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April 10, 2013

VIA EMAIL

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

Attention: Ms. Sylvie Giroux, Analyst

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. United Airlines
Complaint about United Airlines' prohibition against onboard photography and audio or video recording
Motion / Questions and notice/request of production directed to United Airlines**

On February 24, 2013, the Applicant filed a formal complaint with the Agency concerning United Airlines' prohibition against onboard photography and audio or video recording. In the body of the complaint, the Applicant directed seven questions to United Airlines, and also requested the production of a relevant document.

In its letter dated February 27, 2013, United Airlines produced the sought document, and answered question Q2. At the same time, United Airlines refuses to answer questions Q1 and Q3-Q7, and argues that these questions are not relevant to the complaint before the Agency. Furthermore, United Airlines argues that these questions fall outside the scope of Rule 19 of the Agency.

On February 27, 2013, the Applicant brought a motion pursuant to Rule 20(3) to compel United Airlines to answer questions Q1 and Q3-Q7.

On March 14, 2013, in Decision No. LET-C-A-53-2013, the Agency held that the Applicant's motion to compel answers was premature, and decided to hold the motion in abeyance until United Airlines filed its answer to the complaint.

On April 4, 2013, United Airlines filed its answer to the complaint, in which it appears to have answered questions Q1, Q4, and Q7. United Airlines has failed to answer questions Q3, Q5, and Q6.

THE PRESENT MOTION

In the present motion, the Applicant is asking the Agency:

1. to resume consideration of the Applicant's motion dated February 27, 2013 to compel United Airlines to answer the unanswered questions (Q3, Q5, and Q6);
2. to set a deadline, pursuant to Rule 20(1), for United Airlines to answer the questions directed to United Airlines below;
3. to set a deadline for United Airlines to produce the documents listed below;
4. to extend the Applicant's deadline to file his reply pursuant to Rule 44, and allow him 10 days from the the receipt of full and complete answers to all outstanding questions and receipt of the sought documents.

I. Issue: Is the impugned policy a term and/or condition of carriage?

A crucial dispute between the parties in the present proceeding is whether United Airlines' prohibition against onboard photography and audio or video recording is a term and/or condition of carriage within the meaning of s. 111 of the *Air Transportation Regulations* ("ATR"). Specifically, United Airlines most vehemently denies that the impugned policy is a term and/or condition of carriage. The following questions and production requests are aimed at challenging United Airlines' position on this point.

- Q8. As stated in the Applicant's complaint, the Applicant's attention was drawn to United Airlines' prohibition against onboard photography and audio or video recording as a result of a well publicized incident, where a passenger engaging in such a conduct was removed from United Airlines' flight. United Airlines claims that the media article is inaccurate.

United Airlines is requested to produce its own report(s) and results of its own investigation related to the aforementioned incident that was reported in the press.

Rationale: If United Airlines removed at least one passenger in relation to the impugned policy, then it substantiates the Applicant's position that the impugned policy is a term and/or condition of carriage.

Based on the media reports, it appears that United Airlines removed a passenger from an international flight because the passenger appeared to be in violation of the impugned prohibition against onboard photography and audio or video recording. United Airlines' own reports are capable of confirming the truth of the media reports, which in turn will increase the likelihood that the impugned policy is a term and/or condition, and not merely a guide as United Airlines claims.

Q9. According to United Airlines, what is the meaning of the phrase “prohibited” in the language of the impugned policy?

Rationale: The meaning attributed by United Airlines to the phrase “prohibited” in the context of the impugned policy speaks to its pith and substance, and is capable of establishing that it is *effectively* a term and/or condition of carriage, and not merely a guide as United Airlines claims.

Q10. United Airlines states on page 3 of its April 4, 2013 answer that:

[...] it is widely accepted that individuals and companies can prohibit or restrict the use of photography on private property [...]

In making the impugned policy, did United Airlines exercise the aforementioned authority of individuals and businesses to prohibit or restrict photography on their private property?

