
DECISION NO. 344-C-A-2013

August 29, 2013

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No. M4120-3/13-01412

INTRODUCTION

- [1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions appearing in Rule 16, *Responsibility for Schedules and Operations*, i.e., Rules 16(c), (e) and (g) (Existing Tariff Rules) of the *Tariff Containing Rules Applicable to Services for the Transport of Passengers and Baggage or Goods between Points in Canada, CTA(A) No. 1* (Tariff) applied by Porter Airlines Inc. (Porter) are unreasonable within the meaning of subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) for the following reasons:
- i. these provisions deprive passengers of the right to be provided with notice about schedule changes;
 - ii. these provisions are a blanket exclusion that exonerates Porter from liability for delays (such as failure to operate on schedule or sudden changes to its flight schedule);
 - iii. these provisions are inconsistent with the principles of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention).
- [2] Mr. Lukács asks the Agency to disallow the Existing Tariff Rules in their entirety, or in part, and substitute them with wording that incorporates the principles of the Convention.
- [3] In its answer to the complaint, Porter proposed certain tariff revisions (Proposed Tariff Rules) in an effort to respond to Mr. Lukács' challenge of the Existing Tariff Rules. In his reply, Mr. Lukács asserts that some of these Proposed Tariff Rules lack clarity, that are inconsistent with the principles of the Convention. He also asserts that they are unjust and unreasonable, and therefore, they should be disallowed.
- [4] In this Decision, the Agency will address both Porter's Existing Tariff Rules and the Proposed Tariff Rules.

ISSUES

With respect to the Existing Tariff Rules:

1. Does Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20, relieve Porter from the obligation to provide timely notice to its passengers about schedule changes? If so, is Existing Tariff Rule 16(c) unreasonable within the meaning of subsection 67.2(1) of the CTA?
2. Do Existing Tariff Rules 16(c), 16(e) and 16(g) relieve Porter from liability for damages suffered by passengers occasioned by delay and failure to operate on schedule and are they inconsistent with the principles of the Convention? If so, are these Tariff Rules unreasonable within the meaning of subsection 67.2(1) of the CTA?
3. Do the provisions of Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, setting out a list of events for which Porter shall not be liable for failure in the performance of any of its obligations, relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay? Are they inconsistent with the principles of the Convention and, if so, are these tariff provisions unreasonable within the meaning of subsection 67.2(1) of the CTA?

With respect to the Proposed Tariff Rules:

1. Is Proposed Tariff Rule 16(b) unclear with respect to Porter's obligations to inform passengers of delays and schedule changes because the phrase "without notice" in Proposed Tariff Rule 16(b) contradicts and negates the obligation to inform stated in Proposed Tariff Rule 16(c)?
2. Is Proposed Tariff Rule 16(b) unreasonable because it is inconsistent with the principles of the Convention, in that it relieves Porter from liability for failure to make connections? Does it appear to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay as a result of the misinformation?
3. Is the phrase "will make reasonable efforts" found in Proposed Tariff Rule 16(c) unreasonable in that it tends to relieve Porter from liability if it fails to notify the passenger about a schedule change resulting in the passenger's inability to travel with respect to 1) flight delays; and 2) flight advancements?
4. Is Proposed Tariff Rule 16(d) unclear in that it does not contain "terms and conditions of carriage" or other information that a tariff ought to contain pursuant to subsection 107(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR)?

5. Is Proposed Tariff Rule 16(f) unreasonable and inconsistent with the principles of the Convention as it appears to: a) limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change and focuses on the cause rather than Porter's reaction to events; and; b) fail to provide passengers with the right to seek a full refund if Porter is unable to transport them within a reasonable amount of time and limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change?
6. Should the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16(a)(i) and 16.2(b)(i) before "the Carrier and its employees and agents" to ensure that the burden of proof of the affirmative defense is on the carrier and to reflect the wording of Article 19 of the Convention?
7. Is the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) unreasonable, given the proposed definition of "Event of Force Majeure" in Rule 1, because it is misleading and may prejudice passengers' ability to enforce their rights?

RELEVANT TARIFF AND STATUTORY EXTRACTS

- [5] The provisions of Existing Tariff Rules, Proposed Tariff Rules and the relevant legislation are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

- [6] As recently stated in Decision No. 249-C-A-2012 (*Lukács v. WestJet*), a carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Reasonableness and conformity with the principles of the Convention

- [7] 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 rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air 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 recently applied in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*).
- [8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air 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.

- [9] When balancing the passengers' 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.
- [10] Mr. Lukács, in addition to setting out concerns regarding the reasonableness and clarity of Porter's Existing Tariff Rules and Proposed Tariff Rules, also submits that the provisions do not conform with the principles of the Convention. In past Decisions, the Agency has determined that tariff provisions that are contrary to the principles of the Convention are unreasonable. The Agency will consider the submissions of the parties on the issue of conformity with the principles of the Convention.

