pursuant to subsection 14(3) of the General Rules, where the complainant had requested that submissions be expunged as being irrelevant, scandalous and prejudicial. In Decision No. 327-C-A-2013, the Agency stated:

> [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.

[34] Contrary to Porter's argument that this case is distinguishable from Decision No. 327-C-A-2013 because the Agency, in that case, only determined that a certain submission was irrelevant, but not scandalous and prejudicial, the Air Transat submission considered in that Decision was categorized by Mr. Lukács as irrelevant, scandalous and prejudicial. As evident from the text quoted above from Decision No. 327-C-A-2013, the Agency determined that Air Transat's interaction with Mr. Lukács, and Air Transat's submissions as to the underlying motives for Mr. Lukács' complaint, which he asserted were scandalous and prejudicial, as well as irrelevant, would not be considered by the Agency.

[35] As was the case in Decision No. 327-C-A-2013, the Agency finds that the submissions at issue are irrelevant to the Agency's consideration of the substantive matter as to whether Tariff Rule 18 is unclear and/or unreasonable. In light of the foregoing, the Agency denies Porter's request that Mr. Lukács' reply dated April 5, 2014 be struck in whole or in part.

[36] With respect to Porter's request that the Agency order Mr. Lukács to refrain from making further alleged scandalous, inflammatory and prejudicial statements in matters before the Agency, the Agency also denies that request for the same reason as that relating to Mr. Lukács' reply dated April 5, 2014.

[37] Notwithstanding this conclusion, in all cases, the Agency expects interactions between parties during proceedings to be civil and respectful. The parties should refrain from using intemperate language, maligning other parties and imputing ulterior or improper motives to those parties.

Should Porter be granted leave to submit a sur-reply, responding to any portion of the reply that the Agency may decline to strike, or to any amended reply Mr. Lukács may be allowed to file?

Positions of the parties

Porter

[38] Porter submits that distinct from its request for leave to file a response to any forthcoming submissions by Mr. Lukács regarding Porter's draft tariff amendments, if any, Porter also requests leave to submit a sur-reply, responding to any portion of the reply that the Agency may decline to strike out, or to any amended reply that Mr. Lukács may be allowed to file.

[39] Porter argues that to the extent that Mr. Lukács has taken issue in his reply with (a) Porter's request for permission to file draft tariff amendments following the Agency's determination respecting Mr. Lukács' complaint, and (b) leave to file a sur-reply to Mr. Lukács' submissions responding thereto, both such requests were advanced for the first time in Porter's answer, such that they are in substance and effect, an "originating process". Porter contends that Mr. Lukács' submissions responding thereto represent an "answer" to Porter's request, and that it is therefore appropriate that Porter be provided with the opportunity to reply to the arguments raised.

Mr. Lukács

[40] Mr. Lukács maintains that the Agency ought to deny the motion for the following reasons:

1. Normally, a sur-reply is warranted if the reply raises new issues. In this case, it was Porter's answer of April 1, 2014 that raised new issues, and his reply of April 5, 2014 simply responded to them by opposing Porter's procedural requests based on the facts pleaded in Porter's answer.
2. Even though Porter is familiar with the Agency's procedures, it made the strategic choice of putting forward its procedural requests in its April 1, 2014 answer, and not as part of a motion filed earlier, before its answer.
3. Porter did not seek to file a sur-reply in a timely manner, but waited more than two weeks to do so.
4. Allowing Porter to file a sur-reply with respect to its procedural requests would further and unnecessarily delay the proceeding, and frustrate its ultimate goal, which is to ensure that Tariff Rule 18 is revised as soon as possible.

Porter

[41] Porter states that in his answer to Porter's motion, Mr. Lukács characterizes Porter's request for procedural relief as raising "new issues". Porter maintains that in light of this admission, it is just and reasonable that Porter be permitted to respond to any of the submissions in Mr. Lukács' reply regarding his complaint that may not be struck, as those submissions effectively constitute an answer to Porter's request for relief found in Porter's answer to the complaint.

Analysis and findings

[42] As noted above, the substantive matter before the Agency is whether Tariff Rule 18 is clear and/or reasonable. Mr. Lukács' reply is confined to procedural matters and does not speak to this matter. As such, the Agency finds that Porter's request to file submissions on that reply has no foundation, and would unnecessarily prolong the proceeding. The Agency therefore denies Porter's request.

RELEVANT STATUTORY AND TARIFF EXTRACTS

[43] The statutory and tariff extracts relevant to this matter are set out in the Appendix.

IS TARIFF RULE 18 UNREASONABLE WITHIN THE MEANING OF SUBSECTION 67.2(1) OF THE CTA AND UNCLEAR WITHIN THE MEANING OF PARAGRAPH 107(1)(*n*) OF THE ATR?

Positions of the parties

Mr. Lukács

[44] Mr. Lukács submits that Tariff Rule 18 is unclear, contrary to paragraph 107(1)(*n*) of the ATR, because it fails to specify where the choice resides between a refund and alternative transportation, and fails to specify the meaning of "posted check-in cut-off time".

