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August 17, 2014

VIA EMAIL

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

Attention: Mr. Mike Redmond, Chief, Tariff Investigations

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. WestJet
Complaint concerning WestJet's policies and practices relating to claims for delay,
damage, and loss of baggage
File No.: M 4120-3/14-02973
Motion for an order to answer questions, produce documents, and for an extension**

OVERVIEW

On July 18, 2014, the Applicant directed a notice to admit authenticity of documents, certain questions, and a notice to produce documents to WestJet.

On August 11, 2014, WestJet admitted the the authenticity of the documents, provided incomplete answers to the questions directed to it, and refused to produce the sought documents.

In the present motion, the Applicant is asking the Agency to order WestJet to provide full answers to the questions and to produce the sought documents pursuant to Rules 16(2) and 20(3) of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35. The Applicant is also seeking an extension to file his final reply until after resolution of the present motion.

DISPUTED MATTERS

On June 3, 2014, the Applicant filed a complaint concerning WestJet's policies and practices relating to claims for delay, damage, and loss of baggage. The Applicant's complaint alleges that:

[...] WestJet has been systematically refusing to process and settle baggage-related claims in cases where WestJet is the first carrier; instead, WestJet's policy and practice has been to insist that passengers communicate with the last carrier. WestJet has been citing IATA Resolution 780 in support of its position.

[Emphasis added.]

In support of this allegation, the Applicant submitted correspondence sent by WestJet to the Applicant and another passenger, Ms. Jones.

In its answer dated July 11, 2014, WestJet alleged that:

- (a) British Airways allegedly paid the Applicant the amount of CAD\$25.70 to settle his claim; and
- (b) WestJet "will not rely on IATA Resolution 780."

In response to the Applicant's questions and notice to produce documents, WestJet maintains that:

- I. the Applicant received payment in the amount of CAD\$25.70 to settle his claim;
- II. WestJet does not refuse to process and settle baggage-related claims; and
- III. WestJet is committed to refraining from any reference to IATA Resolution 780 in its correspondence with guests.

These allegations of WestJet are heavily disputed by the Applicant, who is asking the Agency to order WestJet to provide answers and documents capable of addressing these questions.

I. Payment allegedly made by British Airways to the Applicant

In response to the Applicant's allegation that WestJet has refused to process his claim, WestJet alleges that the Applicant's claim has already been settled by British Airways. In order to clarify these unsubstantiated allegations, the Applicant directed three questions to WestJet (Q1-Q3).

On August 11, 2014, WestJet stated in response to question Q1 that British Airways sent a cheque in the amount of \$25.70 to the Applicant.

Question Q2 directed to WestJet reads as follows:

Q2. What method was used to confirm that the alleged payment has been received by the Applicant?

[Emphasis added.]

WestJet provided the following answer:

Email correspondence from British Airways received July 25, 2014 was used to confirm this payment was made.

The Applicant submits that WestJet's answer to the question is evasive and fails to answer the thrust of the question, which is aimed at the basis for WestJet's allegation that the Applicant received the payment in question.

It is submitted that the Applicant is entitled to know all details of the alleged payment and WestJet's basis for alleging that such a payment was received by the Applicant. If WestJet received evidence of the payment having been received by the Applicant, then WestJet must produce it in order to allow the Applicant a fair opportunity to respond to it, including by way of rebuttal evidence.

Therefore, the Applicant is asking the Agency to order WestJet to provide a full and complete answer to question Q2.

Question Q3 directed to WestJet was, in its essence, a notice to produce documents:

Q3. Please produce all records (such as, but not limited to, account statements, transaction confirmations, etc.) regarding the making of the alleged payment.

WestJet failed to produce any documents, and stated that:

WestJet has received no records, such as account statements, transaction confirmations, etc., from British Airways as these are confidential materials between British Airways and the recipient of the funds.

The Applicant submits that WestJet's reasons for failing to produce the documents do not meet the requirements of Rule 16(1), which speak about production of documents "in the possession or control of the other party" (emphasis added).