EXISTING TARIFF RULES

Issue 1: Does Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20, relieve Porter from the obligation to provide timely notice to its passengers about schedule changes? If so, is Existing Tariff Rule unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács

- [11] Mr. Lukács submits that, when considered together with Existing Tariff Rule 20, which provides the check-in requirements, Existing Tariff Rule 16(c) is unreasonable because it deprives passengers of their right to be notified about schedule changes affecting their travels.
- [12] Mr. Lukács contends that transportation by air requires significant preparations for the passenger such as travelling to an airport that might be located some distance away from their residence, checking in, clearing security and then boarding the flight. Mr. Lukács adds that due to natural and fully justifiable operation considerations, carriers set deadlines for completing each of these steps. Missing these deadlines may result in losing the assigned seat at the very least and possibly the cancellation of the passenger's reservation. If the departure time of a flight changes, then the respective deadlines change accordingly. In particular, if a carrier reschedules a flight an hour earlier than published, it results in passengers having to arrive at the airport an hour earlier, and having to check in an hour earlier, or else they lose their seats and reservations. Mr. Lukács points out that the Agency recognized, in Decision No. 16-C-A-2013 (*Lukács v. Porter*), the passenger's right to be informed about delays and schedule changes.

Porter

- [13] Porter conceded that Existing Tariff Rule 16(c) is unreasonable and filed Proposed Tariff Rule 16(c).

Analysis and findings

- [14] Existing Tariff Rule 20 provides a list of check-in requirements and states that failure to meet these requirements may result in the loss of the passenger's assigned seat or reservation.
- [15] Existing Tariff Rule 16(c) is silent on the matter of the liability assumed by Porter should a flight be delayed. Given this absence of liability, passengers may not be informed of a delay or changes and therefore may fail to meet the check-in requirements set out in Existing Tariff Rule 20.
- [16] In Decision No. 16-C-A-2013, the Agency addressed the same provisions as in this matter in a case that addressed Porter's international tariff. In that Decision, the Agency found that the absence of a provision to this effect relieves Porter from the obligation to provide timely notice to its passengers about delays or schedule changes. Porter has not provided any rationale that would convince the Agency that the domestic tariff should be governed by a different logic than the international tariff. As noted above, Porter conceded that Existing Rule 16(c) is unreasonable.
- [17] The Agency therefore finds that Existing Tariff Rule 16(c) is unreasonable.

Issue 2: Do Existing Tariff Rules 16(c), 16(e) and 16(g) relieve Porter from liability for damages suffered by passengers occasioned by delay and failure to operate on schedule and are they inconsistent with the principles of the Convention? If so, are these Tariff Rules unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács

- [18] Mr. Lukács challenges the reasonableness of Existing Tariff Rules 16(c), 16(e) and 16(g) on the grounds that they are blanket exclusions that relieve Porter from any and every liability for delay and failure to operate on schedule, and because they are inconsistent with the principles of the Convention.
- [19] Mr. Lukács submits that the Agency has consistently found blanket exclusions of liability to be unreasonable even in the context of domestic tariffs, where the Convention is not applicable. Mr. Lukács adds that the Agency held that the principles of the Convention are a persuasive authority for determining the reasonableness of provisions, regardless of whether the Convention applies, such as in Decision No. 181-C-A-2007 (*Pinksen v. Air Canada*) and Decision No. 309-C-A-2010 (*Kipper v. WestJet*).

- [20] Mr. Lukács points out that the Agency's preliminary opinion on this issue was affirmed in Decision No. 291-C-A-2011 (*Lukács v. Air Canada*) and was subsequently cited with approval by the Agency in Decision No. 16-C-A-2013, which concluded that Porter's international tariff Rule 18(e), a provision similar to its Existing Tariff Rule 16(g) of its domestic tariff, was unreasonable.

Porter

- [21] Porter conceded that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable, and filed Proposed Tariff Rules.

Analysis and findings

- [22] Existing Tariff Rules 16(c), 16(e) and 16(g) are silent on the matter of the liability assumed by Porter for failure to make connections, to operate any flight according to schedule, or for changing the schedule of any flight.

- [23] With respect to applying the principles of the Convention to domestic tariff provisions, the Agency stated in Decision No. LET-C-A-129-2011 (*Lukács v. Air Canada*) that:

[...] it is clear that the Agency is, and has been, of the view that the Convention is a useful interpretive tool to which the Agency may refer when applying its "reasonableness" test and striking the balance between passengers' rights and the statutory, commercial and operational obligations of a carrier. In doing so the Agency takes into account the principles of the Convention rather than applying the Convention itself.

