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April 10, 2013

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Attention: Ms. Judy O’Heare, Senior Analyst

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. Sunwing Airlines
Complaint concerning Sunwing Airlines’ domestic baggage liability policy (Rule 10)
File No.: M 4120-3/13-01289
Reply to Sunwing Airlines’ answer of April 3, 2013**

Please accept the following submissions in relation to the above-noted matter as a reply pursuant to Rule 44 to Sunwing Airlines’ answer of April 3, 2013.

In its answer, Sunwing Airlines has made no submissions concerning the reasonableness of the Existing Rule 10, but instead it put forward proposed amendments (“Proposed Rule 10”). In these circumstances, the Applicant is asking that the Agency make a finding that the Existing Rule 10 is unreasonable.

The remainder of the present reply concerns the Proposed Rule 10. The Applicant acknowledges that Sunwing Airlines’ intention to increase its domestic baggage liability from \$250 to \$1,750 is a very positive change.

Nevertheless, the Applicant submits that Proposed Rule 10 is still unreasonable, and substantial portions of Proposed Rule 10 ought to be disallowed.

ISSUES

I.	Proposed Rule 10(iv) is unreasonable	2
(a)	A blanket exclusion of liability for delay for passengers at their place of residence is unreasonable	2
(b)	Passengers' expenses have to be reasonable, not minimal	3
(c)	It is unreasonable to consider only the 24-hour period following the purchase . . .	4
(d)	Conclusion	4
II.	It is unreasonable to limit liability for wilful misconduct	5

I. Proposed Rule 10(iv) is unreasonable

Proposed 10(iv) significantly limits the rights of passengers for compensation in relation to delay of baggage in three ways: it limits Sunwing Airlines' liability to \$0 in relation to delay of baggage for passengers returning to their place of residence; it focuses only on the activity of passengers in the 24 hours following the purchase; and it imposes on passengers the obligation to minimize their expenses, rather than simply requiring passengers to incur expenses that are *reasonable* in the circumstances. The Applicant submits that these three restrictions ought to be disallowed and deleted from Proposed Rule (iv).

(a) A blanket exclusion of liability for delay for passengers at their place of residence is unreasonable

Proposed Rule 10(iv) states, among other things, that:

[...] any amounts payable under this paragraph shall not be payable to a passenger whose baggage is delayed upon arrival to his or her place of residence.

The effect of this provision is that it relieves Sunwing Airlines from any liability with respect to delay of checked baggage of passengers who arrive at their place of residence. Thus, this provision is a blanket exclusion of liability.

As the Agency held in *Pinksen v. Air Canada*, 181-C-A-2007, and reaffirmed in *Lukács v. Air Canada*, LET-C-A-29-2011, tariff provisions that tend to relieve a carrier from all liability with respect to checked baggage are unreasonable.

Furthermore, as the Agency has explained in a wealth of decisions, blanket exclusions are inconsistent with the legal principles of the *Montreal Convention*. Indeed, Article 26 of the *Montreal Convention* renders null and void any provision tending to relieve a carrier from liability beyond what is permitted in the convention.

In addition to the aforementioned legal reasons for this blanket limitation of liability being unreasonable, the Agency ought to also take judicial notice of the common knowledge and experience that passengers do not always own more than one piece or one package of many types of items: medications, chargers for electronic devices (such as laptops and cellphones), electric shavers, and expensive clothing items (such as tuxedos). Consequently, if such items are contained in delayed baggage, the location where the delay takes place does not alter the immediate need to incur expenses due to the delay.

Therefore, it is submitted that the portion of Proposed Rule 10(iv) that excludes Sunwing Airlines' liability for delay of baggage upon arrival at the passenger's place of residence is unreasonable and ought to be disallowed.

The Applicant proposes a case-by-case approach to compensation for delay, and submits that the appropriate requirement for compensation of passengers for expenses incurred in relation to delay is that the expenses be *reasonable in the circumstances*.

(b) Passengers' expenses have to be reasonable, not minimal

Proposed Rule 10(iv) states, among other things, that:

The passenger must minimize the costs incurred by making only necessary purchases, in accordance with the above.

The Applicant does not doubt that only *reasonable* expenses incurred by passengers are to be reimbursed. However, it is unreasonable for Sunwing Airlines to expect passengers to spend a substantial portion of the time at their destination on seeking out the cheapest possible price for each item that they buy.

Moreover, what purchases are "necessary" or "essential" can be open to interpretation, because arguably, one does not need a tuxedo or a formal dress to physically survive, although appropriate attire is certainly socially necessary at certain events. These concerns are not hypothetical; indeed, in *Shetty v. Air Canada*, 353-C-A-2012, the airline objected to the passenger's interim purchases on the ground that they were "non-essential," and its refusal to compensate the passenger required the intervention of the Agency.

