



April 18, 2013

VIA EMAIL (Judy.OHeare@otc-cta.gc.ca)

**THE SECRETARY
CANADIAN TRANSPORTATION AGENCY
RAIL, AIR AND MARINE DISPUTES DIRECTORATE
DISPUTE RESOLUTION BRANCH**
15, rue Eddy/15 Eddy Street
Gatineau, QC K1A 0N9

Attention: Ms. Judy O'Heare

WITH A COPY VIA EMAIL (lukacs@AirPassengerRights.ca)

Gabor Lukács
[REDACTED]

Dear Madam Secretary:

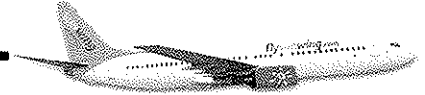
**Re: Complaint by Gabor Lukács against Sunwing Airlines Inc.
Your File: M 4120-3/13-01289; Complaint dated February 28, 2013
Our File: 100-006**

Please accept this Notice of Motion in the above-noted matter.

Background

Dr. Lukács' initial complaint (the "Initial Complaint") in this matter to the Canadian Transportation Agency (the "CTA") dated February 28, 2013 pertained to the maximum liability limits set out in Rules 10(a) and 10(iv) of Sunwing Airlines' current Local Domestic Tariff, in respect of the loss or damage to, and delay of, baggage, respectively. Specifically, Dr. Lukács submitted that the maximum amounts set out therein are unreasonable.

Sunwing Airlines responded to the Initial Complaint on April 3, 2013. On April 10, 2013, Dr. Lukács submitted his reply (the "Reply") to Sunwing Airlines' response. Dr. Lukács' Reply seeks to bring before the CTA, in the current proceeding, new issues which were not raised in the Initial Complaint, and it is Sunwing Airlines' submission that the addition of these issues to the current proceeding must be disallowed for the reasons set out herein.



New Issues

Specifically, the new issues are as follows:

1. On pages 2 and 3 of the Reply, Dr. Lukács introduces a new issue with respect to language contained in Rule 10(iv) of Sunwing Airlines' current Local Domestic Tariff (copy attached) relating to the delay of baggage upon arrival at a passenger's arrival at their place of residence. This language was not objected to by Dr. Lukács in his Initial Complaint, despite being contained in Rule 10(iv) at the time the Initial Complaint was filed.
2. On pages 3 and 4 of the Reply, Dr. Lukács introduces an issue with respect to the limitation of Sunwing Airlines' liability to expenses incurred for "necessary items" purchased in Rule 10(iv) of Sunwing Airlines' current Local Domestic Tariff. This limitation was not objected to by Dr. Lukács in his Initial Complaint, despite being contained in Rule 10(iv) at the time the Initial Complaint was filed. While Sunwing Airlines concedes that its proposed new text for Rule 10(iv) (as submitted in its response to the Initial Complaint) attempts to further clarify the rule, the liability limitation to only "necessary" purchased is not a new one.
3. On page 5 of the Reply, Dr. Lukács introduces a new issue with respect to language contained in Rule (10)(a) of Sunwing Airlines' Local Domestic Tariff (copy attached), contending, in essence, that such language would have the effect of limiting Sunwing Airlines' liability in the case of wilful misconduct. This language was not objected to by Dr. Lukács in his Initial Complaint, despite being contained in Rule 10(iv) at the time the Initial Complaint was filed.

Right to Make Submissions

A decision against a party in a quasi-judicial proceeding, without that party having been afforded the opportunity to make submissions on the issues, is contrary to natural justice. Therefore, Sunwing Airlines submits that if the CTA were to rule on the new issues without Sunwing Airlines having had the opportunity to respond to them, the CTA would be in breach of the *audi alteram partem* rule, a cornerstone of natural justice. Indeed, the rule is so much so, that Justice L'Heureux-Dube of the Supreme Court of Canada held that



audi alteram partem is a rule so fundamental in our legal system that I do not think there is any necessity to discuss it at length.¹

Moreover, Sunwing Airlines respectfully submits that the CTA should ask itself why the new issues, which are only now being raised in the Reply and immediately prior to the close of pleadings, were not raised in the Initial Complaint, notwithstanding that the opportunity existed at the time the Initial Complaint was filed.

Relief Sought

Sunwing Airlines respectfully seeks the following relief:

1. The disallowance, by the CTA, of the addition of the new issues raised in the Reply to the current proceeding.
2. In the alternative, if, notwithstanding the foregoing objections, the CTA determines that the new issues shall be added to the current proceeding, Sunwing Airlines must be afforded adequate opportunity to make submissions with respect to the new issues raised in the Reply. Although Sunwing Airlines intends to make fulsome submissions, it submits that a period of twenty (20) days would be adequate.

All of which is most respectfully submitted.

Yours truly,

SUNWING AIRLINES INC.

¹ *Supermarches Jean Labrecque Inc. v. Flamand* [1987] 2 S.C.R. 219 at 233.

RULE 9. LIMITATION OF LIABILITY - PASSENGERS

- a) The liability of the carrier in respect of the death of, or injury to, a passenger is limited to the sum of **\$100,000** exclusive of legal fees and costs, per passenger, per incident.
- b) In no cases shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.
- c) The carrier is not liable
 - (i) In the case of any passenger whose age or mental or physical condition, including pregnancy, is such as to involve an unusual risk or hazard, for any damages sustained by that passenger that would not have been sustained but for his/her age or mental or physical condition; or
 - (ii) In the case of a pregnant passenger, for any damages in respect of the unborn child of that passenger.

