
DECISION NO. 311-C-A-2013

August 14, 2013

COMPLAINT by Gábor Lukács against United Air Lines, Inc.

File No. M4120-3/13-01170

INTRODUCTION

- [1] On February 24, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) against United Air Lines, Inc. (United). Mr. Lukács submits that he was motivated by media reports about a passenger being removed from a United flight for taking photographs on board that flight. In his complaint, Mr. Lukács points out that United's in-flight magazine *Hemispheres* sets out the following prohibition against onboard photography, or audio or video recording (the prohibition):

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.

- [2] Mr. Lukács alleges that the prohibition is misleading, contrary to paragraph 18(b) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), as it is not published in United's contract of carriage. Mr. Lukács also alleges that the prohibition is unreasonable pursuant to subsection 111(1) of the ATR.

Conclusion

- [3] As indicated in the reasons that follow, the Agency finds that the prohibition is not a term or condition of carriage that must be included in United's International Passenger Rules and Tariff (Tariff). Consequently, the Agency does not need to determine whether the prohibition is misleading and unreasonable.
- [4] The Agency therefore dismisses the complaint.

ISSUE

- [5] Is the prohibition a term or condition of carriage that must be included in United's Tariff pursuant to section 122 of the ATR?

RELEVANT STATUTORY EXTRACTS

- [6] The extracts relevant to this Decision are set out in the Appendix.

POSITIONS OF THE PARTIES

Mr. Lukács

- [7] Mr. Lukács submits that the prohibition found in *Hemispheres* is a policy and/or a condition that is not in United's Tariff and as such, is misleading and is therefore contrary to paragraph 18(b) of the ATR. Mr. Lukács further submits that the in-flight magazine of an airline is not the appropriate method for publishing any additional terms and conditions or policies that are not found in the carrier's tariff.
- [8] Mr. Lukács asserts that the prohibition is of significant relevance to the travelling public for several reasons:
1. It is very common for passengers to take photographs on board aircraft;
 2. It appears that United considers this policy so important that its breach justified removing a passenger from an international flight;
 3. United applies the policy to international flights, including flights to and from Canada, and connecting flights on which passengers travel to and from Canada;
 4. Documenting the conduct of airline personnel by audio and/or video recording is an important tool for passengers to defend themselves against abusive conduct and groundless allegations of misconduct that are so frequently leveled against passengers.

United

- [9] United points out that the media article that motivated the complaint 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.
- [10] United advises that the prohibition was created after an incident in 2009 on a United flight when photographs and a video recording were made of another passenger's ordinary travel activities without that passenger's consent or knowledge. The material was subsequently uploaded for public viewing on the Web.
- [11] United submits that after this incident it decided to draft a policy to guide its flight crew in how to deal with onboard photography, and video and audio recording on flights. United states that in developing this policy it considered several factors such as:

- Passengers' legitimate interest in documenting their travel;
- Protection of an individual's privacy;
- Privacy interests of flight crew and interference in their duties;
- Various jurisdictions governing privacy;
- Surveillance recording of flight crew equipment and procedures which could affect the safety and security of flights especially in light of the terrorist attacks of 9/11; and,
- It is widely accepted that individuals and companies can prohibit or restrict the use of photography on private property and many businesses do so for the comfort of their customers and employees.

- [12] United submits that the policy was included in *Hemispheres* in order to make the policy easily available to flight attendants, who could refer passengers to it rather than having to repeatedly explain what is appropriate and what is not.
- [13] United acknowledges that paragraph 122(c) of the ATR provides that a tariff must include the terms and conditions of carriage, but submits that "terms and conditions" are not defined in the ATR or in the *Canada Transportation Act, S.C., 1996, c. 10, as amended (CTA)*. United submits that, consequently, the Agency must interpret these terms, which requires that the words be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the ATR and the CTA, the object of the ATR and the CTA, and the intention of Parliament.
- [14] United maintains that the phrase "terms and conditions" as it appears in section 122 of the ATR refers to stipulations, prerequisites, and requirements that must be met for a carrier to transport a passenger. It follows that a "policy" only needs to be included within the tariff if it is a stipulation, requirement or condition for carriage. United submits that carriers' tariffs only need to include those stipulations and conditions that are prerequisites and requirements for carriage, rather than setting out every detail of how the carrier will deal with every possible circumstance, as supported in Decision No. 16-C-A-2013 (*Lukács v. Porter*).
- [15] United contends that the prohibition is not a term or condition of carriage; rather it is a guide for passengers reflecting United's view of what types of behavior and activities are appropriate and inappropriate on its aircraft. United asserts that flight crew will prohibit behavior that unreasonably affects the comfort of other passengers or interferes with duties of the flight crew and will request that the passenger cease this activity. United also asserts that failure to cease recording is not in itself 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, Refusal to Transport, of its Tariff.
- [16] United submits that the flight crew exercises its discretion in dealing with photography and video recordings on board aircraft as the crew has expertise and experience when it comes to managing passengers in the confines of an aircraft. In certain circumstances, it may be necessary for the flight crew to intervene as soon as inappropriate use of photography or video recording equipment occurs. In other circumstances, it may be appropriate to allow minor transgressions.