The Agency is of the view that passengers should expect and be entitled to consistency in treatment irrespective of whether they are on a domestic or international flight. To that end, the principles set out in the Convention provide insight into what is reasonable to apply in a domestic context.

- [24] Article 19 of the Convention provides that the carrier is liable for delay, and it can exonerate itself from liability only if it demonstrates the presence of an affirmative defense, namely, that it and its servants and agents have taken all reasonable steps necessary to avoid the delay.

- [25] In Decision No. 16-C-A-2013, the Agency addressed tariff provisions similar to those currently being considered. In that Decision, the Agency determined that the tariff provisions were contrary to Article 19 of the Convention and therefore unreasonable because they were silent on the liability assumed by Porter. Porter has not provided any arguments which would convince the Agency to decide differently than it did in Decision No. 16-C-A-2013. As noted above, Porter conceded that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable.

- [26] The Agency therefore finds that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable and inconsistent with the principles of Article 19 of the Convention.

Issue 3: Do the provisions of Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, setting out a list of events for which Porter shall not be liable for failure in the performance of any of its obligations, relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay? Are they inconsistent with the principles of the Convention and, if so, are these tariff provisions unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács – Delay

[27] Mr. Lukács submits that the exclusions appearing on the list starting on 3rd Revised Page 31 of the Tariff are unreasonable as they amount to a blanket exclusion of liability. He argues that they are inconsistent with the principles of the Convention.

[28] Mr. Lukács points out that the list has a preamble that reads:

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

[...]

Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.

[29] Mr. Lukács also points out that the list of events that Porter purports to exonerate itself from any liability from performance of any of its obligations includes, for example:

v) Accidents to or failure of the aircraft or equipment used in connection therewith including, in particular, mechanical failure.

vi) Non-availability of fuel at the airport of origin, destination or enroute stop.

vii) Others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.

- [30] Mr. Lukács asserts that, as the Agency explained in Decision No. 16-C-A-2013, it is not the cause of delay that determines liability but how the carrier reacts to the delay. The exclusions listed starting on 3rd Revised Page 31 of the Tariff relieve Porter from liability for delay solely based on the cause and without reference to how it reacts to the delay. Mr. Lukács argues that these exclusions are inconsistent with the principles of the Convention, and are therefore unreasonable.

Mr. Lukács – Damage or destruction of baggage or cargo

- [31] Mr. Lukács points out that destruction, loss and damage to checked baggage and to cargo are governed respectively by Article 17(2) and Article 18(2) of the Convention. The exclusions listed starting on 3rd Revised Page 31 of the Tariff relieve Porter from liability for delay solely based on the cause and without reference to how Porter reacts to the delay. This is inconsistent with the principles of Articles 17(2) and 18(2) of the Convention, and therefore unreasonable.

Mr. Lukács – Relief from “performance of any of its obligations”

- [32] Mr. Lukács contends that the impugned provisions purport to relieve Porter from “performance of any of its obligations” in the case of certain events, regardless of how the event affects Porter’s ability to perform. Mr. Lukács thus submits that the impugned provisions are a blanket exclusion of liability, and are therefore inconsistent with the principles of the Convention.

Porter

- [33] Porter conceded that the provisions starting on 3rd Revised Page 31 of the Tariff, which are in effect, a “force majeure” clause, may have the effect of excluding liability in a manner that is inconsistent with the Convention, and filed Proposed Tariff Rules.

Analysis and findings

- [34] Article 19 of the Convention provides that carriers are liable for delay unless it and its servants and agents have taken all reasonable steps necessary to avoid the delay. Articles 17(2) and 18(2) of the Convention provide that carriers are liable for damage or loss of baggage and cargo even in the absence of a causal link between the damage or loss and the inherent defect, vice or quality of the baggage.
- [35] The Agency agrees with Mr. Lukács that the exclusions of liability relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay, and for damage or loss of baggage or cargo. Also, as noted above, Porter conceded that the provisions starting on 3rd Revised Page 31 of the Tariff, which are in effect a “force majeure” clause, may have the effect of excluding liability in a manner that is inconsistent with the Convention, and Porter filed Proposed Tariff Rules.
- [36] The Agency therefore finds the exclusions listed in Existing Tariff Rule 16, starting on 3rd Revised Page 31 of the Tariff, are unreasonable within the meaning of subsection 67.2(1) of the CTA and inconsistent with the principles of the Convention.

PROPOSED TARIFF RULES

Issue 1: Is Proposed Tariff Rule 16(b) unclear with respect to Porter’s obligations to inform passengers of delays and schedule given that the phrase “without notice” in Proposed Tariff Rule 16(b) contradicts and negates the obligation to inform stated in Proposed Tariff Rule 16(c)?

