

May 17, 2013

File No. M 4120-3/13-01170

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United Air Lines, Inc.
c/o Conlin Bedard LLP
Barristers & Solicitors
220 Laurier Avenue
Ottawa, Ontario
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Gábor Lukács
Halifax, Nova Scotia

Attention: Drew Tyler

Dear Sirs:

Re: Complaint by Gábor Lukács against United Air Lines, Inc.

- [1] On February 26, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) against United Air Lines, Inc. (United) concerning its prohibition against onboard photography and audio/video recording. In his complaint, Mr. Lukács included, pursuant to section 19 of the Canadian Transportation Agency General Rules (General Rules,) seven questions to United, to which United objected in its submission dated February 27, 2013. On the same date, Mr. Lukács filed a motion, pursuant to subsection 20(3) of the General Rules, asking the Agency to order that the questions be answered. In Decision No. LET-C-A-53-2013 dated March 14, 2013, the Agency opened pleadings respecting this complaint and placed in abeyance the matter of Mr. Lukács' motion until United filed its answer to the complaint on the basis that such motion was premature.
- [2] On April 4, 2013, United filed its answer to the complaint. On April 10, 2013, Mr. Lukács filed a motion:
- 1) to resume consideration of his motion dated February 27, 2013 to compel United to answer his unanswered questions (Q3, Q5, and Q6);
 - 2) to set a deadline, in accordance with subsection 20(1) of the General Rules, for United to answer the additional questions (Q7 to Q30) directed to United in his submission of April 10, 2013;
 - 3) to set a deadline for United to produce the documents listed in the correspondence of April 10, 2013;
 - 4) to extend his deadline to file his reply and allow him 10 days from the receipt of a full and complete answer to all outstanding questions and receipt of the requested documents.
- [3] On April 15, 2013, United objected to the motion to extend Mr. Lukács' deadline to file his reply. On the same date, Mr. Lukács replied by indicating that he needed the extra time as he could not provide his reply until he had answers to his questions, all of which arose from

United's answer to the complaint. United then replied to the reply, objecting to the fact that Mr. Lukács tried, in his reply, to justify his request for an extension. United's submission also addresses the relevancy of certain questions posed by Mr. Lukács. On April 16, 2013, Mr. Lukács filed a request for directions, asking that the Agency not accept the unsolicited submissions of United.

ISSUES

1. Should the Agency accept United's reply of April 15, 2013 to Mr. Lukács' submission of the same date?
2. Should the Agency grant Mr. Lukács' motion to compel United to answer his questions Q3, Q5 and Q6?
3. Should the Agency direct United to answer Mr. Lukács' questions filed in his submission dated April 10, 2013? And if so, what is the deadline to answer those additional questions?
4. Should the Agency direct United to produce certain documents identified in Mr. Lukács' notice dated April 10, 2013? And if so, what is the deadline to produce those documents?
5. Should Mr. Lukács' request for an extension be granted?

ISSUE 1

Should the Agency accept United's reply of April 15, 2013 to Mr. Lukács's submission of the same date?

- [4] As provided for in the General Rules, the parties have a right to answer a motion and to reply to the answer. On April 15, 2013, United filed an answer to the motion of April 10, 2013 and, on the same date, Mr. Lukács filed a reply. Therefore, pleadings respecting this motion closed with the filing of Mr. Lukács' reply. Later on April 15, 2013, United filed a submission in reply to Mr. Lukács' reply.
- [5] The Agency has established guidelines setting out the responsibilities of parties when filing submissions after the close of pleadings and the considerations generally taken into account by the Agency in addressing such requests. These guidelines may be found on the Agency's Web site at: <https://www.otc-cta.gc.ca/eng/publication/requests-additional-filings-after-close-pleadings>. Among the considerations set out are the following:
- 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.

- [6] The Agency has considered United's submission filed after close of pleadings and is of the opinion that United has not demonstrated that this submission meets any of the above-noted considerations. Therefore, the Agency does not accept it. United's submission dated April 15, 2013 in reply to Mr. Lukács reply will not form part of the record.

