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September 28, 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
Response to Porter Airlines' request, dated September 22, 2015

Please accept the following response of the Applicant, pursuant to Rule 27(2) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*"), to Porter Airlines' request of September 22, 2015.

SUMMARY OF THE FACTS

On September 18, 2015, Porter Airlines refused to respond to certain questions and productions directed to it by the Applicant on September 10, 2015. Porter Airlines argued that the information sought is irrelevant to the proceeding.

On September 21, 2015, the Applicant brought a request, pursuant to Rule 32 of the *Dispute Rules*, to require Porter Airlines to provide a complete response to certain questions and productions that have remained unanswered ("Request to Compel").

THE ISSUE

Should Porter Airlines be permitted to file a response to the Request to Compel, and if so, what should be the appropriate scope of such a response?

ARGUMENTS IN OPPOSITION OF PORTER AIRLINES' REQUEST

1. Rule 32 of the *Dispute Rules* does not provide for an automatic right to respond to a request to compel answers. Thus, Porter Airlines is effectively asking the Agency to vary the rules “in the interest of fairness.”
2. In the context of procedural fairness, it is submitted that the Agency should consider:
 - (i) whether the Request to Compel affects Porter Airlines’ ability to lead evidence, make submissions, and meet the case against it;
 - (ii) whether Porter Airlines will be prejudiced by being required to answer the questions and produce the requested documents;
 - (iii) whether Porter Airlines proposes to address a genuinely new issue, or merely a new argument relating to a pre-existing issue; and
 - (iv) whether Porter Airlines had a prior opportunity to address the issue it is proposing to address.
3. While the Request to Compel is vital for the Applicant’s ability to test the position and evidence advanced by Porter Airlines, it does not affect Porter Airlines’ ability to lead evidence, make submissions, and meet the case against it.
4. Porter Airlines did not oppose any of the questions or the productions on the basis that responding to them would cause it undue hardship, and it follows from the nature of the questions that answering them requires far less effort than objecting to them, as Porter Airlines is currently doing. Thus, Porter Airlines will not suffer any prejudice by being required to answer the questions and produce the requested documents.
5. Porter Airlines has had an opportunity and was required to state its grounds for objecting to the questions and productions. It is the nature of a Request to Compel that the party seeking answers would present further arguments to refute the objections of the party resisting the questions; however, not every new argument gives rise to a genuinely new issue.
6. With respect to the “issues” identified by Porter Airlines at paragraph 10 of its request:
 - (a) Porter Airlines could have addressed the legal test for relevance in its response, dated September 18, 2015, to the questions and productions. Indeed, Porter Airlines was objecting to the questions on the basis of lack of relevance, and as such, Porter Airlines was the party to raise the issue. There was nothing to prevent Porter Airlines from addressing the legal test in detail at that time.

- (b) On September 10, 2015, Porter Airlines was clearly advised about the Applicant's intention to rely on the record retention provisions of the *Income Tax Act* (see Q2-Q4 and the explanation below them). Porter Airlines has already addressed this issue on September 18, 2015, although perhaps less thoroughly than it may wish in hindsight. Thus, no new issue is being raised in the Request to Compel, only a reply to Porter Airlines' submissions of September 18, 2015.
- (c) The Applicant has consistently alleged that Porter Airlines failed to apply the terms and conditions set out in its tariffs with respect to compensation for baggage delay (see the Overview on pp. 1-2 of the Application, dated August 10, 2015 as well as page 2 of the Request to Compel, under "Summary of the facts").

Porter Airlines chose to create a "strawman" by interpreting the allegation to mean that no passenger with delayed baggage has ever been compensated; however, this is not what is alleged by the Application.

The allegation is correctly explained at paragraph 16 on page 6 of the Request to Compel: it is alleged that some and/or many passengers with delayed baggage were not compensated (in accordance with the policy stated on Porter Airlines' website and as the two Porter Airlines agents stated on the phone).

- (d) No new "material" has been introduced with respect to Google. Citing an authority that has not been cited before does not constitute a new issue nor a new "material." The statements in the Request to Compel with respect to Google are common knowledge in our age, and the Agency could anyway take judicial notice of same.
- (e) Challenging the credibility of the evidence of a party does not constitute a new issue; however, the Applicant concedes that Porter Airlines should be provided with an opportunity to respond to arguments that relate to the content of Document No. 13.

For greater clarity, this document, dated September 17, 2015, was not available to the Applicant prior to directing the questions to Porter Airlines on September 10, 2015.

- (f) The relevance of confirming that Agents Darryl and Britney are indeed employees of Porter Airlines, and their names and experience with Porter Airlines, are not a new issue (see Q16-Q17 and Q19 directed to Porter Airlines). Porter Airlines has already addressed this issue on September 18, 2015. Porter Airlines is not entitled to respond to each and every argument that is put forward to counter its position.
- (g) The issue of the necessity of the Application was raised by Porter Airlines (in its Answer of September 3, 2015, at paragraphs 3, 84, and 85), not by the Applicant. Porter Airlines has already addressed its grounds for objecting to questions relating to this issue on September 18, 2015 (paras. 38-41). The Request to Compel does not raise any new issue in this regard.

CONCLUSION

The Request to Compel raises no new allegations, although Document No. 13, dated September 17, 2015, was a new document that the Applicant, and quite possibly counsel for Porter Airlines, was not previously aware of.

Porter Airlines has already had a fair opportunity to state its full position and arguments for objecting to the questions, and it has done so on September 18, 2015 with respect to all issues, with the possible exception of the the submissions relating to Document No. 13 (paragraph 30 of the Request to Compel).

Therefore, Porter Airlines' additional submissions in relation to the Request to Compel should be strictly confined to paragraph 30 of the Request to Compel and Document No. 13.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

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