Positions of the parties

Mr. Lukács

- [37] Mr. Lukács maintains that Proposed Tariff Rule 16(b) is unclear as part of it contradicts and negates Proposed Tariff Rule 16(c). Proposed Tariff Rule 16(b) states, in part: “Schedules are subject to change without notice.” Mr. Lukács points out that at the same time, Proposed Tariff Rule 16(c) states that: “The carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.”
- [38] According to Mr. Lukács, these two provisions contradict each other because the phrase “without notice” in Proposed Tariff Rule 16(b) purports to relieve Porter of any obligation to inform passengers of delays and schedule changes, and thus negates the obligation stated in Proposed Tariff Rule 16(c).

Analysis and findings

- [39] The Agency agrees with Mr. Lukács that Proposed Tariff Rule 16(b) is unclear when read in conjunction with Proposed Tariff Rule 16(c) because Proposed Tariff Rule 16(b) contradicts and seems to negate the obligation stated in Proposed Tariff Rule 16(c). In that sense, Proposed Tariff Rule 16(b) creates reasonable doubt, ambiguity or uncertain meaning.
- [40] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(b) would be found to be unclear.

Issue 2: Is Proposed Tariff Rule 16(b) unreasonable because it is inconsistent with the principles of the Convention, in that it relieves Porter from liability for failure to make connections? Does it appear to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay as a result of the misinformation?

Positions of the parties

Porter

- [41] Porter submits that Proposed Tariff Rule 16(b) contains language taken from Rule 90(B)(2) of the Sample Tariff published by the Agency, and that the statement “schedules are subject to change without notice” was found reasonable in light of the Agency’s finding in Decision No. 16-C-A-2013. Proposed Tariff Rule 16(b) reads as follows:

Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.

- [42] Porter acknowledges that when considering the same language in the context of Porter's proposed tariff rule in that other proceeding, the Agency also held that additional language was required stating that the carrier "will make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them." Porter advises that it has accordingly included the latter language in Proposed Tariff Rule 16 at Proposed Tariff Rule 16(c). Porter asserts that this statement serves to inform the passenger that notice from the carrier may not reach the passenger despite the carrier's reasonable efforts, thus reducing the possibility that passengers will place undue reliance on the expectation that they will necessarily receive prior notice in all instances.
- [43] Porter contends that passengers may more frequently (but are not required to) take steps to independently ascertain their flights' status, thus reducing the likelihood that they will be unaware of schedule changes and increasing their opportunity to mitigate the impact thereof.
- [44] Porter contends that the balance of Proposed Tariff Rule 16(b) reflects the Agency's repeated findings that timetables do not form part of the contract of carriage and that undue reliance by passengers on stated departure times is unreasonable. Porter argues that, to the extent that this provision is contained in the Agency's Sample Tariff, it is *prima facie* evidence of its reasonableness.

Mr. Lukács

- [45] Mr. Lukács states that Proposed Tariff Rule 16(b) provides, among other things, that: "[...] the carrier assumes no responsibility for the passenger making connections."
- [46] Mr. Lukács submits that in Decision No. 16-C-A-2013, the Agency considered Porter's international tariff Rule 18(c) that contained a similar disclaimer of liability with respect to making connections, and found that the absence of a provision setting out Porter's liability should a flight be delayed and Porter is unable to provide the proof required by Article 19 of the Convention to relieve itself from such liability rendered tariff Rule 18(c) inconsistent with Article 19 of the Convention, and therefore unreasonable.
- [47] Mr. Lukács also states that Proposed Tariff Rule 16(b) provides that: "The carrier will not be responsible for errors or omissions [...]"
- [48] Mr. Lukács asserts that this provision is unreasonable because it relieves Porter from the duty of due diligence to provide accurate information to passengers about Porter's timetables and schedules.

[49] Mr. Lukács points out that in Decision No. 16-C-A-2013, the Agency recognized that carriers should have the latitude required to amend flight schedules based on commercial and operational obligations, but also recognized the passengers' fundamental right to be informed about schedule changes that affect their itinerary and their ability to travel.

[50] Mr. Lukács submits that this portion of Proposed Tariff Rule 16(b) is therefore unreasonable because it purports to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay that follows as a result of the misinformation. Mr. Lukács adds that the impugned portion of Proposed Tariff Rule 16(b) is also unreasonable because it is inconsistent with the principles of the Convention.

Analysis and findings

[51] Porter has made statements concerning the Sample Tariff published by the Agency on its Web site. The Agency clarified its intent in the *Important Qualifiers* section of the Sample Tariff which is set out below.