ISSUE 2

Should the Agency compel United Airlines, pursuant to subsection 20(3) of the General Rules, to respond to Mr. Lukács' questions Q3, Q5 and Q6?

- [7] As provided for in the General Rules, a party to a proceeding may direct questions to any other party if the party files with the Agency, and serves on the other party, a copy of the questions along with the reasons for them and their relevance to the proceeding. A party to whom questions have been directed may then provide answers or make arguments as to relevancy, confidentiality or availability of the information requested. After that, the party who directed the questions may ask the Agency, if that party is not satisfied with the answers provided, to order that the questions be answered in full. The Agency may order that the questions be answered in full or in part, or not at all.

Submissions

- [8] Mr. Lukács submits that the questions at issue are intended to test whether the prohibition against photography and recording on board is related in any way to United's ability to meet its statutory, commercial, and operational obligations.
- [9] With respect to question Q3, United submits that Mr. Lukács is requesting that United, an opposing party in a Canadian proceeding, provide him with legal advice on United States law. United submits that it is under no obligation to provide Mr. Lukács with that advice. It also argues that U.S. law is not relevant to this proceeding.
- [10] As to questions Q5 and 6, United submits that Mr. Lukács is not asking United to disclose a fact; rather he is again asking United to take a position. United submits that Mr. Lukács is also requesting that United speculate whether or not there is any circumstance where the photographing or audio or video recording of airline personnel could affect the safety of a flight.

Analysis and findings

- [11] In Decision No. LET-C-A-154-2012 dated October 24, 2012 (*Lukács vs Air Canada*), the Agency established the test to use when making a determination on the relevancy of evidence. The Agency noted that in order to make a determination on the relevancy of evidence, the Agency must:

1. examine the nature of what is claimed; and then
2. look at whether the question to be answered or the evidence that is to be produced/disclosed shows, or at least tends to show, or increases or diminishes the probability of the existence of the fact related to what is claimed.

if the answer to the second question is positive, the question/evidence is relevant. At this point, the Agency retains discretion to decide to disallow a relevant question/document where responding to it would place undue hardship on the answering party, where there is any other alternative information, or where the question forms part of a “fishing expedition.”

[12] As mentioned, the General Rules provide that the party directing questions must provide the reasons for them and their relevance to the proceeding. In the case of *R. v. Chaplin*, [1995] 1 SCR 727, the Supreme Court of Canada had to deal with the extent of a disclosure request that the opposing party can make. Although in a criminal context, what the Supreme Court indicated is important:

Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. In cases involving wiretaps, such as this appeal, this is particularly important. **Fishing expeditions and conjecture must be separated from legitimate requests for disclosure.** [Emphasis added]

[13] The same applies to questions/interrogatories to a party.

[14] At this point, the Agency insists that proceedings before the Agency, such as this one, must proceed as described in the General Rules. When an application is filed in accordance with section 40 of the General Rules, it must contain, among other things, a clear and concise statement of the relevant facts, the grounds for the application, the nature of and justification for the relief sought. Also included in the application is any other information or documentation that is relevant in explaining or supporting the application. A respondent may then oppose the application with a clear and concise written answer with any supporting documents that are relevant in explaining and supporting the answer. The applicant may then file a reply. Although it is true that the General Rules provide that a party to a proceeding may direct questions and the production of documents to any other party, it does not mean that this proceeding can then turn into a commission of inquiry.

[15] In *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535, the Supreme Court of Canada took the opportunity to clarify this point, and said:

[41] I would reject the appellants' approach for three reasons. Firstly, it is illogical. The relevance of evidence is tested by reference to what is in issue. The statement of claim (which here did undergo significant amendment) defines what is in issue. The trial of an action should not resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight.

[16] The Agency agrees with this and is of the opinion that an applicant cannot file a complaint and then expect that any lack of information or documentation that, in the applicant's view, could be relevant in explaining or supporting the application be compensated for by inundating the respondent with questions or requests for production of documents. In addition, the Agency is of the opinion that, in the present case, there is no rationale explaining the relevance of the information, as it would appear to be hoped by Mr. Lukács, that some relevance can be established from the documents themselves, after the fact. This is exactly what is contemplated in the Supreme Court ruling in *R. v. Chaplin* as a fishing expedition.

