

Halifax, NS

lukacs@AirPassengerRights.ca



September 21, 2015

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Porter Airlines
Application concerning misrepresentation, application of terms and conditions not set out in the tariff, and failure to apply the tariff with respect to compensation for baggage delay / Case No.: 15-03657
Request for Agency to Require Party to Respond

The Applicant is hereby requesting, pursuant to Rule 32 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 (“*Dispute Rules*”), that the Agency require Porter Airlines to provide a complete response to the Notice of Written Questions and Productions, dated September 10, 2015.

I. Relief sought

The Applicant is asking the Agency to order Porter Airlines to:

- (a) answer questions Q2-Q4 in full;
- (b) answer question Q7 in full;
- (c) answer question Q8 in full;
- (d) produce earlier versions, pre-dating Tab C to its September 18, 2015 answers, of all its training and/or policy and/or operation manuals for staff, which address compensation of passengers for delay or loss of baggage (Q14);

- (e) answer questions Q16-Q17 and Q19 in full;
- (f) produce computer logs showing the exact date and time when the email referenced in paragraph 15(c) of Mr. Gonzalez's affidavit was sent to each recipient (Q24); and
- (g) answer questions Q26-Q31 in full.

II. Summary of the facts

On August 10, 2015, the Applicant brought the within Application against Porter Airlines, alleging that:

- (i) between February 19, 2013 and August 4, 2015, Porter Airlines published false and/or misleading information on its website concerning the lack of entitlement of passengers to monetary compensation for expenses incurred as a result of baggage delay, contrary to s. 18(b) of the *ATR*;
- (ii) between February 19, 2013 and August 6, 2015, Porter Airlines shortchanged passengers travelling on international itineraries by applying terms and conditions with respect to baggage delay not set out in its International Tariff and/or failing to apply its International Tariff Rule 18.2 and/or Transborder Tariff Rule 80(F), contrary to s. 110(4) of the *ATR*;
- (iii) between October 10, 2013 and August 6, 2015, Porter Airlines shortchanged passengers travelling on domestic itineraries by applying terms and conditions with respect to baggage delay not set out in its Domestic Tariff and/or failing to apply its Domestic Tariff Rule 16.2, contrary to s. 67(3) of the *CTA*; and
- (iv) Porter Airlines profited from its unlawful conduct, while causing losses to the travelling public.

The Applicant is seeking an Order, pursuant to s. 67.1(c) of the *CTA* and/or 113.1(a) of the *ATR*, directing Porter Airlines to take corrective measures.

On August 13, 2015, the Agency opened pleadings. On September 3, 2015, Porter Airlines submitted its Answer as well as a 60-page affidavit (including exhibits).

On September 10, 2015, the Applicant directed a total of 31 written questions and requests for productions to Porter Airlines, pursuant to Rule 24(1) of the *Dispute Rules*.

On September 18, 2015, Porter Airlines refused to respond to many of these questions, nor did it produce the requested documents ("**Response to Questions**").

III. Arguments in support of the request

1. Porter Airlines objects to the questions and productions chiefly on the ground that they are irrelevant. In *R. v. Arp*, [1998] 3 SCR 339, the Supreme Court of Canada defined relevance as follows (at para. 38):

To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to “increase or diminish the probability of the existence of a fact in issue”. [...] As a consequence, there is no minimum probative value required for evidence to be relevant.

[Emphasis added.]

2. In Decision No. LET-C-A-154-2012, the Agency established the test to use when making a determination on the relevancy of evidence as requiring the Agency to:
 - (i) examine the nature of what is claimed; and then
 - (ii) look at whether the question to be answered or the evidence to be produced or disclosed shows, or at least tends to show, or increases or diminishes the probability of, the existence of the fact related to what is claimed.

If the answer to the second question is positive, the question or evidence is relevant.

3. The Applicant submits that this test is met with respect to each of the questions and productions addressed below.

(a) Porter Airlines’ lack of records for 2013 (Q2-Q4)

(i) What is claimed

4. The Applicant alleges that not all Porter Airlines passengers with baggage delay were compensated in accordance with Porter Airlines’ tariffs in a period that includes the year 2013.
5. Porter Airlines claims that it did compensate passengers for expenses associated with baggage delay in 2013, but mysteriously it has no records detailing compensation amounts paid out in 2013, because the records have allegedly been disposed “in accordance with Porter’s document retention policies.”

Gonzalez Affidavit, para. 11 and Response to Questions, para. 6

6. The Applicant disputes that Porter Airlines disposed of such records after less than six (6) years, and alleges that Porter Airlines must have detailed records of all compensation it paid out to passengers in 2013, if any compensation was paid out at all.