This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR. The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

[52] In Decision No. 16-C-A-2013, the Agency determined that the absence of a provision that required Porter to make reasonable efforts to inform passengers of delays and schedule changes and the reasons for them rendered the Tariff Rule at issue unreasonable. Porter's Proposed Tariff Rule 16(b) does not meet that standard, nor has Porter provided any rationale that would justify a change to the Agency's determination in Decision No. 16-C-A-2013.

[53] Passengers should not be deprived of the right to be informed as described above because an error or omission has been committed by a carrier in preparing and/or publishing a timetable or schedule. The absence of a provision in Proposed Tariff Rule 16(b) compelling Porter to make a reasonable effort to advise passengers of errors or omissions in timetables and/or schedules renders that Rule unreasonable.

[54] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(b) would be found to be unreasonable.

Issue 3: Is the phrase “will make reasonable efforts” found in Proposed Tariff Rule 16(c) unreasonable in that it tends to relieve Porter from liability if Porter fails to notify the passenger about a schedule change resulting in the passenger’s inability to travel with respect to 1) flight delays; and 2) flight advancements?

Positions of the parties

Porter

- [55] Porter advises that Proposed Tariff Rule 16(c) states: “The carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.” In this regard, Porter submits that in Decision No. 16-C-A-2013, the Agency found that the same proposed change applicable to international transportation properly balances the passenger’s right to information on schedule changes.

Mr. Lukács

- [56] Mr. Lukács acknowledges that Proposed Tariff Rule 16(c) is an improvement compared to the current state of affairs, but submits that making “reasonable efforts” sets the bar too low for Porter in some circumstances.

- [57] Mr. Lukács refers to Decision No. LET-A-112-2003 in which the Agency held, under the heading “Passenger Notification,” that:

The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

- [58] Mr. Lukács argues that the phrase “will make reasonable efforts” ought to be replaced with the more onerous “undertakes.”

- [59] Mr. Lukács contends that, while in the case of flight delays, failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, Porter’s failure to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times.

- [60] Mr. Lukács submits that under Proposed Tariff Rule 16 in general, and Proposed Tariff Rule 16(c) in particular, the passenger is left without any rights or remedies. However, if the word “undertakes” appeared in Proposed Tariff Rule 16(c), then the passenger would have recourse.

Analysis and findings

“Reasonable efforts” versus flight delays

[61] In Decision No. 16-C-A-2013, the Agency stated that:

[87] [...] the Agency notes that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them. The Agency finds that such provisions are reasonable, and that, in this regard, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh any of the carrier’s statutory, commercial or operational obligations.

[62] The Agency finds that the commitment to make “reasonable efforts” to inform passengers, insofar as such commitment pertains to flight delays and schedule changes, is consistent with the Agency’s ruling in Decision No. 16-C-A-2013, and is reasonable.

“Reasonable efforts” versus flight advancements

[63] No evidence has been put forth that flight advancements are common. They may occur in practice from time to time. When the air carrier advances the scheduled departure of a flight, the consequences may be more severe than a delay for the passenger and it follows that the duty to inform should be no less onerous.

[64] With respect to flight advancements, passengers affected by flight advancement are not afforded the same protection as passengers affected by flight delay or other schedule changes. In that sense, the Agency agrees with Mr. Lukács’ submission that in such a case, the passenger is left without any rights or remedies as the liability established by the principles of the Convention only apply to flight delays, and not to flight advancements. The absence of a tariff provision that imposes on Porter a requirement to “undertake” to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.

[65] The Agency is of the opinion that the commitment to make “reasonable efforts” to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(c) would be found to be unreasonable.

Issue 4: Is Proposed Tariff Rule 16(d) unclear in that it does not contain “terms and conditions of carriage” or other information that a tariff ought to contain pursuant to subsection 107(1) of the ATR?

Positions of the parties

Porter

- [66] Porter submits that Proposed Tariff Rule 16(d) contains language taken from Rule 90(B)(5) of the Agency’s Sample Tariff. Proposed Tariff Rule 16(d) states:

It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier’s Web site or refer to airport terminal displays to ascertain the flight’s status and departure time.

- [67] Porter asserts that to the extent that this provision does not create any obligation on the part of the passenger, nor limit the obligations or liability of the carrier, it is reasonable. According to Porter, this provision operates similarly to the warning that schedules may change without notice, insofar as it precludes undue reliance on notice from the carrier and increases the likelihood that passengers will be informed of any schedule changes and thus be better positioned to mitigate the impact.

Mr. Lukács

- [68] Mr. Lukács submits that while Porter notes that this provision was taken from the Agency’s Sample Tariff, Porter omits to acknowledge that the Sample Tariff is provided to carriers together with the following warning:

This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR. The Agency, upon investigating a complaint or on its own motion, could find a carrier’s tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier’s tariff reflects the wording of the Sample Tariff.