[17] The Agency will now address the relevancy of the questions posed by Mr. Lukács to the Agency's consideration of the present matter.

[18] In his complaint, Mr. Lukács challenged, among other things, the reasonableness of United's following policy:

ONBOARD PHOTO AND VIDEO The use of still and video cameras, film or digital, including any cellular or other devices that have this capability, is permitted only for recording of personal events. Photography or audio or video recording of other customers without their express prior consent is strictly prohibited. Also unauthorized photography or audio or video recording of airline personnel, aircraft equipment or procedures is always prohibited. Any photography (video or still) or voice or audio recording or transmission while on any United Airlines aircraft is strictly prohibited, except to the extent specifically permitted by United Airlines.

[19] The Agency has stated previously that in order to determine whether a term or condition of carriage applied by a carrier is "reasonable" within the meaning of subsection 111(1) of the *Air Transportation Regulations (ATR)*, a balance must be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. In this context, do the questions posed by Mr. Lukács show or at least tend to show, or increase or diminish the probability, that the policy is unreasonable?

Q3. "Is there any regulation of the Federal Aviation Administration that addresses the use of cameras and/or audio recording devices on board aircrafts [sic]? If so, please elaborate."

[20] The Agency has considered the submissions of the parties. Considering the test established by the Agency to determine whether a term or condition of carriage applied by a carrier is “reasonable,” the Agency fails to see how this question is relevant. In particular, the Agency agrees with United that U.S. law is not relevant to the present proceeding. In any case, the Agency notes that this information is publicly available. The Agency finds, therefore, that question Q3 is not relevant.

Q5. “Does the photography or audio or video recording of airline personnel affect the safety of the flight in any way? If so, please elaborate.”

Q6. “Does the photography or audio or video recording of other passengers affect the safety of the flight in any way? If so, please elaborate.”

[21] In reviewing the April 4, 2013 submission of United, the Agency notes that these two questions were answered by United (pages 18 and 19.) The Agency therefore disallows questions Q5 and Q6.

ISSUE 3

(i) Should the Agency compel United, pursuant to subsection 20(3) of the General Rules, to respond to Mr. Lukács’ questions Q9, Q10, Q13 to Q18 on the basis that the responses to those questions are relevant to the Agency’s consideration of whether the policy at issue is a “term or a condition”?

(ii) Should the Agency compel United, pursuant to subsection 20(3) of the General Rules, to respond to Mr. Lukács’ questions Q20 to Q23, Q25 to Q30 on the basis that the responses to those questions are relevant to the Agency’s consideration of whether the policy at issue is reasonable?

[22] Keeping in mind the provisions of the General Rules as described in the first paragraph of Issue 2 above, the Agency notes that Mr. Lukács, in his submission of April 10, 2013, asks that the Agency set a deadline for United to answer 11 questions or produce documents related to the issue of whether the policy at issue is a term or condition and to answer 12 questions or produce documents related to the issue of reasonableness of the policy. The Agency also notes Mr. Lukács’ submission on Issue 3(i) that “the following questions and production requests are aimed at challenging United’s position on this point.”

[23] It is important to clarify that the purpose of questions, which could also be referred to as interrogatories, is different than the purpose attributed to cross-examination. Hunter C.J., in *Hopper v. Dunsmuir* (No. 2) (1903), 10 B.C.R. 23 at 27 (*Hopper*) discussed that difference:

It is clear, on the one hand, that the decisions as to the latitude which may be allowed in the matter of administering interrogatories can throw little or no light on the question as to the latitude permissible in cross-examination, for, as already stated, cross-examination has no place in a system which provides only for interrogatories; and it is, I think, equally clear that in a cross-examination on the issues raised by the pleadings any question is permissible the answer to which may be relevant to the issues.