(ii) Relevance

7. Section 230 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) requires corporations to retain records and books for six (6) years from the end of the last taxation year to which the records and books relate:

230. (1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

⋮

(4) Every person required by this section to keep records and books of account shall retain

- i. the records and books of account referred to in this section in respect of which a period is prescribed, together with every account and voucher necessary to verify the information contained therein, for such period as is prescribed; and
- ii. all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein, until the expiration of six years from the end of the last taxation year to which the records and books of account relate.

(4.1) Every person required by this section to keep records who does so electronically shall retain them in an electronically readable format for the retention period referred to in subsection 230(4).

[Emphasis added.]

8. Section 248 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) defines a "record" as follows:

"record" includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form;

[Emphasis added.]

9. Thus, if Porter Airlines is subject to the *Income Tax Act*, then it must have retained every “record” relating to expenses it incurred in relation to baggage irregularity for the past six years, including:
- (a) each and every cheque issued to passengers and the documents in support of each passenger’s claim; and
 - (b) each and every invoice for bag delivery and bag repair fees.

In particular, if Porter Airlines has been complying with the *Income Tax Act*, then it should have no difficulty to distinguish amounts paid for bag delivery and repair from amounts paid to passengers for expenses associated with delay in the year 2013, as all related invoices, letters, and other documents must still be in Porter Airlines’ possession and/or control.

10. Consequently, answers to questions Q2-Q4 will tend to increase the probability that Porter Airlines did not dispose of records of payments of compensation to passengers for 2013, but rather:
- (a) these records never existed (i.e., no compensation was paid); or, alternatively,
 - (b) Porter Airlines is withholding information and/or documents from the Agency (because they are unfavourable for Porter Airlines’ case).

(b) Data about passengers, delayed bags, and compensation paid (Q7)

(i) What is claimed

11. The Applicant alleges that:
- (a) since 2012, Porter Airlines has transported at least 2.5 million passengers every year;
 - (b) at least 2 out of 1000 Porter Airlines passengers have a case of baggage delay;
 - (c) since 2012, Porter Airlines had at least 5000 delayed bags per year; and
 - (d) not all of the passengers with baggage delay were compensated in accordance with Porter Airlines’ tariffs between February 19, 2013 and August 6, 2015.

Application, paras. 1-4 and overview

12. Porter Airlines neither denies nor admits allegations (a)-(c), but denies allegation (d): it claims that in 2014 and 2015 combined, it paid out \$46,777.40 in compensation to passengers with delayed baggage, and that its practice has always been to reimburse passengers for expenses associated with baggage delay.

13. Porter Airlines also claims that it has identified 2,485 passengers with baggage delay in 2013 and 2014 combined, and that the “vast majority of travellers with delayed baggage will be contacted directly in this way.”

**Response to Questions, para. 32
Porter Airlines’s Answer, para. 24**

(ii) Relevance

14. First, the issue is not whether answers to the questions “in itself” will provide conclusive proof of any fact in dispute; rather, the issue is whether answers to the questions will tend to support the finding that not all Porter Airlines passengers were compensated in accordance with the tariffs.
15. Second, evidence of individual passengers is not required in order to establish the general practices of Porter Airlines; its records, including claims of passengers and statements showing payments, are also capable of establishing the same.
16. While the amount of compensation paid to passengers for expenses associated with baggage delay may be indicative of whether any passenger was compensated, it does not address the allegation in the present Application, which is that some and/or many passengers were not compensated (i.e., a systemic problem).
17. Question Q7 consists of numerous sub-questions that together test the claims advanced by Porter Airlines, and serve multiple purposes:
- (a) answers to questions Q7(3) and Q7(4), combined, are capable of showing that Porter Airlines was delinquent in compensating passengers with baggage delay who made a claim;
 - (b) the answer to question Q7(2) is capable of showing that the 2,485 passengers identified by Porter Airlines are, contrary to what the airline claims, not the “vast majority” of the affected passengers, and can lend further support for the need for additional corrective measures;
 - (c) the answer to question Q7(1) provides a “reality check” with respect to the answer to question Q7(2), because the ratio of baggage incidents per 1000 passengers tends to be fairly similar across carriers using the same airport facilities; and
 - (d) answers to questions Q7(2) and Q7(3), combined, will demonstrate the substantial gap between the number of passengers with baggage delay and those who did file a claim—this, in turn, is tending to increase the probability that the false and/or misleading information on Porter Airlines’ website and/or provided to passengers by the airline’s agents had an adverse impact on passengers asserting their rights.