- [69] Mr. Lukács maintains that the fact that this provision was included in the Agency’s Sample Tariff does not speak either to its clarity or the reasonableness of any provision, and does not convey any obligation of either the passenger or the carrier.

- [70] Mr. Lukács asserts that while a carrier is entitled to display various travel tips and recommendations on its Web site, such recommendations do not and cannot form part of the contract of carriage; they are not terms and conditions of carriage, and as such, they ought not be included in the carrier’s tariff.

- [71] Mr. Lukács submits that Proposed Tariff Rule 16(d) fails to be clear, and ought not be included in Porter's Tariff as it contains no "terms and conditions of carriage" or any other information that a tariff is to contain pursuant to subsection 107(1) of the ATR.

Analysis and findings

- [72] The Agency disagrees with Mr. Lukács' contention that Proposed Tariff Rule 16(d) is unclear. The Agency finds that it is worded in such a manner that does not create reasonable doubt, ambiguity or uncertain meaning. The Agency does agree with Mr. Lukács that Proposed Tariff Rule 16(d) does not represent a term or condition of carriage. However, Proposed Tariff Rule 16(d) does not impose an obligation on either the carrier or the passenger, and is therefore unenforceable.
- [73] The Agency has not been presented with evidence establishing any harm if Proposed Tariff Rule 16(d) were to appear in the Tariff.

Issue 5: Is Proposed Tariff Rule 16(f) unreasonable and inconsistent with the principles of the Convention as it appears to: a) limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change and focuses on the cause rather than Porter's reaction to events; and b) fail to provide passengers with the right to seek a full refund if Porter is unable to transport them within a reasonable amount of time and limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change?

Positions of the parties

Porter

- [74] Porter contends that the provisions following Existing Tariff Rule 16(g) have the effect of excluding liability in a manner inconsistent with the Convention, and therefore proposes to replace the impugned clause with Proposed Tariff Rule 16(f) which reads as follows:

Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure.

- [75] Porter maintains that Proposed Tariff Rules 16.1 and 16.2 specifically incorporate the principle that passengers are entitled to compensation unless the carrier took all reasonable and possible measures to avoid the damage. Porter therefore argues that even in the case of a delay due to force majeure, passengers will have recourse to reimbursement for their resulting damages where the conditions of the Convention are satisfied.

- [76] Porter advises that it is not aware of any Agency Decision in which a force majeure clause has been disallowed as unreasonable for any reason other than its failure to allow for the application of the liability regime prescribed by the Convention. Porter submits that it is reasonable, in balancing the rights of the carrier and the passenger, to exclude liability for events beyond the control of the carrier, subject always to the carrier's strict liability for damages resulting from delay, irrespective of the cause of the delay.
- [77] Porter contends that Proposed Tariff Rule 16(f) corrects the defect in the Existing Tariff Rule 16 force majeure clause by specifically subjecting it to the liability regime in which Porter will be liable for delay unless it demonstrates the limited defense set forth in Article 19 of the Convention, rendering the Proposed Tariff Rule reasonable.

1. Proposed definition of "Event of Force Majeure"

- [78] Porter submits that, as Proposed Tariff Rule 16(f) makes reference to the term "Force Majeure Event," Porter proposes to add a definition of this term under Rule 1 (Definitions) of its Tariff. Porter advises that the proposed definition provides that a "Force Majeure Event" represents occurrences "which are not within the reasonable control of the Carrier," and sets forth a number of examples of situations which may constitute force majeure events, subject always to the qualification that such events were beyond Porter's reasonable control.

Mr. Lukács

- [79] Mr. Lukács contends that what determines liability for delay is not the cause of the delay, but rather how the carrier reacts to events that may cause delay, even if these events may have been caused by third parties that are not directed by the carrier.
- [80] Mr. Lukács submits that the Agency explains this in Decision No. 16-C-A-2013:

[105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

- [81] Mr. Lukács maintains that as Proposed Tariff Rule 16(f) deals with flight cancellations and schedule changes, it is difficult to understand what kind of liability, other than liability for delay, this provision aims to exclude. Mr. Lukács further submits that Porter provided no explanation or examples of scenarios where it may wish to invoke Proposed Tariff Rule 16(f), but which do not already fall within the scope of delay.
- [82] Mr. Lukács asserts that Porter seems to suggest that the Convention is the only reason the Agency disallowed provisions dealing with the rights of passengers in the case of flight cancellation and schedule changes, which is not the case.

- [83] In this regard, Mr. Lukács points out that in Decision No. 28-A-2004 (*Air Transat*), the Agency considered in great detail the rights of passengers for protection in the case of events that are beyond the passengers' control:

By Decision No. LET-A-166-2003 dated August 7, 2003 [...] the Agency advised Air Transat that Rule 6.3 of its tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR, in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains.