RULE 10. LIMITATION OF CARRIER RESPECTING BAGGAGE

- a) Subject to subsection (2), the liability of the carrier in respect of loss, or damage to, baggage, whether caused directly or indirectly by the act, neglect or default of the carrier or not, the maximum liability is limited to the sum of **CAD\$250.00** per passenger.
- b) The liability of the carrier is limited to the declared value of baggage except if the passenger or charterer does elect to declare a higher value an additional charge shall be payable and the carrier's liability will not exceed the higher value declared. The additional charge shall be calculated as follows:
 - The amount of the carrier's liability calculated in accordance with the parts of this rule set out above shall be referred to as "basic carrier liability";
 - No charge shall be payable on that part of the declared value which does not exceed basic carrier liability;
 - For that part of the declared value which does exceed basic carrier liability, a charge shall be payable at the rate of CAD 0.50 cents for each CAD \$100.00 or fraction thereof.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 3.

ISSUE DATE
November 1, 2010

EFFECTIVE DATE
November 2, 2010

- (i) Whether the passenger or charterer declares value or not, in no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.
- a) No action shall be maintained for any loss, or partial loss of or damage to baggage or for any delay in the carriage thereof unless notice of a claim is presented in writing to the head office of the carrier within 30 days from the date the baggage should have been delivered.
 - b) In no cases shall the carrier's liability exceed the actual loss of the passenger. All claims are subject to proof of amount of loss.

In the case of damage or partial loss, the person entitled to delivery must complain to the carrier forthwith after discovery of the damage or partial loss, and, at the latest, within seven days from the date of receipt of the baggage. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage has been placed at his disposal. In the case of loss, the complaint must be made at the latest within 30 days from the date the baggage should have been delivered. The passenger must notify the carrier immediately upon arrival in the case of missing checked-in baggage. Every complaint, whether for loss, partial loss, damage or delay, must be made in writing and must be dispatched within the times aforesaid. Failing complaint within the times aforesaid, no action shall lie against the carrier.

- (ii) The Carrier shall not be liable for loss, damage or delay of fragile items including any kinds of electronic equipment, electrical appliances, cameras & camera accessories, laptops etc or perishable articles, money, jewellery, silverware, ceramics, statues, art and art supplies, musical instruments, negotiable papers, securities or other valuables, samples or business documents and tools of business and trade, whether the non-acceptable property is included in the passengers' checked baggage with or without the knowledge of the carrier. The Carrier shall have no liability for any damage to baggage in the form of scratches, dents, scuffs, soiling, nicks, or to handles, straps, seams, zippers, wheels and wheel compartments, or locks, or resulting from manufacturer's defects, normal wear and tear or adverse weather conditions. In addition Carrier shall not be liable when damage, or partial loss occurs after the completion of a limited release tag as set forth thereon and further, Carrier shall not be liable for any item stolen or missing from bags that were not locked with a combination or key lock..
- (iii) No claim shall be eligible under this Rule unless the person presents a valid baggage tag issued by the Carrier for the lost, damaged or delayed bag.

For explanation of abbreviations, reference marks and symbols used but not explained hereon, see Page 3.

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- (iv) Notwithstanding paragraphs a) & b) of this rule, in the case of delayed baggage upon the passenger's arrival at a point in the itinerary other than the place of residence, the Carrier's liability shall be limited to **CAD25.00** per day per bag, until the passenger receives the bag(s) or up to a maximum of **CAD75.00** whichever comes first. Subject to all of the above stated monetary limits. Carrier shall only reimburse expenses incurred for necessary items purchased. Any claims for reimbursement must be supported by original receipts and any amounts payable under this paragraph shall not be payable to a passenger whose baggage is delayed upon arrival at his place of residence. Any amounts paid to a passenger to compensate for expenses incurred as a result of delayed baggage as set out in this rule shall be deducted from the compensation covered under paragraphs a) or b) of this rule in the event the baggage is deemed lost.
- (v) Notwithstanding paragraphs a) & b) of this rule, in the case of damaged baggage, the carrier's liability shall be limited to repairing the damaged bag, paying the cost of the repair, if such were pre-approved by the Carrier on the basis of an estimate or replacing the bag if it is not repairable. The Carrier shall have the discretion to determine which, if any of the three above methods to use to compensate the passenger.
- (vi) In the case of unclaimed baggage which cannot be identified, the carrier will hold the baggage and items therein for up to 30 days, subsequent to which it will dispose of the bag and its contents as it sees fit. If the baggage can be identified by a name, address, telephone number, the Carrier will make reasonable efforts to inform the passenger that his/her bag is in the possession of the Carrier and that he/she should make arrangements at his/her own cost and expense for collecting the said baggage within 30 days after which time the Carrier will dispose of the bag and its contents as it sees fit.
- (vii) In the event of loss or partial loss the passenger must submit receipts when filing a claim. The Carrier may disallow any and all claims when the passenger fails to provide proof of loss in the form of receipts of purchase.

RULE 11. SUBSTITUTION OF AIRCRAFT*

- a) When, due to causes beyond the control of the carrier, the aircraft contracted for is unavailable at the time the air transportation commences or becomes unavailable while carrying out such transportation the carrier may furnish another aircraft of the same type or, with the consent of the party contracting for the use of the aircraft, substitute any other type of aircraft if the rates and charges for the new aircraft are the same as for the original aircraft, except as provided in paragraphs (b) and (c).

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