[45] Mr. Lukács contends that Tariff Rule 18 is unreasonable because it:

1. fails to provide for the tendering of denied boarding compensation to passengers, contrary to Decision No. 666-C-A-2001 (*Anderson v. Air Canada*);
2. does not leave open the possibility of reprotecting passengers on flights of other carriers, contrary to, among other decisions, Decision No. 31-C-A-2014;
3. limits refunds to the unused portion of the ticket, regardless of the circumstances, contrary to, among other decisions, Decision No. 31-C-A-2014;
4. does not provide for return transportation to the passenger's point of origin within a reasonable time and without additional charge, regardless of the circumstances, contrary to, among other decisions, Decision No. 31-C-A-2014.

Porter

[46] Porter acknowledges that it needs to revise Tariff Rule 18 to reflect the requirements established by Decision Nos. 342-C-A-2013 and 31-C-A-2014 which, among other things, 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. Lukács.

[47] Porter accepts that passengers who are denied boarding due to overbooking are entitled to:

1. their choice of remedies for delay offered pursuant to the circumstance-focussed approach endorsed by the Agency in Decision Nos. 248-C-A-2012 (*Lukács v. Air Transat*), 249-C-A-2012 (*Lukács v. WestJet*) and 250-C-A-2012 (*Lukács v. Air Canada*), which approach is substantively summarized in the Agency's Notice to Industry dated July 3, 2013;
2. compensation for any expenses resulting from the delay in accordance with Tariff Rule 16; and,
3. cash or equivalent compensation in accordance with one of the two denied boarding compensation regimes endorsed as reasonable by the Agency in Decision Nos. 342-C-A-2013 and 31-C-A-2014, or travel vouchers subject to the restrictions set out in the offering and provision thereof in the aforesaid Decisions.

[48] Porter does not dispute that, where a passenger is denied boarding due to overbooking, the choice between reprotection and refund resides with the passenger and not with the carrier. Further, Porter does not object to revising any reference to check-in deadlines to include a reference to the Rule prescribing such deadlines.

[49] Porter acknowledges that Tariff Rule 18 does not reflect its practice of providing denied boarding compensation in the form of a $500 travel voucher to affected passengers, nor the regimes endorsed by the Agency in Decision Nos. 342-C-A-2013 and 31-C-A-2014, or the principles set out above.

[50] Porter requests that it be given the opportunity to submit for the Agency's consideration a draft amended Tariff Rule 18 that:

1. incorporates a denied boarding compensation regime substantively similar to that in its International Tariff, being the U.S. analogous regime endorsed by the Agency in Decision No. 31-C-A-2014; and,
2. otherwise provides for the passenger to choose among remedies presented in accordance with the circumstance-focussed approach.

Analysis and findings

[51] The Agency notes that Porter accepts the submissions by Mr. Lukács respecting the lack of clarity and unreasonableness of Tariff Rule 18, and that such Rule must be modified to reflect previous Agency decisions, including one involving similar provisions appearing in Porter's International Tariff.

[52] The Agency finds that Tariff Rule 18 is unclear within the meaning of paragraph 107(1)(*n*) of the ATR because the Rule fails to specify:

1. where the choice rests between a refund and alternative transportation; and,
2. to what "posted check-in cut-off time" refers, i.e., whether it refers to the cut-off time set out in Tariff Rule 20 or to something else.

[53] In addition, the Agency finds, for the same reasons set out in Decision No. 666-C-A-2001, that Tariff Rule 18 is unreasonable within the meaning of subsection 67.2(1) of the CTA because it fails to provide for the tendering of denied boarding compensation to passengers. The Agency also finds, for the same reasons set out in Decision No. 31-C-A-2014, that Tariff Rule 18 is unreasonable within the meaning of subsection 67.2(1) of the CTA, because the Rule:

1. neglects to create the possibility of reprotecting passengers on flights of other carriers;
2. restricts refunds to the unused portion of the ticket, regardless of the circumstances; and,
3. fails to provide for return transportation to the passenger's point of origin within a reasonable time and without additional charge, regardless of the circumstances.

ORDER

[54] The Agency, pursuant to subsection 67.2(1) of the CTA, disallows Tariff Rule 18.

[55] Given that Porter has acknowledged that it must make revisions to Tariff Rule 18, and that the issues relating to that Rule have already been addressed in previous Agency decisions, the Agency orders Porter, by July 8, 2014, to amend its Tariff to provide for the following conditions that are consistent with previous Agency decisions:

1. denied boarding compensation;
2. allowing for the possibility of being reprotected on other carriers;
3. not limiting refunds to the unused portions of tickets, irrespective of the circumstances;
4. leaving the option to the passenger respecting a refund or alternative transportation; and,
5. providing for return transportation to the passenger's point of origin within a reasonable time and without additional charge, regardless of the circumstances.

[56] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Tariff Rule 18 shall come into force when Porter complies with the above or on July 8, 2014, whichever is sooner.

(signed)

Sam Barone
Member

(signed)

Geoffrey C. Hare
Member