18. The combined amount of compensation paid out by Porter Airlines in 2014 and 2015 appears to be unreasonably low based on the number of affected passengers, and suggests that only a fraction of the affected passengers were paid compensation. Furthermore, the combined amount for 2014 and 2015 provides no information about whether the airline compensated passengers in both 2014 and 2015, or perhaps only in one of the two.
19. Requiring Porter Airlines to provide a year-by-year breakdown of the amount of compensation paid out (Q7(5)) and the other relevant information under question Q7 will allow for verifying the consistency in Porter Airlines' data, and it can increase or diminish the probability that Porter Airlines has been compensating passengers in accordance with its tariff in each of the years 2013, 2014, and 2015.
20. Answers to question Q7 with respect to the period in 2013 is particularly important, because Porter Airlines has been refusing thus far to provide any data about 2013, even though it admitted that it has no written document retention policy, and acknowledged that it does have hard copies of Baggage Irregularity Reports (BIR) from 2013.

Response to Questions, paras. 4 and 31(a)

(iii) Additional considerations

21. Question Q7 does not seek any "private" information from Porter Airlines; however, in the unlikely event that Porter Airlines considers any of the information sought to be of a sensitive nature, this can be fully addressed pursuant to Rule 31 of the *Dispute Rules*.
22. Pursuant to paragraph 5 of Schedule 6 of the Agency's Dispute Rules, Porter Airlines was required to set out in its answer "the elements that the respondent agrees with or disagrees with in the application" and "a full description of the facts." Thus, Porter Airlines could not simply ignore the allegations about the number of passengers it carries, its bag ratio, or the number of passengers who had a case of baggage delay.

(c) Prominence of Porter Airlines' page containing the false/misleading information (Q8)

(i) What is claimed

23. Porter Airlines claims that the false and/or misleading information with respect to liability for baggage delay on its website was insignificant, because the correct information is found in its tariffs online.

Porter Airlines' Answer, para. 21

24. The Applicant disputes Porter Airlines' position, and seeks to establish that the false and/or misleading information was displayed on a prominent page of Porter Airlines' website.

(ii) **Relevance**

25. Google is the leading Internet search engine as of 2015, with approximately two-thirds of market share: 2 out of 3 users are using Google for searching for information on the Internet.

Equustek Solutions Inc. v. Google Inc., 2015 BCCA 265, para. 19

26. Google uses a sophisticated algorithm to determine the “ranking” of each page that is returned as a result for a search. Pages that rank among the first 10, and in particular, pages that rank as the first result in response to a search are viewed as the most relevant page(s) by the users, and therefore these are the most prominent pages.
27. The answer to question Q8 will tend to increase the probability that the impugned web page of Porter Airlines is the most prominent and exposed one, which passengers searching for Porter Airlines’ baggage delay policy are the most likely to visit.

(d) **Production of training and/or policy and/or operation manuals between 2006 and the present (Q14)**

(i) **What is claimed**

28. Porter Airlines claims that its practice has always been to reimburse passengers for their expenses associated with baggage delay, since the airline began to operate in 2006.

**Gonzalez Affidavit, para. 12
Response to Questions, para. 20**

29. The Applicant claims that Porter Airlines’ practice used to be to not reimburse passengers for expenses they incurred for baggage delay.

(ii) **Relevance**

30. There is a good reason to question the truthfulness of Porter Airlines’ representations on this matter: on September 17, 2015, in a statement to the media, Porter Airlines referred to the impugned false and/or misleading statement that was displayed on its website as “[a]n outdated summary” of its policy with respect to compensation for baggage delay.

Porter Airlines’ statement to Global TV News, Dated September 17, 2015, Document No. 13

31. Consequently, contrary to what Porter Airlines claims before the Agency, the statement that “No additional sum shall be paid for expenses or incidentals incurred as a result of the delayed luggage” reflects what used to be, at some point in time, Porter Airlines’ policy.

32. Although Porter Airlines produced an undated portion of a document, purporting to be a training manual for its Baggage Department staff that has allegedly been in place since “mid-2013,” it failed to provide previous versions of the manual nor other policy manuals that would set out Porter Airlines’ policy or practice with respect to compensation of passengers with delayed baggage prior to “mid-2013,” contrary to what was requested (Q14).
33. In particular, Porter Airlines produced no training and/or policy and/or operation manual that was in effect between February 19, 2013 and “mid-2013.”
34. Older training and/or policy and/or operation manuals, which pre-date “mid-2013,” will assist the Applicant’s case and will tend to show that Porter Airlines has not been compensating passengers as required by its tariff, because they:
 - (a) inform on Porter Airlines’ practices between February 19, 2013 and “mid-2013”; and
 - (b) can affirm or refute Porter Airlines’ claims about its practices prior to “mid-2013.”