The Applicant submits that instead of imposing the onerous requirement to "minimize" costs upon passengers, the threshold ought to be whether the expenses incurred by them are reasonable in the circumstances. Indeed, in *Shetty v. Air Canada*, 353-C-A-2012, the Agency held that:

[13] The Agency is of the opinion that what is reasonable in one circumstance may not be in another. Each situation must be evaluated on its own merits in light of the specific circumstances of the case. [...]

Thus, the Applicant submits that the impugned portion of Proposed Rule 10(iv) is excessively onerous for passengers, and fails to strike the balance between the rights of passengers and the commercial, operational, and statutory obligations of Sunwing Airlines; as such, the provision is unreasonable.

(c) It is unreasonable to consider only the 24-hour period following the purchase

Proposed Rule 10(iv) states, among other things, that:

the carrier shall only reimburse expenses incurred for the purchase of necessary items, having regard to the intended activities of the passenger in the next 24-hour time period following the purchase of the replacement items.

As a preliminary matter, the Applicant notes that this provision is an unfortunate instance of attempting to micromanage the criteria for reasonableness of expenses. As the Agency explained in *Shetty*, a far more circumstance-focused approach is necessary.

From a practical point of view, the implication of this provision is that a passenger whose baggage is delayed for 5 days would need to go back to the stores every day, and each time purchase clothing only for the next 24 hours, or else the passenger may risk not being reimbursed for some of the purchases. For example, passengers travelling for the purpose of vacation could not go for a full day of activity until their baggage arrives, because every day they would have to go back to the stores to purchase more clothing. Moreover, this provision would have devastating effects for passengers travelling for the purpose of hiking. Indeed, if their equipment is delayed, they could not purchase replacement items that are relevant for their activities beyond the next 24 hours, and perhaps the entire trip.

To summarize, with utmost respect to Sunwing Airlines, the proposed provision is unreasonable, because it would substantially aggravate the stress and inconvenience suffered by passengers as a result of delay of their baggage, and would have the *effect* of depriving passengers of being adequately compensated for reasonable expenses they incur in relation to delay of their baggage. It is further submitted that there is nothing in the *Montreal Convention* to allow a carrier to limit its liability to purchases of replacement items that relate only to the intended activities of the passenger in the next 24 hours.

(d) Conclusion

Proposed Rule 10(iv) in its present form contains a blanket exclusion of liability and substantially limits the ability of passengers to recover from Sunwing Airlines the expenses they incur as a result of the delay of their baggage. Hence, it is submitted that Proposed Rule 10(iv) ought to be disallowed and substituted with a circumstance-focused language that requires Sunwing Airlines to compensate passengers for expenses that are *reasonable in the circumstances*.

II. It is unreasonable to limit liability for wilful misconduct

Proposed Rule 10(a) reads as follows:

Subject to paragraph b) of this Rule, the liability of the Carrier in respect of loss, or damage to, or delay of, baggage, whether caused directly or indirectly by the act, neglect, or default of the Carrier or not, is limited to 1,131 Special Drawing Rights [...] per passenger for all baggage.

[Emphasis added.]

The Applicant submits that while it is perfectly reasonable to limit liability in relation to accidental damage, loss, or delay of baggage, it is unreasonable for Sunwing Airlines to limit its liability in the case of acts done with the intent to cause damage or recklessly and with the knowledge that damage would probably result (often referred to as wilful misconduct). Indeed, limiting the carrier's liability in the case of wilful misconduct is inconsistent with the principles of the *Montreal Convention*. Indeed, Article 22(5) states that:

The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

[Emphasis added.]

In other words, carriers cannot invoke the liability limits of the *Montreal Convention* to relieve themselves from liability for wilful misconduct. This principle was analyzed and applied (in the context of expensive cargo and the *Warsaw Convention*) in *Connaught Laboratories Ltd. v. British Airways*, 2002 CanLII 4642 (ON SC), and was upheld by the Ontario court of appeal in *Connaught Laboratories Ltd v. British Airways*, 2005 CanLII 16576 (ON CA).

Therefore, it is submitted that Proposed Rule 10(a) is unreasonable to the extent that it purports to limit Sunwing Airlines' liability in the case of wilful misconduct.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Mark Williams, President of Sunwing Airlines

LIST OF AUTHORITIES

Legislation

1. *Canada Transportation Act*, S.C. 1996, c. 10.
2. *Canadian Transportation Agency General Rules*, S.O.R./2005-35.
3. *Carriage by Air Act*, R.S.C. 1985, c. C-26.

International instruments

4. *Montreal Convention: Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 28 May 1999).

Case law

5. *Connaught Laboratories Ltd. v. British Airways*, 2002 CanLII 4642 (ON SC).
6. *Connaught Laboratories Ltd v. British Airways*, 2005 CanLII 16576 (ON CA).
7. *Lukács v. Air Canada*, Canadian Transportation Agency, LET-C-A-29-2011.
8. *Pinksen v. Air Canada*, Canadian Transportation Agency, 181-C-A-2007.
9. *Shetty v. Air Canada*, Canadian Transportation Agency, 353-C-A-2012.