- [84] According to Mr. Lukács, that Agency Decision demonstrates that passengers have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control and that the carrier cannot keep the fare paid by the passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

Analysis and findings

- [85] The Agency agrees with Mr. Lukács' submission that Proposed Tariff Rule 16(f) is unreasonable in that it fails to reflect the appropriate approach to the issue of liability, as set out in Decision No. 16-C-A-2013:

[105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

- [86] The Agency also agrees with Mr. Lukács' submission that Proposed Tariff Rule 16(f) does not provide for refunds should Porter be unable to carry the passenger because of reasons beyond Porter's control. Proposed Tariff Rule 16(f) simply requires that passengers be compensated in accordance with that Rule.

- [87] Existing Tariff Rule 17(b) provides that:

Involuntary Cancellations – In the event a refund is required because of the carrier's failure to complete the operation of any flight after its commencement and the ticket is partially unused as a result of an enroute cancellation, termination or diversion, that part of the total fare paid for each unused segment will be refunded. If the ticket is totally or partially unused as a result of a refusal to transport, the total fare or that part of the total fare paid for each unused segment will be refunded. No refund will be available if the flight is cancelled prior to the commencement of the flight and the provisions of Rule 16 will apply.

[88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.

[89] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(f) would be found to be unreasonable.

Issue 6: Should the phrase “the Carrier proves that” be inserted into Proposed Tariff Rules 16(a)(i) and 16.2(b)(i) before “the Carrier and its employees and agents” to ensure that the burden of proof of the affirmative defense is on the carrier and to reflect the wording of Article 19 of the Convention?

Positions of the parties

Porter

[90] Porter submits that Proposed Tariff Rule 16.1 clearly sets out the circumstances in which Porter will be liable to passengers for expenses resulting from delays, in accordance with the principles of the Convention. Porter points out that the contents of its various provisions were considered and determined to be reasonable in Decision No. 16-C-A-2013.

[91] Porter maintains that Proposed Tariff Rule 16.1 is consistent with Decision No. LET-C-A-29-2011 and that Rule states plainly that Porter will be liable to reimburse passengers in the circumstances set out in that Decision; there is no suggestion that liability will only adhere in exceptional circumstances.

[92] Porter contends that Proposed Tariff Rule 16.2 addresses Porter's liability under the Tariff for delayed delivery of a passenger's baggage. Porter adds that the Proposed Tariff Rule's contents are substantially identical to those found to be reasonable in Decision No. 16-C-A-2013.

[93] According to Porter, consistent with the Convention's liability principles, Proposed Tariff Rule 16.2(b) positively states that, notwithstanding that concurrent baggage delivery is not guaranteed, Porter will be liable for delays in the carriage of baggage except in the circumstances set out therein. Porter adds that as with Proposed Tariff Rule 16.1(i)(b), Proposed Tariff Rule 16.2(b) reproduces the exception to liability contained in Article 19 of the Convention, and sets out a reasonable process by which passengers may submit claims for compensation to Porter.

[94] Porter asserts that Proposed Tariff Rule 16.2(c) provides notice to passengers of the compensation available to them from Porter, including that:

(a) Porter will reimburse passengers for the loss of her bag after 21 days, subject to limits of:

(i) 1131 SDR, expressly stated to be approximately equivalent to CAD \$1,800, where no excess value has been declared, and

(ii) CAD \$3,000, where the passenger has declared an excess value of the lost item.

- [95] Porter points out that in Decision No. 418-C-A-2011 (*Lukács v. WestJet*), the Agency has found similar provisions – including as to clarity, limits of liability and requirement of proof of value – to be reasonable.
- [96] Porter also points out that as with Proposed Tariff Rule 16.1, Proposed Tariff Rule 16.2 permits Porter to deny otherwise eligible claims only where the passenger has failed to follow the reasonable process set out therein, or where the expenses claimed are not reasonable.

Mr. Lukács

- [97] Mr. Lukács contends that the vast majority of the provisions under Proposed Tariff Rules 16.1 and 16.2 are reasonable but the phrase “the Carrier proves that” ought to be inserted into Proposed Tariff Rule 16.1(a)(d) [or more correctly, Proposed Tariff Rule 16.2(a)(i)] and Proposed Tariff Rule 16.2(b)(i) before “the Carrier and its employees and agents” in order to reflect the wording of Article 19 of the Convention.
- [98] According to Mr. Lukács, this phrase is to ensure that the burden of proof of the affirmative defense is on the carrier, which is a central feature of the Convention that has been widely recognized by the courts in Canada.
- [99] Mr. Lukács disagrees with Porter’s statement that Existing Tariff Rule 16 does not affect Porter’s liability with respect to baggage; not only do these provisions explicitly refer to baggage, but they also purport to relieve Porter from all of its obligations, including with respect to delivery of baggage to the passenger.
- [100] Mr. Lukács points out that the provisions in Existing Tariff Rule 16 provide that:

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

[...]

Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.

[101] Mr. Lukács submits that not only do these provisions explicitly refer to baggage, they also purport to relieve Porter from all of its obligations, including with respect to delivery of baggage to the passenger.

Analysis and findings

[102] Proposed Tariff Rules 16.1 and 16.2 are exactly the same as Rules 18.1 and 18.2 in Porter's international tariff, which were found reasonable by the Agency in Decision No. 16-C-A-2013. The only new argument raised by Mr. Lukács is the need to add the words "the Carrier proves that." The Agency disagrees with Mr. Lukács' submission that to accurately reflect the principles of the Convention, these words should be inserted in the Proposed Tariff Rules.

[103] The Agency is of the opinion that irrespective of whether the words "the Carrier proves that" appear in Proposed Tariff Rules 16.1 and 16.2, the burden of proof rests with the carrier to demonstrate that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[104] The Agency finds that it is not necessary that the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16.1 and 16.2 to reflect the wording of Article 19 of the Convention.

Issue 7: Is the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) unreasonable, given the proposed definition of "Event of Force Majeure" in Rule 1, because it is misleading and may prejudice passengers' ability to enforce their rights?

Positions of the parties

Porter

[105] Porter advises that as Proposed Tariff Rule 16(f) makes reference to an "Event of Force Majeure," Porter has filed a definition of that term which it proposes to add to Rule 1 (Definitions) of its Tariff.

[106] Porter submits that the proposed definition provides that an "Event of Force Majeure" is an occurrence that is not within the reasonable control of the Carrier and Porter sets forth a number of examples of situations which may constitute events of force majeure, subject always to the qualification that such events were beyond Porter's reasonable control.

Mr. Lukács

[107] Mr. Lukács maintains that most events of the type listed under the proposed definition are not considered to be force majeure by Canadian courts or international authorities. Mr. Lukács contends that Porter's proposed definition of "Event of Force Majeure" is misleading and may prejudice passengers' ability to enforce their rights. According to Mr. Lukács, the definition is cause-and-event based and unnecessarily complicates the simple and straightforward liability regime of Article 19 of the Convention.

Analysis and findings

- [108] The Agency is of the opinion that, in and of itself, the proposed definition of “Event of Force Majeure” provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute “force majeure.” In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.
- [109] The Agency finds that the reference to “Event of Force Majeure” in Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency, given the proposed definition of “Event of Force Majeure” in Rule 1.

SUMMARY OF CONCLUSIONS

With respect to Porter’s Existing Tariff Rules

Issue 1

- [110] The Agency has determined that Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20 of the Tariff, is unreasonable.

Issue 2

- [111] The Agency has determined that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable.

Issue 3

- [112] The Agency has determined that the exclusions listed in Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, are unreasonable.

With respect to Porter’s Proposed Tariff Rules

Issue 1

- [113] The Agency has determined that the wording in Proposed Tariff Rule 16(b) would be found to be unclear if filed with the Agency.

Issue 2

- [114] The Agency has determined that the wording in Proposed Tariff Rule 16(b) would be found to be unreasonable if filed with the Agency.

Issue 3

- [115] The Agency has determined that the wording in Proposed Tariff Rule 16(c) would be found to be unreasonable if filed with the Agency.

Issue 4

- [116] The Agency has determined that the wording in Proposed Tariff Rule 16(d) would be found to be clear if filed with the Agency.

Issue 5

- [117] The Agency has determined that Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency.

Issue 6

- [118] The Agency has determined that it is not necessary to insert the phrase “the Carrier proves that” in Proposed Tariff Rules 16.1 and 16.2.

Issue 7

- [119] The Agency has determined that the reference to “Event of Force Majeure” in Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency, given the proposed definition of “Event of Force Majeure” in Rule 1.

ORDER

- [120] The Agency, pursuant to section 113 of the ATR, disallows the following provisions of Porter’s Tariff:

- Rule 16(c);
- Rule 16(e);
- Rule 16(g); and,
- The exclusions listed in Existing Tariff Rule 16, starting on 3rd Revised Page 31.

- [121] The Agency orders Porter, by September 30, 2013, to amend its Tariff to conform to this Order and the Agency’s findings set out in this Decision.

[122] Pursuant to paragraph 28(1)(b) of the CTA, the disallowance of Existing Tariff Rules 16(c), 16(e) and 16(g), and the exclusions listed in Existing Tariff Rule 16 starting on 3rd Revised Page 31, shall come into force when Porter complies with the above or on September 30, 2013, whichever is sooner.

(signed)

Raymon J. Kaduck
Member

(signed)

Sam Barone
Member