(e) Porter Airlines Agents Darryl and Britney (Q16-Q17 and Q19)

(i) What is claimed

35. The Applicant submitted in support of the Application recordings and transcripts of three conversations with agents of Porter Airlines that took place on August 5-6, 2015.

In all three of the conversations, the agents stated the same policy with respect to baggage delay as what appeared on the impugned web page of Porter Airlines: Porter Airlines would provide only up to \$125 in travel vouchers, but no other compensation for expenses associated with baggage delay.

Telephone conversation between Dr. Gábor Lukács and Porter Airlines agent Darryl on August 5, 2015 at 13:39 (ADT), Document No. 8: p. 3, lines 19-23 and p. 4, lines 10-16

Telephone conversation between Dr. Gábor Lukács and Porter Airlines agent Darryl on August 5, 2015 at 13:48 (ADT), Document No. 9: p. 2, lines 5-8 and p. 3, lines 1-10

Telephone conversation between Dr. Gábor Lukács and Porter Airlines agent Britney and Natalie Bambury on August 6, 2015 at 14:22 (ADT), Document No. 10: p. 4, l. 21 - p. 6, l. 13

36. The Applicant alleges that these agents honestly stated what was Porter Airlines’ common practice with respect to baggage delays.
37. Porter Airlines disputes the reliability of the statements of its own agents, and questions the weight of their statements.

(ii) Relevance

38. The statements made by Darryl and Britney are inconsistent with and refute the statement of Mr. Gonzalez about Porter Airlines' practices, and as such they are capable of demonstrating that Mr. Gonzalez and/or Porter Airlines are not being truthful with respect to Porter Airlines' practices.
39. Answers to questions Q16 and Q17, seeking confirmation that Darryl and Britney were indeed agents of Porter Airlines, the lengths of their employment, and the roles in which they have gained experience at Porter Airlines, tend to increase (or diminish) the probability that their knowledge of Porter Airlines' practices is reliable, and thus increase (or diminish) the weight of their statements.

For example, Britney said that she has been with Porter Airlines "for almost two years now," which would be a long enough time to allow her to thoroughly familiarize herself with the practices of the airline.

40. Obtaining statements or calling to testify employees who are not involved in the management of a company is a common tool, both in civil and criminal law, for proving unlawful conduct. Both Darryl and Britney displayed knowledge of Porter Airlines' practice (as opposed to its written policy) with respect to compensation for baggage delay, and their evidence is likely to support the allegations put forward by the Applicant.
41. Consequently, Darryl and Britney are witnesses from whom the Applicant may wish to solicit statements or may request the Agency to call to testify orally. As such, their full names are relevant, and Porter Airlines should be required to answer question Q19. (See also s. 240(b) of the *Federal Courts Rules*.)

(f) Email allegedly sent to affected passengers (Q24)

42. Porter Airlines' affiant, Mr. Gonzalez, claimed at paragraph 15(c) of his affidavit that a certain email "was sent" to passengers who were identified as having had a baggage delay.
43. Question Q24 was asking for the following production:

Porter Airlines is requested to produce computer logs showing the exact date and time when the email referenced in paragraph 15(c) was sent to each recipient.

[Emphasis added.]

44. Tab D to Porter Airlines' Response to Questions does not respond to this request for production, because:

- (a) no recipients are shown, and thus it is impossible to verify to whom and how many recipients the communication was sent; and
 - (b) it is not a computer log showing the actual transmission of the email, but rather an email that Porter Airlines sent to itself.
45. Mr. Gonzalez's affidavit is not capable of showing that Porter Airlines' communicated with the affected passengers, because he cannot testify about future events. Indeed, according to Porter Airlines, the email in question "was sent to passengers [...] after Mr. Gonzalez swore his affidavit."

Response to Questions, para. 36

46. Therefore, whether Porter Airlines sent any communication to any of the affected passengers remains a live and contentious issue, which is also relevant to the necessity of the remedies being sought.

(g) Necessity of the present Application (Q26-Q31)

(i) What is claimed

47. Porter Airlines has raised a new issue in its Answer to the Application, namely, it claims that:
- (a) the Applicant ignored "the line of communication which had been opened and the many alternatives to formally adjudicating the issues"; and
 - (b) the Application was unnecessary because "the carrier has already taken reasonable steps to address concerns."