[24] In *Haylock v. The ship "Norway"*, 2003 FC 932 (CanLII), the Federal Court noted:

[5] Written discovery, or its nearest equivalent in other jurisdictions, interrogatories, has long been considered a relatively inexpensive means of obtaining answers to questions which are of a technical or clerical nature. Indeed, in some jurisdictions, but not in the Federal Court, they are limited, including to admissions of facts that are needed to establish a litigant's case in order to assist in security a justice, speedy and inexpensive determination on the merits by providing, among other things, a foundation for cross-examination by way of later oral discovery. This is clearly set out in *Tse-Ching v. Wesbild Holdings Ltd.* ...which includes the following material:

"14 Interrogatories are a pre-trial tool designed to narrow and focus the issues in the lawsuit, reduce the length and expense of trial and eliminate the element of surprise at trial ..."

[25] On the other hand, three purposes are generally attributed to cross-examination:

- (1) to weaken, qualify or destroy the opponent's case;
- (2) to support the party's own case through the testimony of the opponent's witnesses;
- (3) to discredit the witness.¹

[26] One thing is clear, questions/interrogatories are used to narrow and focus the issues in the case, and cross-examination is to "weaken, qualify or destroy" the other party's case. Considerable latitude is given when cross-examining and restrictions placed on the questions are rare; this latitude is however not permitted when it comes to questions/interrogatories. Although the line that exists between the two is fine, it nonetheless exists

¹ Sopinka, Lederman, Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at page 857

- [27] The powers of the Agency under the General Rules are described at sections 2 to 7. Subsection 3(1) of the General Rules provides that when the Agency has a discretionary power under those Rules, it shall exercise that power in a fair and expeditious manner. As per paragraph 3(2)(b), the Agency can do anything prescribed in the Rules on the Agency's own part, even if the Rules state that a party must make a request or motion to the Agency. The Agency is of the opinion that, after a review of the questions directed by Mr. Lukács to United, it is appropriate to determine, on the Agency's own part, whether the questions should be answered in full or in part, or not at all.

Submissions – Issue 3(i)

Question Q9

- [28] Mr. Lukács submits that the meaning attributed by United 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 claims.

Question Q10

- [29] Mr. Lukács is of the opinion that United is attempting to both invoke a right of a property owner to prohibit or restrict the use of photography on United's property and at the same time it insists that said prohibition is only a guide and not a rule. In his view, the two are contradictory because the remedy for breach of the former is removal of the photographer from the property under applicable trespassing laws. Mr. Lukács submits that an answer to this question will reveal the true pith and substance of the impugned policy.

Questions Q13 to Q17

- [30] Mr. Lukács is of the view that as disruptive behaviour is a ground for removal of passengers and/or refusal of carriage, United's 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 his position that the impugned policy is effectively a term and/or condition of carriage.

Question Q18

- [31] Mr. Lukács submits that United's 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.

Analysis and findings – Issue 3(i)

[32] The Agency will now address the relevancy of the questions posed by Mr. Lukács to the Agency’s consideration of the present matter, applying the test, set out above, established in Decision No. LET C-A-154-2012.

[33] In response to the complaint, United has argued that the policy at issue is not a “term and condition.”

[34] Do the questions posed by Mr. Lukács show or at least tend to show, or increase or diminish the probability, that the policy is a “term or condition?”

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

[35] Mr. Lukács is of the view that the meaning attributed by United 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.

[36] The Agency notes that the meaning attributed by United to the word “prohibited” is covered in United’s answer of April 4, 2013 for example, at pages 1 and 4. As this question has already been answered, the Agency disallows question Q9.

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 exercise the aforementioned authority of individuals and businesses to prohibit or restrict photography on their private property?”

[37] The Agency notes that the particular quote used by Mr. Lukács is part of an argument which starts with: “United considered several factors when deciding whether or not to create an onboard privacy statement [...]” United then details six factors considered and finishes by saying “Lastly, it is widely accepted [...]” It is obvious, in reading this entire paragraph, that the question asked by Mr. Lukács has already been answered. Therefore, the Agency disallows question Q10.

Q13. “What are United’s criteria for determining whether the behaviour of a passenger is disruptive?”