Even if the records are not currently in WestJet's possession, the notion of "control" is far broader than "possession." Rule 223(3) of the *Federal Court Rules* provides guidance with respect to the meaning of "control":

[...] a document shall be considered to be within a party's power or control if

- (a) the party is entitled to obtain the original document or a copy of it; and
- (b) no adverse party is so entitled.

In the present case, there is no doubt that WestJet is entitled to receive from British Airways all records that can confirm that the alleged payment has indeed been made, because WestJet and British Airways are jointly and severally liable for making the payment. In this context, it is important to note that WestJet has made no effort to obtain the documents, and has provided no evidence of British Airways' refusal to provide them.

Finally, WestJet's arguments based on confidentiality are meritless, because in the present case, the alleged recipient of the funds, the Applicant, is requesting the disclosure of the information.

On the other hand, it would be grossly unfair to allow WestJet to make such a bold allegation that the Applicant's claim has already been settled without solid evidence and without allowing the Applicant to address the basis of these allegations.

Therefore, the Applicant is asking the Agency to order WestJet to produce the records in question, with a particular emphasis on any records that the cheque allegedly sent by British Airways to the Applicant was allegedly cashed. Indeed, information concerning when and where the alleged cheque was allegedly cashed is essential to determining whether such payment was indeed received, and is essential to allow the Applicant a fair opportunity to refute such allegations.

In the alternative, the Applicant is asking the Agency to make a production order directed to British Airways, pursuant to section 25 of the *Canada Transportation Act*, which states that:

The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

The Applicant notes that, by way of analogy, Rule 233(1) of the *Federal Court Rules* provides for production of documents from non-parties. Therefore, the Agency certainly has jurisdiction to make such an order for the production of the records from British Airways.

II. Systemic refusal to process and settle claims

In its answer to the complaint, WestJet ignored the Applicant's allegation of "systemic refusal to process and settle baggage-related claims in cases where WestJet is the first carrier." Thus, the Applicant directed the following questions and notice of production to WestJet:

- Q4. Please produce WestJet's internal policies, manuals, guidelines or any other documents that were used by Ms. Susie Felker of WestJet in deciding to decline to process the claims of the Applicant and Ms. Jones (Exhibits "A" and "B").
- Q5. In the past 12 months, in how many baggage-related claims did WestJet refuse to process in situations where WestJet was not the last carrier?
- Q6. In the past 12 months, in how many communications with passengers did WestJet refer to IATA Resolution 780?
- Q7. Please produce all communications from the past 12 months between passengers and WestJet that meet at least one of the following criteria:
 - i. making reference to IATA Resolution 780;
 - ii. relating to WestJet's refusal to process baggage-related claims in situations where WestJet was not the last carrier.

WestJet has refused to produce any of the documents or to answer these questions on the basis that:

- (a) they are not relevant; and
- (b) the Applicant "has no standing to represent other guests."

The applicant disputes both grounds of refusal, and is seeking an order directing WestJet to provide full answers and productions.

(a) Relevance

WestJet's argument concerning relevance is based on misstatement of the issue and the disputed matters. The issue is not which pretext WestJet cited to refuse to process and settle baggage-related claims, but rather the systematic refusal itself. Although WestJet has ignored this allegation in its answer to the complaint, it has shifted its position in its August 11, 2014 submissions by stating that:

WestJet reiterates that it is not a refusal to process and settle baggage-related claims rather it is the most practical and efficient process to resolve these types of issues.

Thus, there is a very real and substantial dispute between the parties about how WestJet responds to certain types of baggage-related claims: the Applicant says that WestJet refuses to process them, while WestJet denies that it refuses to process them.

The only method for deciding this dispute is by reviewing WestJet's internal policies, manuals, guidelines or other internal documents governing such baggage-related claims (Question Q4), and communications between WestJet and passengers related to such baggage-related claims (Question Q7).

Therefore, Q4 and Q7 are capable of increasing or decreasing the probability of an allegation made by the Applicant, and which is disputed by WestJet.

(b) Standing

WestJet's argument concerning the Applicant's standing appears to be a collateral attack to challenge the Applicant's standing to bring the present complaint, which is improper.

