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October 12, 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
Reply**

Please accept the following submissions as a reply, pursuant to Rule 44 and Decision No. LET-C-A-70-2014, in the present complaint.

I. Preliminary matter: Notice of protest and preservation of right to appeal

The Applicant reserves his right to challenge Decision No. LET-C-A-70-2014 as part of an appeal from the final decision of the Agency in the present proceeding.

II. Systemic refusal to process and settle claims

WestJet led no evidence to establish that it processed and/or settled the baggage-related claims of any passenger in cases where WestJet was not the last carrier.

WestJet acknowledged the authenticity of the correspondence it sent to the Applicant and Ms. Jones in response to their claims for compensation related to baggage. The common features of these responses were WestJet's insistence that "it remains the responsibility of [the last carrier] to settle your claim and reach resolution" and the *de facto* refusal of WestJet to process and settle the claims.

On August 11, 2014, WestJet also admitted that:

WestJet systematically directed guests to resolve their issue with the last carrier at their final destination.

The practice of directing passengers to make claims against another airline is merely a euphemistic expression of the fact that WestJet refuses to process and settle these claims on its own.

III. WestJet's obligations under Article 36(3) of the *Montreal Convention*

In light of WestJet's admission as to its practice, it is necessary to revisit Article 36(3) of the *Montreal Convention*:

Article 36 - Successive carriage

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be **jointly and severally liable to the passenger** or to the consignor or consignee.

[Emphasis added.]

According to Black's Law Dictionary (8th edition, p. 933):

joint and several liability. Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. • Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from the nonpaying party.

[Emphasis added.]

The discretion of the party to whom the liability is owed how to apportion the liability, and in more practical terms, how to pursue any claim arising from the liability, is central to the notion of “joint and several liability” that drafters of the *Montreal Convention* chose to put in place. It prevents carriers from pointing at each other, as WestJet has admitted to having done; it also allows passengers to enforce their rights against the carrier that they consider the easiest to collect from, and thus increases the protection offered to passengers.

In the case of checked baggage, if WestJet is the first carrier or the carrier which performed the carriage during which the destruction, loss, damage, or delay took place, then it is jointly and severally liable to the passenger pursuant to Article 36(3). In practical terms, this means that it is up to the passenger, and not WestJet, to decide whether to make a claim against WestJet or the last carrier, or perhaps against both. WestJet cannot lawfully dictate to passengers against whom to make the claim.

WestJet is required to process and settle on its own all baggage-related claims that it receives and for which it is liable under the *Montreal Convention*. (It goes without saying that WestJet may subsequently seek reimbursement from the other airlines involved in the carriage.)

Therefore, WestJet’s practice of directing passengers to the final carrier, and refusing to process and settle their claims on its own, deprives passengers of the choice to decide against which of the carriers they wish to make a claim, and as such, it is contrary to Article 36(3) of the *Montreal Convention*.

IV. WestJet admitted that it intends to continue the same unlawful practice

Although WestJet admitted in its July 11, 2014 answer that IATA Resolution 780 “is not a guest-facing agreement and is not part of WestJet’s International Tariff,” WestJet admitted in its August 11, 2014 submissions that it intended to continue the same practice, but without referring to IATA Resolution 780:

WestJet has agreed to work with the agency on more appropriate language to achieve the same outcome without any implication that the rights under the Montreal Convention are infringed upon or even perceived to be.

[Emphasis added.]

WestJet’s admission demonstrates that the airline intends to continue to refer passengers with baggage-related claims to the final carrier, and to refuse to process and settle baggage-related claims of such passengers.

All that WestJet is offering is cosmetics, by way of changing the language used for conveying the same message, namely, that WestJet would not process or settle baggage-related claims in cases where it was the first carrier (or the carrier which performed the carriage during which the destruction, loss, damage, or delay took place).

The present complaint is not about the actual language used by WestJet, but rather the practice of systematically refusing to process and settle claims of passengers, and referring passengers to the final carrier instead.

Therefore, the Applicant is asking the Agency to order WestJet to amend its practices and procedures to comply with Article 36(3) of the *Montreal Convention*, and require that WestJet process all baggage-related claims that it receives and for which it is liable under the *Montreal Convention*.

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