Porter Airlines is asking the Agency to award costs against the Applicant based on this claim.

48. The Applicant denies these claims, and submits that Porter Airlines has taken some remedial steps with respect to passengers who were misled by its website only after the Application was brought to the Agency, and the Agency set a deadline for Porter Airlines to respond.

(ii) Relevance and necessity

49. Questions Q26-Q31 focus on this new issue that Porter Airlines raised, namely, whether the Application was necessary, and not on the issues underpinning the Application.
50. Questions Q26-Q28 seek certain admissions from Porter Airlines in order to simplify the proceeding, and avoid lengthy submissions and evidence on points that should reasonably

be undisputed. Seeking admissions is consistent with the objective of the *Dispute Rules* as set out in Rule 5(1).

51. Porter Airlines argues that the Application was unnecessary, yet it allegedly sent out an email to some affected passengers on September 3, 2015, inviting them to make belated claims for expenses incurred for baggage delay.
52. Question Q29 seeks an explanation for the timing of the alleged email, which happens to coincide with the deadline for Porter Airlines' Answer to the Application. The answer to this question will tend to show that Porter Airlines took some remedial steps to inform misled passengers as a result of the Application.
53. Questions Q30-Q31 seek admissions with respect to an issue that was communicated to Porter Airlines at the same time as the issues raised in the Application, but was not included in the Application.

Answers to these questions will show that Porter Airlines ignored a number of concerns the Applicant communicated to it, and thus will tend to show Porter Airlines' claim with respect to "line of communication" is patently false.

Porter Airlines' Answer, para. 83

IV. Documents relied on

The Applicant relies on the following documents in support of the request, which have already been served by or on Porter Airlines and filed with the Agency, or are attached:

1. Application and its supporting documents, dated August 10, 2015;
2. Porter Airlines' Answer, dated September 3, 2015;
3. affidavit of Mr. Luis Gonzalez, sworn on September 3, 2015;
4. Notice of Written Questions and Production of Documents directed to Porter Airlines, dated September 10, 2015;
5. Statement of Porter Airlines' Public Relations Department, dated September 17, 2015 (attached); and
6. Porter Airlines' Response to the Notice of Written Questions, dated September 18, 2015.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Orestes Pasparakis, counsel for Porter Airlines
Mr. Rahoo P. Agarwal, counsel for Porter Airlines

From: Sean.OShea@globalnews.ca Thu Sep 17 17:13:04 2015
Date: Thu, 17 Sep 2015 20:12:54 +0000
From: Sean O'Shea <Sean.OShea@globalnews.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: FW: Global TV News Story re: Lost Baggage

[The following text is in the "utf-8" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some characters may be displayed incorrectly.]

Gabor:

This is the Porter Airlines spin....FYI.

Sean

From: Sasha Campbell
Sent: September-17-15 4:12 PM
To: Sean O'Shea
Subject: FW: Global TV News Story re: Lost Baggage

From: Porter Media [mailto:media@flyporter.com]
Sent: September-17-15 4:11 PM
To: Sasha Campbell
Subject: Re: Global TV News Story re: Lost Baggage

Hello Sasha, our policy for delayed baggage has been consistently applied since it was updated in 2013. We reimburse reasonable expenses for passengers if they have issues related to baggage delays. This meets the international standard that all airlines follow.

As a customer service gesture, we also provide \$25 travel vouchers per day for up to five days of delay. This is beyond what is required.

Most delayed bags are returned within 24 hours. We also have the best baggage handling rate of any airline in North America with less than one mishandled bag per 1,000 passengers on average. This policy is reflected properly within our tariff and is posted on the website. An outdated summary of the policy in another section of the website was brought to our attention and we immediately updated it.

Please let me know if there is anything else I can assist with.

Regards,
Robyn

On Thu, Sep 17, 2015 at 2:00 PM, Sasha Campbell <Sasha.Campbell@globalnews.ca>
wrote:

Hi Brad,

Sean O'Shea, Consumer SOS reporter at Global News Toronto, is doing a story
tonight on passenger rights concerning lost or delayed baggage.

We are aware of the recent complaint involving the Canadian Transportation
Agency regarding an inconsistency on the Porter Airlines website with what is
outlined in its International Tariff.

Could you please explain how Porter Airlines presently handles delayed or lost
baggage claims?

Thank you,

Sasha

Sasha Campbell

Global News

Consumer SOS

sasha.campbell@globalnews.ca

416-446-5466

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Porter Media

Porter Airlines Inc.

Email:

media@flyporter.com

www.flyporter.com

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