[38] The Agency notes that in United's answer of April 4, 2013, at pages 3 and 4, which are, in fact, quoted by Mr. Lukács, United responds to the exact question now asked by Mr. Lukács. As mentioned earlier, the purpose of questions/interrogatories is different than the purpose of cross-examination. Mr. Lukács cannot ask a question for the sole purpose of cross-examining United on that answer, nor can he ask a question for the purpose of a fishing expedition. The Agency therefore disallows question Q13.

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

[39] The Agency is of the opinion that this question cannot be answered without speculation on the part of United. This is clearly a "fishing expedition," which will lead nowhere useful. Hypotheticals as to passenger/crew interactions involving matters outside the ambit of the complaint, a specific claim that specific wording in a tariff is unreasonable, are unproductive. The Agency does not make pre-emptive rulings on such interactions in the abstract. The question need not be answered as the Agency finds question Q14 irrelevant.

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

[40] The issue is whether the policy at issue is a "term or condition." The Agency fails to see how a description of United's practices and procedures will help determine that issue. United has already indicated that failure to cease the activity is not, *per se*, grounds to remove a passenger. The Agency finds question Q15 irrelevant.

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

[41] The issue is whether the policy is a "term or condition." The Agency fails to see how a description of United's practices and procedures will help determine that issue. The Agency finds question Q16 irrelevant.

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

[42] The Agency notes that this question was answered by United at page 6 of its April 4, 2013 submission. Therefore, the Agency disallows question Q17.

Q18. "What is the reason that United 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?"

- [43] The Agency notes that this question was answered by United in the second paragraph of page 4 of its April 4, 2013 submission. Therefore, the Agency disallows question Q18.

Submissions – Issue 3(ii)

Questions Q20 to Q23

- [44] Mr. Lukács submits that the reasonableness of terms and conditions of carriage are determined based on balancing the rights of passengers with the carrier’s ability to meet its commercial, operational, and statutory obligations.

Question Q25

- [45] Mr. Lukács submits that the question is relevant because it is aimed at clarifying United’s arguments and to allow him to adequately respond to those arguments.

Questions Q26 to Q28

- [46] Mr. Lukács’ view is that these questions speak to United’s statutory obligations with respect to the privacy of its passengers, and that they are relevant to the balancing test for reasonableness of tariff provisions.

Questions Q29 and Q30

- [47] Mr. Lukács submits that United 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 private property from outside the fence. In his view, whether the aircraft is a private area when it is in use for carriage of passengers affects the validity of United’s arguments.

Analysis and findings – Issue 3(ii)

- [48] The Agency has stated in previous decisions that in order to determine whether a term or condition of carriage applied by a carrier is “reasonable” within the meaning of subsection 111(1) of the ATR, a balance must be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier’s statutory, commercial and operational obligations. Do the questions posed by Mr. Lukács show or at least tend to show, or increase or diminish the probability, that the policy of United found in its onboard magazine *Hemispheres* is unreasonable?

Q20. “How does the prohibition on photography and audio and video recording on board affect United’s ability to meet its commercial, operational, and statutory obligations?”

[49] The Agency is of the opinion that this question will show or at least tend to show, or increase or diminish the probability, that the policy of United found in its onboard magazine *Hemispheres* is unreasonable. The question is relevant. However, the Agency notes that United already answered the question at pages 8 to 19 of its April 4, 2013 submission. The Agency therefore disallows question Q20.

Q21. “According to United’s evidence, the impugned policy was put in place after 2009, and United did not have such a policy up until that time. Did the absence of such a policy hinder United in any way in the past in meeting its commercial, operational, and statutory obligations?”

[50] The Agency has no choice, at this point, but to remind Mr. Lukács that the test is that “a balance must be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier’s statutory, commercial and operational obligations.” The test is applied to current tariffs. It does not create a “reverse-image test,” where the carrier is quizzed as to how it was able to meet such obligations in the absence of an impugned tariff provision. How United managed before 2009 is irrelevant to the issue to be determined. In any event, the Agency notes that this question was answered by United, in part, in its April 4, 2013 submission. The Agency finds that question Q21 is irrelevant.