Rationale: United Airlines is attempting to both invoke a right of a property owner to prohibit or restrict the use of photography on their property and at the same time it insists that said prohibition is only a guide and not a rule. The two are contradictory, because the remedy for breach of the former is removal of the photographer from the property under applicable trespassing laws. Answer to this question will reveal the true pith and substance of the impugned policy.

Q11. United Airlines stated on page 3 (at the bottom) of its April 4, 2013 answer that:

[...] United drafted a policy to guide flight crew in dealing with video and audio recording on flights.

United Airlines is requested to produce a copy of the policy in question; specifically, United Airlines is requested to produce the detailed version of the policy that is provided to flight crew members.

Q12. What kind of training do United Airlines’ flight crew members receive in relation to photography and video or audio recording on board?

United Airlines is requested to produce copies of portions of the training materials, bulletins, and other instructions it provides to its flight crew members that are related to photography and video or audio recording on board.

Rationale: The instructions and training that United Airlines’ flight crew members receive in relation to the impugned policy speak to the nature of the policy; it is capable of increasing the likelihood that the policy in question is a rule, and not merely a “guide” as United Airlines claims.

Q13. United Airlines states on pages 3-4 of its April 4, 2013 answer that:

The policy is not a rule, term, condition, or regulation; rather it is a guide. Depending on the circumstances of the particular case, if a flight crew member observes a passenger videorecording another passenger or crew or trying to film certain parts of the aircraft (e.g. the cockpit while the door is open), the flight attendants will request that the individual cease their activity. Failure to cease recording is not per se grounds to remove a passenger and/or refuse carriage. However, if the flight crew determines that the behavior of a passenger is sufficiently disruptive to affect the safety and security of the flight-e.g. it is creating conflict with other passengers or that the recording individual has a malicious intent—United will exercise its right to remove the passenger or refuse carriage pursuant to Rule 21 of its Tariff.

What are United Airlines' criteria for determining whether the behaviour of a passenger is disruptive?

Q14. A passenger reading a copy of a strongly controversial book (such as "Mein Kampf") on board would likely be objectionable, and would likely spark conflicts with other passengers; nevertheless, it is perfectly legal.

Does United Airlines consider reading a controversial book on board a form of disruptive behaviour, and would it ask the passenger to put it away?

Q15. What are United Airlines' practices and procedures with respect to handling passengers who engage in inappropriate behaviour on board?

Q16. What are United Airlines' criteria for determining whether the behaviour of a passenger is sufficiently disruptive to affect the safety and security of the flight?

Q17. Does United Airlines consider photography and video or audio recording of other passengers or crew a form of disruptive behaviour?

Rationale: Since disruptive behaviour is a ground for removal of passengers and/or refusal of carriage, United Airlines' interpretation and practice with respect to disruptive behaviour is *effectively* a term and/or condition of carriage. Consequently, establishing the relationship between photography and recording of video or audio on board and the possibility of a passenger being removed from a flight or refused carriage will support the Applicant's position that the impugned policy is effectively a term and/or condition of carriage.

- Q18. United Airlines states on page 7 of its April 4, 2013 answer that there are many forms of disruptive behaviour. Nevertheless, none of the other examples listed by United Airlines are mentioned in the *Hemispheres* magazine.

What is the reason that United Airlines chose to single out photography and audio or video recording among the many forms of allegedly disruptive behaviour, and address only this one in its *Hemispheres* magazine?

Rationale: United Airlines' reasons for including this policy in its magazine, while not including other alleged examples of disruptive behaviour, will increase the likelihood that the policy in question is not a guide, but rather a rule.

II. Issue: Reasonableness and origin of the impugned policy

- Q19. United Airlines states on pages 2-3 of its April 4, 2013 answer that:

In 2009, one or more passengers took photographs and extended video-recordings of another passenger's ordinary travel activities while travelling on a United flight without that passenger's consent or knowledge. Subsequently, the recordings were disseminated on the internet. The passenger whose image was recorded and disseminated complained to United that these other passengers had invaded his privacy, that such behavior was inappropriate, and that flight crew should not allow such behavior in the future. The complaining passenger inquired whether United had a policy to deal with non-consensual video-recordings and photographs on-board its aircraft. United responded that it did not, but that it would consider the matter.