[17] United maintains that the fact that *Hemispheres* advises passengers in advance that photographing or video recording other passengers without their consent is inappropriate, but does not state that playing a musical instrument is inappropriate, does not make the statement a term or condition of carriage. United also maintains that the fact that the statement uses the term “prohibited” also does not make it a term or condition. United submits that the prohibition can prevent conflicts between passengers and the embarrassment that can arise when a passenger is confronted by flight crew. It also provides reassurance to other passengers that United will take appropriate steps to ensure that other passengers do not unreasonably invade their privacy.

Mr. Lukács

[18] Mr. Lukács argues that passengers purchase air fares for the purpose of transportation. Consequently, the list of circumstances in which a passenger may be denied transportation and thus the carrier may be relieved from the obligation to perform the contract of carriage is one of the most vital portions of the contract of carriage.

[19] Mr. Lukács submits that he never claimed that every policy of a carrier must be contained in the tariff, but the ones of United that are related to and/or may lead to passengers being refused transportation or removed from the aircraft must be clearly stated in the Tariff.

[20] Mr. Lukács asserts that given that photography or video recording is not an illegal or disruptive activity, at least under the common and ordinary meaning of “disruptive,” it is not the photographer but rather the other passengers who may be causing disruption, and thus it is the other passengers that United is entitled to remove from the aircraft.

[21] Mr. Lukács refers to Rule 21 of United’s Tariff, which provides a lengthy list of circumstances in which a passenger may be refused transportation or removed from the aircraft. He submits that Tariff Rule 21(H) specifically addresses the issue of safety of passengers and crew, and provides a list of 18 circumstances that United considers to affect the safety of the flight, none of which refer to photography, or audio or video recording. Mr. Lukács adds that Tariff Rule 21 does not appear to be unreasonable, and as long as United interprets the phrases used in Tariff Rule 21 in their common and ordinary meaning, there is no need to provide an exhaustive list of all circumstances that may fall within the scope of Tariff Rule 21. However, if United intends to attribute to the phrases used in Tariff Rule 21 a meaning other than their common and ordinary meaning, then these phrases must be defined, and these definitions are part of the terms and conditions of carriage.

- [22] Mr. Lukács refers to Tariff Rule 21(H)(5), which allows United to refuse transportation or remove “passengers who are barefoot or not properly clothed,” and contends that if United adopts a policy that it considers clothes made of pink fabric, improper clothing and contrary to Tariff Rule 21(H)(5), then this unique interpretation of Tariff Rule 21(H)(5) is an inherent and inseparable part of the terms and conditions of carriage. Mr. Lukács adds that, similarly, given that the common and ordinary meaning of “disruptive behaviour” or “disorderly behaviour” does not encompass photography or audio or video recording, if United intends to interpret these phrases in its Tariff to include these activities, then this non-standard and unique interpretation of the phrases forms an inherent and inseparable part of the terms and conditions of carriage.
- [23] Mr. Lukács submits that there is no expectation of privacy on board an aircraft of a common carrier with the exception of segregated areas, such as washrooms and the cockpit, and no reasonable person would consider photography, and audio or video recording in such a place a socially unacceptable or disruptive behavior.

ANALYSIS AND FINDINGS

- [24] When a complaint is filed with the Agency, the onus is on the complainant to convince the Agency, with evidence and arguments, that their version or interpretation is more reasonable than that of the other party.
- [25] Mr. Lukács advises that his complaint was prompted by a media report that suggested to him that a passenger was removed from a flight for taking photographs. He alleges that the prohibition against such activity is a term and condition of carriage and should therefore be included in the Tariff. Mr. Lukács alleges that any policy that may lead to a passenger being refused transportation or being removed from the aircraft should be included in the Tariff.
- [26] United submits that the prohibition does not represent a term and condition of carriage as it does not lead to a refusal of transportation, but rather serves as a guide respecting the types of behavior and activities that are appropriate and inappropriate on United’s aircraft.
- [27] With regard to the media report that prompted Mr. Lukács’ complaint, the Agency agrees with United’s submission that the report only presents one side of the event, and that as such, it cannot be relied on as demonstrating that United refuses to transport passengers who engage in photography, and/or audio and video recording while in the aircraft. Furthermore, the Agency lacks jurisdiction to consider the specific details of that case.
- [28] The Agency is of the opinion that context is the key element in a matter such as the one at issue, where a passenger takes photographs, and/or engages in audio and video recording while on board an aircraft.
- [29] In the same manner that there is no sanction associated with some other behaviour and activities, there is no sanction associated with the prohibition against photography and/or audio and video recording itself. Rather, the sanction is associated with the passenger’s behaviour, if the situation escalates, i.e., the passenger’s behaviour becomes unruly when requested by flight crew to stop taking photographs and/or audio and video recording.

- [30] The Agency is of the opinion that given that there is no sanction associated directly with the prohibition at issue, such prohibition does not represent a term or condition of carriage, and as such, does not have to be included in the Tariff.
- [31] The Agency finds that the prohibition is not a term or condition of carriage that must be included in United's Tariff. Consequently, the Agency does not need to determine whether the prohibition is misleading and unreasonable and dismisses the complaint.

(signed)

J. Mark MacKeigan
Member

(signed)

Raymon J. Kaduck
Member