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

[51] Mr. Lukács’ rationale for asking this question is that the “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.” The Agency does not agree that this question will show or at least tend to show, or increase or diminish the probability, that the policy of United found in its onboard magazine *Hemispheres* is unreasonable. This question is without merit. The Agency finds that question Q22 is irrelevant.

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?”

[52] Mr. Lukács’ rationale for asking this question is that the “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.” The Agency does not agree that this question will show or at least tend to show, or increase or diminish the probability, that the policy of United found in its onboard magazine *Hemispheres* is unreasonable. The Agency finds that question Q23 is irrelevant.

Q25. “United has frequently referred to privacy legislation, including PIPEDA, in attempting to justify the impugned policy in its April 4, 2013 answer. Is it United’s position that these statutes also apply to collection of information by individuals for non-commercial purposes?”

[53] The Agency notes that this question was answered by United at pages 11 and 12 of its April 4, 2013 submission. The Agency therefore disallows question Q25.

Q26. “Why is the possible violation of the privacy of one passenger by another passenger the business of United?”

Q27. “What is the source of United’s standing in such a dispute?”

Q28. “What is the source of United’s authority or jurisdiction to interfere with respect to such civil matters between passengers?”

[54] Mr. Lukács submits that these questions are relevant because United is relying on the right of property owners to prohibit or restrict photography on their property. The Agency is of the opinion that these questions will show or at least tend to show, or increase or diminish the probability, that the policy of United found in its onboard magazine *Hemispheres* is unreasonable. The Agency finds these questions relevant. The Agency notes, however, that these are questions of law, not fact, which would require United to advance a legal argument, which is not United’s obligation in these proceedings. The Agency therefore disallows questions Q26, Q27 and Q28.

Q29. “Is United Airlines a common carrier?”

[55] Mr. Lukács submits that this question is relevant because United is relying on the right of property owners to prohibit or restrict photography on their property. The Agency does not agree that this question will show or at least tend to show, or increase or diminish the probability, that the policy of United found in its onboard magazine *Hemispheres* is unreasonable. The question is unmeritorious. The Agency finds that question Q29 is irrelevant.

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

[56] The Agency notes that this question was answered by United at page 19 of its April 4, 2013 submission. The Agency therefore disallows question Q30.

ISSUE 4

(i) Should the Agency direct United to respond to Mr. Lukács’ request for production of documents at questions Q8, Q11, and Q12 on the basis that the documents are relevant to the Agency’s consideration of whether the policy at issue is a “term or a condition”?

(ii) Should the Agency direct United to respond to Mr. Lukács’ request for production of documents at Q19 and Q24 on the basis that the documents are relevant to the Agency’s consideration of whether the policy at issue is reasonable?

[57] Also included in Mr. Lukács' submission of April 10, 2013 was a request to produce documents. As provided for in the General Rules, a party may give notice to another party to produce a document that relates to any matter in dispute that is in the possession or control of the other party. If the party fails to produce the document, the Agency may order the production of the document, or permit the party who gave the notice to submit secondary evidence of the contents of the document. Subsection 3(1) of the General Rules provides that the discretionary power given to the Agency under the General Rules must be exercised in a fair and expeditious manner. Before ordering the production of any documents, the Agency must first decide if those documents are relevant. The Agency will therefore address the issue of the relevancy of documents which Mr. Lukács is asking United to produce.

Submissions – Issue 4(i)

Question Q8

[58] Mr. Lukács submits that, based on the media reports, it appears that United 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. He maintains that United's 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 claims. Mr. Lukács submits that if United removed at least one passenger in accordance with the impugned policy, then it substantiates his position that the impugned policy is a term and/or condition of carriage.

Questions Q11 and Q12

[59] Mr. Lukács is of the view that the instructions and training that United's 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 claims.

Analysis and findings – Issue 4(i)

Q8. United is requested to produce its own report(s) and results of its own investigation related to a well publicized incident that was reported in the press.