United Airlines is requested to produce a copy of the passenger's complaint, United Airlines' response to the passenger, and copies of any subsequent communications between the passenger and United Airlines.

Rationale: First, United Airlines referred to these documents in its answer, and thus the documents are relevant. Second, the documents will demonstrate United Airlines' approach to the matters governed by the impugned policy prior to 2010, the time when the impugned policy was established. This, in turn, speaks to whether the impugned policy is related in any way to United Airlines' commercial, operational, and statutory obligations.

- Q20. How does the prohibition on photography and audio and video recording on board affect United Airlines' ability to meet its commercial, operational, and statutory obligations?

Q21. According to United Airlines' evidence, the impugned policy was put in place after 2009, and United Airlines did not have such a policy up until that time.

Did the absence of such a policy hinder United Airlines in any way in the past in meeting its commercial, operational, and statutory obligations?

Q22. How does United Airlines monitor the implementation of the impugned policy?

Q23. Are there any statistics on how frequently the impugned policy is applied and/or how frequently the impugned policy creates a conflict between passengers and the crew?

Rationale: Reasonableness of terms and conditions of carriage is determined based on balancing between the rights of passengers and the carrier's ability to meet its commercial, operational, and statutory obligations.

Q24. United Airlines refers to various safety considerations on pages 18-19 of its April 4, 2013 answer, and states that these considerations support prohibiting the video recording of its equipment and procedures.

Are there any advisories or regulations of the US Transportation Security Administration (TSA) or any other body concerned with the safety of civil aviation concerning photography and video recording of equipment and procedures? If there are any, please produce copies.

Rationale: The TSA is a respectable body with substantial expertise in the area of flight safety, and it regulates every aspect of flight safety, including which items may be brought on board. The absence of any advisory or regulation issued by the TSA calling for limiting or prohibiting photography and video recording of equipment and procedures will strongly suggest that United Airlines' alleged safety concerns are mere speculations, are groundless, and certainly do not justify imposing any restriction upon passengers.

Q25. United Airlines has frequently referred to privacy legislation, including *PIPEDA*, in attempting to justify the impugned policy in its April 4, 2013 answer.

Is it United Airlines' position that these statutes also apply to collection of information by individuals for non-commercial purposes?

Rationale: This question is aimed at clarifying United Airlines' arguments, and to allow the Applicant to adequately respond to them.

Q26. The privacy of passengers has been a central theme in United Airlines' April 4, 2013 answer. Even if United Airlines is correct in interpreting the law on privacy (which the Applicant disputes), breach of a passenger's privacy by a fellow passenger is no more than a civil matter between two citizens who happen to have met on board an airplane. On its face, none of that is the business of United Airlines.

Why is the possible violation of the privacy of one passenger by another passenger the business of United Airlines?

Q27. What is the source of United Airlines' standing in such a dispute?

Q28. What is the source of United Airlines' authority or jurisdiction to interfere with respect to such civil matters between passengers?

Rationale: These questions speak to United Airlines' statutory obligations with respect to the privacy of its passengers, and they are relevant to the balancing test for reasonableness of tariff provisions.

Q29. Is United Airlines a common carrier?

Q30. Does United Airlines consider the interior of its aircraft, at the time it is in use for carrying passengers, a private area?

Rationale: United Airlines has been relying on the right of property owners to prohibit or restrict photography on their property. These rights, however, exist only with respect to private areas, and for example, it is perfectly legal to photograph a private property from outside the fence. Thus, whether the aircraft is a private area when it is in use for carriage of passengers affects the validity of United Airlines' arguments.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Mr. Drew Tyler, Counsel for United Airlines