The purpose of policy-based complaints to the Agency is not merely to provide a remedy for the individual complainant, but rather to seek corrective measures for the benefit of the travelling public at large. Such remedies were envisaged in enacting subsection 113.1(a) of the *Air Transportation Regulations*. The Agency has addressed the issue of "standing" to seek such remedies in a wealth of decisions, most recently in Decision No. LET-C-A-104-2013, where the Agency refused to dismiss a policy-based complaint on the grounds of lack of standing.

In the present complaint, the Applicant is alleging a systemic behaviour of WestJet that affects not only the Applicant individually, but also the travelling public at large, and the Applicant is seeking corrective measures as a remedy. Since WestJet disputes the alleged systemic behaviour, the Applicant is seeking production of documents capable of determining the dispute.

Production of communications between WestJet and passengers does not require standing to represent other passengers. For example, in File No. M4120-3/13-03258, in Decision No. LET-C-A-23-2014, the Agency ordered WestJet to provide full answers concerning passengers other than the complainant himself, including communications between WestJet and other passengers.

(c) Conclusion

Therefore, the Applicant submits that productions Q4 and Q7 are relevant to the matters in dispute in the present proceeding, and WestJet has no excuse for refusing to produce these documents.

Hence, the Applicant is asking the Agency to order WestJet to produce the documents described under Q4 and Q7. In order to protect the privacy of the passengers, the Applicant will not oppose the confidential treatment of the names and other personal information of the passengers that may be contained in them.

III. WestJet's refusal to process and settle the claim of Ms. Jones

WestJet also refused to answer the following questions:

- Q8. Did WestJet send Ms. Jones any correspondence after its June 25, 2014 email (top part of Exhibit "D")?
- Q9. Did WestJet advise Ms. Jones that WestJet would no longer rely on IATA Resolution 780?
- Q10. Has WestJet began the processing the claim of Ms. Jones?
- Q11. Has WestJet settled the claim of Ms. Jones?

WestJet stated as the basis for its refusal that:

- (a) WestJet would need Ms. Jones' consent to answer the questions; and
- (b) the questions are not relevant.

(a) Is Ms. Jones' consent required?

WestJet has not cited any legislation that would require the consent of Ms. Jones to allow WestJet to answer questions directed to it pursuant to the rules of the Agency. This is because such legislation does not exist.

Subsection 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 states that:

For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

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(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

As noted earlier, pursuant to section 25 of the *Canada Transportation Act*, the Agency is such a body with jurisdiction to compel production of information.

Therefore, WestJet does not require the consent of Ms. Jones to answer the questions.

(b) Relevance

Although WestJet maintains that it is committed to no longer relying on IATA Resolution 780, the case of Ms. Jones may demonstrate that WestJet's commitment is worthless, and that WestJet continues to engage in the same conduct that led to the present complaint in spite of its commitment to refrain from that conduct.

Furthermore, since WestJet disputes that it refuses to process and settle certain baggage-related claims, WestJet's confirmation that it has done nothing to process or settle the claim of Ms. Jones despite repeated requests to do so is capable of demonstrating that WestJet is misstating the facts, and WestJet is in fact refusing to process and settle such claims.

(c) Conclusion

Since the questions are relevant to the issues in dispute and WestJet does not require the consent of Ms. Jones to answer them, WestJet has no lawful excuse for failing to answer these questions.

Therefore, the Applicant is asking the Agency to order WestJet to answer the questions.

IV. Motion for an extension

Although the Applicant directed the questions and the production notice to WestJet a month ago, as the present motion shows, WestJet has failed to comply with them. The response of WestJet is essential for the Applicant's final reply (pursuant to Rule 44) in the proceeding.

Thus, the Applicant is respectfully asking the Agency to allow him 5 business days after the determination of the present motion and the receipt of all answers and documents from WestJet to prepare and file his final reply in the proceeding, pursuant to Rule 44.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Applicant

Cc: Jeff Landmann, Senior Legal Counsel for WestJet
Lorne Mackenzie, Director of Regulatory and Government Affairs for WestJet