

Halifax, NS

lukacs@AirPassengerRights.ca



March 13, 2013

**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 about WestJet's International Tariff Rule 110**  
**File No.: M 4120-3/13-01286**  
**Reply**

Please accept the following submissions in relation to the above-noted matter as a reply pursuant to Rule 44 of the *Canadian Transportation Agency General Rules* to WestJet's answer of March 12, 2013.

In its March 12, 2012 answer, WestJet does not oppose the Applicant's position that the Existing Tariff is unclear, that Existing Rules 110(B) and 110(G) are unreasonable, and that part of the Existing Rule 110(E) is unreasonable. WestJet made no submissions at all to support the reasonableness of these provisions.

Thus, the Applicant is asking that the Agency disallow these provisions as being unreasonable.

WestJet's submissions were confined to proposing various amendments to Rule 110 (the "Proposed Rule 110"). The Applicant submits that the proposed amendments are only of a cosmetic nature, eliminating only the most offensive portions of the impugned tariff rules, but they fail to address the substance of the Applicant's complaint.

**I. Proposed Rule 110(B) still contradicts Rule 75**

Proposed Rule 110(B) reads as follows:

The Carrier will, at the carrier's discretion, provide any passengers affected by such denied boarding with:

(1) A credit, valid for one year from the cancellation date, towards the provision of a fare relating to a future flight or flights if booked as a round trip and the originating sector is cancelled, which credit shall be equal to the original fare(s) which was/were cancelled)

or

(2) To otherwise refund to such passenger, an amount which shall not be greater than the fare paid by the passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

[Emphasis added.]

**(a) Choice as to the form of payment**

Rule 75 used to be Rule 15, and its provisions came under the Agency's scrutiny in *Lukács v. WestJet*, Decision No. 249-C-A-2012. Rule 75(B):

In cases where the passenger is offered alternative remedies, the choice among the alternatives shall rest with the passenger.

It is submitted that Proposed Rule 110(B) contracts Rule 75(B) in that it allows WestJet to make the choice as to the form of the payment.

**(b) Amount of payment**

Rule 75 used to be Rule 15, and its provisions came under the Agency's scrutiny in *Lukács v. WestJet*, Decision No. 249-C-A-2012. Rule 75(B)(3) provides that:

(3) monetary payment in an amount to be defined by the Carrier which shall in no case be less than the value of the unused portion of the passenger's ticket;

[Emphasis added.]

Furthermore, Rule 75(D) provides that:

In defining the alternative remedies to be offered, the Carrier will consider, to the extent they are known to the Carrier, the circumstances of the passenger affected by the overbooking or cancellation, including any expenses which the passenger, acting reasonably, may have incurred as a result of the overbooking or cancellation as, for example, costs incurred for accommodation, meals or additional transportation.

[Emphasis added.]

It is submitted that Proposed Rule 110(B) contradicts Rules 75(B)(3) and 75(D) in that it precludes reimbursement for out-of-pocket expenses for accommodation, meals or additional transportation, and refund for segments that no longer serve any purpose with respect to the passenger's travel plans.

## **II. Proposed Rule 110(B) is unreasonable and unnecessary**

Proposed Rule 110(B) appears, implicitly, to preclude reimbursement of passengers for out-of-pocket expenses for accommodation, meals or additional transportation, and purports to cap WestJet's liability in the case of denied boarding at the amount of fare paid by the passenger. In the vast majority of cases, this liability cap is substantially lower than the limit of 4,694 SDRs set out in Article 22(1) of the *Montreal Convention* (as updated in 2009).

Thus, Proposed Rule 110(B) is a provision tending to set a limit of liability lower than what is provided for in the *Montreal Convention*, and as such, it is null and void pursuant to Article 26.

In *Lukács v. WestJet*, LET-C-A-83-2011, the Agency held that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger.

Proposed Rule 110(B) also appears to allow WestJet to decide whether it compensates passengers by a cash payment or a travel credit, contrary to the Agency's findings in Decision No. LET-C-A-83-2011.

Therefore, it is submitted that Proposed Rule 110(B) is unreasonable.

The Applicant notes that in light of Rule 75, it is difficult to understand why Proposed Rule 110(B) is necessary at all: it either contradicts Rule 75, or it is an unnecessary and confusing duplication. In either case, it is submitted Proposed Rule 110(B) ought to be disallowed.

### **III. Proposed Rule 110(G) is unclear, unreasonable, and unnecessary**

Proposed Rule 110(G) states that:

The passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

First, this provision is unclear, because although the conjunctive language (using “and”) suggests that a passenger must decline the payment in order to seek recovery in a court of law, it does not state so explicitly.

Second, this provision is unreasonable, because it still appears to require passengers to decline any payment in order to retain their right to seek redress in a court of law. This issue has already been settled by the Agency disallowing a similar provision in *Lukács v. WestJet*, 249-C-A-2012.

Third, this provision appears to be unnecessary. In the absence of explicit contractual language, there is nothing to prevent a passenger, who accepted some payment from WestJet, from seeking additional damages in a court of law or otherwise.

Therefore, it is submitted that Proposed Rule 110(G) is both unclear and unreasonable, and it ought to be disallowed.

### **IV. Proposed Rule 110(E) remains unreasonable**

While WestJet proposes to remove a provision that explicitly deprives passengers travelling to and from Canada from their rights for denied boarding compensation, Proposed Rule 110(E) provides any denied boarding compensation only to passengers departing from the US.

Thus, the deletion proposed by WestJet is no more than a cosmetic change. It does not alter the unacceptable state of affairs that Rule 110(E) provides no denied compensation for passengers departing from Canada. This state of affairs is inconsistent with the findings of the Agency in *Anderson v. Air Canada*, 666-C-A-2001:

[a]ny passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

The Applicant submits that compensation of victims of denied boarding has two components:

- (1) reimbursement for out-of-pocket expenses, including refunds; and
- (2) denied boarding compensation (lump sum, no evidence of specific damage is required).

This principle is recognized, for example, in *Kirkham v. Air Canada*, 268-C-A-2007, where the Agency ordered Air Canada to both reimburse the passenger for his out-of-pocket expenses, and in addition to pay the passenger denied boarding compensation.

While WestJet's International Tariff Rule 75 addresses (1), that is, reimbursement for out-of-pocket expenses, including refunds, neither the Existing Rule 110(E) nor the Proposed Rule 110(E) contains any provisions for payment of denied boarding compensation (i.e., lump sum, without evidence of specific damage) to passengers departing from Canada, or travelling to Canada from an airport outside the US. The Applicant submits this policy of WestJet is unreasonable.

As the Agency correctly recognized in *Anderson v. Air Canada*, passengers who are denied boarding suffer damages that are common to all passengers in such situations, and they are entitled to compensation without evidence of specific damages suffered.

On the other hand, WestJet has put forward no evidence to explain how the obligation of paying denied boarding compensation would affect WestJet's ability to meet its statutory, commercial and operational obligations.

The Proposed Rule 110(E), and specifically, the absence of a provision for denied boarding compensation to all passengers, including those who do not depart from an airport in the US, adversely affects the rights of passengers, and it is not necessary for WestJet to meet its statutory, commercial and operational obligations.

Therefore, it is submitted that by the balancing test established by the Agency, Proposed Rule 110(E) is unreasonable.

The Applicant submits that the Existing/Proposed Rule 110(E) ought to be substituted with a provision that imposes the obligation of paying denied boarding compensation (i.e., lump sum in addition to reimbursement for out-of-pocket expenses) on WestJet.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Applicant

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