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April 20, 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  
Sunwing Airlines’ motion for additional filings after the close of pleadings**

Please accept the following submissions in relation to the above-noted matter as an answer to Sunwing Airlines’ motion dated April 18, 2013 to make additional filings after the close of pleadings.

The Agency’s practice with respect to such motions is set out on the Agency’s website<sup>1</sup>, and calls for considering various factors:

- whether the filing was available before the pleadings were closed;
- whether the filing could have been obtained with the exercise of due diligence;
- whether the filing is relevant to the matter;
- whether the filing might affect the outcome of the matter;
- whether the filing should be allowed to avoid a miscarriage of justice, for example, to correct an error in the record or to supplement an incomplete record;
- whether the new filing would allow a party to split or reargue its case;
- the prejudice suffered by the other party or parties if the filing is allowed.

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<sup>1</sup><http://www.cta-otc.gc.ca/eng/publication/requests-additional-filings-after-close-pleadings>

As a preliminary matter, the Applicant notes that Sunwing Airlines has not addressed any of these factors in its motion, nor did it provide the Agency with a copy of the filing that it intends to submit if leave is granted. Thus, at this point, it is impossible to determine whether the filing is “relevant to the matter.”

**I. Were new issues raised in the Applicant’s Reply of April 10, 2013?**

The Applicant’s complaint, dated February 28, 2013, challenged the reasonableness of Sunwing Airlines’ Existing Domestic Tariff Rules 10(a) and 10(iv).

It is important to note that in its April 3, 2013 answer, Sunwing Airlines made no submissions concerning the Existing Domestic Tariff Rules, but rather chose to propose amendments to its tariff rules (the “Proposed Tariff Rules”). By failing to respond to the challenge concerning the reasonableness of the Existing Tariff Rules, Sunwing Airlines made a choice about its litigation strategy in the present proceeding, and it exposed itself to the risk of the Proposed Tariff Rules being challenged as unreasonable in the Applicant’s reply.

It was Sunwing Airlines, and not the Applicant, who raised new issues by proposing tariff amendments, and the Applicant was within his right to address these new issues in his reply pursuant to Rule 44.

It is submitted that Sunwing Airlines’ choice to confine its answer pursuant to Rule 42 to proposing tariff amendments does not entitle Sunwing Airlines to make additional submissions after the closing of the pleadings, in response to the Applicant’s reply.

**(a) No new issue was raised with respect to Rule 10(iv)**

The relief sought with respect to Sunwing Airlines’ Existing Tariff Rule 10(iv) is found on page 8 of the Applicant’s complaint dated February 28, 2013:

Hence, it is submitted that Rule 10(iv) ought to be disallowed.

Thus, the Applicant was not simply challenging part of Rule 10(iv), but rather objected to the entire provision. The basis for said challenge is inconsistency with the principles of the *Montreal Convention* and failure to strike the balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and Sunwing Airlines’ statutory, commercial and operational obligations.

The applicable legal principles that the Applicant relied on were set out on pages 3 and 4 of the Applicant’s February 28, 2013 complaint. Therefore, Sunwing Airlines has had more than enough time to review these applicable legal principles and the relevant jurisprudence as part of the drafting of its April 3, 2013 answer. In particular, no new issue was raised with respect to Rule 10(iv) in the Applicant’s reply.

**(b) New issue may have been raised with respect to Rule 10(a)**

Although Sunwing Airlines was provided on February 28, 2013 with due notice of the legal principles applicable to the present case and to which its tariff must conform, Sunwing Airlines' Proposed Rule 10(a) fails to comply with these principles. All the Applicant did in his April 10, 2013 reply was to point this out. The Applicant recognizes that Sunwing Airlines may perceive this as raising a new issue.

**II. If any new issues were raised in the April 10, 2013 reply, what is the proper remedy?**

The Applicant submits that if the Agency finds that any new issues were raised in the Applicant's April 10, 2013 reply, then it would be more efficient from the point of view of judicial economy to reopen the pleadings, rather than striking out those portions from the record, and dealing with these issues in a separate complaint.

Formulation of issues

Should the Agency finds that any new issues were raised in the Applicant's April 10, 2013 reply, the Applicant respectfully asks the Agency to clearly identify these, and direct both parties to confine their submissions to these issues exclusively.

Timelines

Since Sunwing Airlines was served with the Applicant's reply on April 10, 2013, if the reply raises any new issues, then Sunwing Airlines has been aware of these new issues since then, that is, for 10 days. In these circumstances, it is submitted that Sunwing Airlines ought to be able to file any additional submissions that it may have by April 25, 2013.

The Applicant is asking to be allowed to file his reply to Sunwing Airlines' additional submissions by May 1, 2013.

All of which is respectfully submitted.

Dr. Gábor Lukács  
Applicant

Cc: Mr. Stephen White, Sunwing Airlines  
Mr. Mark Williams, President of Sunwing Airlines