[60] The Agency notes that United, in its April 4, 2013 submission, has commented on the said incident and the fact that Mr. Lukács' complaint was motivated by the media report. United submits that the:

incident at issue did not involve an air service to or from Canada. The alleged incident therefore occurred outside of the Agency's jurisdiction and Dr. Lukács does not have standing to complain about an incident affecting another individual, particularly given that he was not present. More particularly, the media article presents only one side of the incident and it would be improper to rely on it as factual basis for deciding whether the statement in Hemispheres is a term or condition of carriage, misleading, or unreasonable.

[61] The Agency finds this request for production to be purely a fishing expedition. The Agency therefore disallows the request for production found at question Q8.

Q11. "United is requested to produce a copy of the policy in question; specifically, United is requested to produce the detailed version of the policy that is provided to flight crew members."

[62] The Agency finds this request for production to be a pure "fishing expedition." The Agency therefore disallows the request for production found at question Q11.

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

[63] The Agency finds this request for production to be purely a fishing expedition. The Agency therefore disallows the request for production found at question Q12.

Submissions – Issue 4(ii)

Question Q19

[64] Mr. Lukács submits that because United stated, in its April 4, 2013 submission, 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.

[65] Mr. Lukács argues that the documents are relevant, as United referred to these documents in its answer, and the documents will demonstrate United's approach to the matters governed by the impugned policy prior to 2010, the time when the impugned policy was established. This, in Mr. Lukács' view, speaks to whether the impugned policy is related in any way to United's commercial, operational, and statutory obligations.

Question Q24

[66] Mr. Lukács submits that the Transportation Security Administration (TSA) is a respected 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. He maintains that 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's alleged safety concerns are mere speculation, are groundless, and certainly do not justify imposing any restriction upon passengers.

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Q19. United is requested to produce a copy of the passenger's complaint, United's response to the passenger, and copies of any subsequent communications between the passenger and United Airlines.

[67] The Agency finds this request for production to be purely a fishing expedition. The Agency therefore disallows the request for production found at question Q8.

Q24. "United 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."

[68] Not only does the Agency note that this information is publicly available, but the Agency considers this request for production to be purely a fishing expedition. Furthermore, it relates to matters outside the Agency's jurisdiction. The Agency therefore disallows the request for production found at question Q24.

[69] The Agency is concerned that Mr. Lukács is under a misapprehension as to the purpose of questions/interrogatories. This adversarial dispute process is not equivalent to, as noted before, a commission of inquiry. Questions must flow from assertions made by the opposing party or evidence introduced by the other party and refer to information necessary to refute those assertions or counter such evidence. This does not include using questions to force a respondent to adopt particular defences that the complainant can then defeat. The respondent sets out the defences it will rely upon; the complainant does not get to steer the other party into making his case. The complainant does not get to choose the respondent's arguments using questions/interrogatories as his tool.

ISSUE 5

[70] Should Mr. Lukács' request for an extension be granted?

[71] Given that the Agency has decided that no further information or documents is necessary to review this case, the Agency denies Mr. Lukács' request for an extension of 10 days. However, the Agency finds it appropriate to grant Mr. Lukács until May 27, 2013 to file his reply to United's answer, closing pleadings in this matter.

SUMMARY OF CONCLUSIONS

Issue 1

[72] The Agency does not accept United's submission dated April 15, 2013. United's submission dated April 15, 2013 will therefore not form part of the record.

Issue 2

[73] The Agency disallows questions Q3, Q5, and Q6.

Issue 3

[74] The Agency disallows questions Q9, Q10, Q13 to Q18, Q20 to Q23, and Q25 to Q30.

Issue 4

[75] The Agency disallows the request for production of documents found at questions Q8, Q11, Q12, Q18, and Q24

Issue 5

[76] The Agency grants Mr. Lukács until May 27, 2013 to file his reply to United's answer.

[77] Should you have any questions regarding the foregoing, you may contact Sylvie Giroux at facsimile number 819-953-7910 or by e-mail at sylvie.giroux@otc-cta.gc.ca.

Sincerely,

(signed)

Cathy Murphy
Secretary

BY THE AGENCY:

(signed)

J. Mark MacKeigan
Member

(signed)

Raymon J. Kaduck
Member