
DECISION NO. 227-C-A-2013

June 12, 2013

COMPLAINT by Gábor Lukács against WestJet.

File No. M4120-3/13-01286

INTRODUCTION

[1] On February 27, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that:

- Rule 110(B), governing denied boarding compensation, appearing in WestJet’s *International Passenger Rules and Fares Tariff No. WS-1, Airline Tariff Publishing Company, Agent, NTA(A) No. 518* (Tariff), contradicts Rule 75 of the Tariff, which relates to cancellation, changes and refunds, and is therefore unclear, contrary to paragraph 122(c) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR);
- Tariff Rule 110(B) is unreasonable, contrary to subsection 111(1) of the ATR;
- Part of Tariff Rule 110(E), setting out the amount of denied boarding compensation tendered by WestJet, is unreasonable, contrary to subsection 111(1) of the ATR; and,
- Tariff Rule 110(G), respecting a passenger’s options, is unreasonable, contrary to subsection 111(1) of the ATR.

[2] WestJet filed its answer on March 12, 2013, and Mr. Lukács submitted his reply on March 13, 2013. In its answer, WestJet proposed certain revised Tariff provisions, and did not provide any submissions specifically responding to those provided by Mr. Lukács.

ISSUES

[3] With respect to the Existing Tariff Rules:

1. Does Existing Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Existing Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?
2. Is Existing Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

3. Is part of Existing Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR? and,
4. Is Existing Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

[4] With respect to the Proposed Tariff Rules:

1. Does Proposed Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Proposed Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?
2. Is Proposed Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?
3. Is part of Proposed Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR? and,
4. Is Proposed Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[5] The existing and proposed Tariff provisions and the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[6] As recently stated by the Agency in Decision No. 248-C-A-2012 (*Lukács v. Air Transat*), a carrier meets its tariff obligation of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Reasonableness

[7] To assess whether a term or condition of carriage is “unreasonable”, the Agency has traditionally applied a balancing test, which requires that a balance 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. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 150-C-A-2013 (*Forsythe v. Air Canada*).

- [8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.
- [9] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

EXISTING TARIFF RULES

Issue 1: Does Existing Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Existing Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?

- [10] Mr. Lukács submits that Existing Tariff Rule 75, which was previously Rule 15, imposes several obligations on WestJet relating to passengers who are denied boarding, and that Existing Tariff Rule 75(F) explicitly recognizes that the rights of passengers are also governed by Article 19 of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention). He points out that the provisions of Existing Tariff Rule 75 were addressed in Decision No. 249-C-A-2012 (*Lukács v. WestJet*).
- [11] Mr. Lukács asserts that in sharp contrast with the obligations set out in Existing Tariff Rule 75, Existing Tariff Rule 110(B) provides, in part, that “[t]he Carrier shall not be liable to any passenger in respect of such overbooking, whether or not resulting from an Event of Force Majeure.”
- [12] Mr. Lukács maintains that the blanket exclusion of liability in Existing Tariff Rule 110(B) contradicts and negates the provisions of Existing Tariff Rule 75, which recognize WestJet's liability.

Analysis and findings

- [13] As stated by Mr. Lukács, Existing Tariff Rule 75, which was addressed in Decision No. 249-C-A-2012, sets out certain obligations assumed by WestJet in the event that a passenger is denied boarding, and reflects the rights of passengers under the Convention. The Agency agrees with Mr. Lukács' submission that Rule 110(B) fully exempts WestJet from liability for passengers who are affected by denied boarding, which contradicts Existing Tariff Rule 75. Given this contradiction, the Agency finds that Existing Tariff Rule 110(B) is unclear because it is stated in such a manner as to create a reasonable doubt and ambiguity regarding its application.

Issue 2: Is Existing Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

- [14] Mr. Lukács asserts that the effect of Existing Tariff Rule 110(B) is to relieve WestJet from liability for denied boarding if it provides a full refund or future credit to the passenger. He adds that, as noted by the Agency in Decision No. 249-C-A-2012, and incorporated in the Tariff as Existing Tariff Rule 75(F), most cases of denied boarding fall within the scope of Article 19 of the Convention, which imposes a regime of strict liability on WestJet. Mr. Lukács contends that, as a contractual provision tending to relieve WestJet from liability for delay under Article 19 of the Convention, Existing Tariff Rule 110(B) is null and void pursuant to Article 26 of the Convention. He also contends that Existing Tariff Rule 110(B) represents a blanket exclusion of liability that is inconsistent with the legal principles of the Convention, and therefore it is unreasonable even for itineraries where the Convention is not applicable.

Analysis and finding

- [15] Existing Tariff Rule 110(B) exempts WestJet from liability for overbooking a flight, irrespective of whether that overbooking occurred as a result of force majeure, provided that WestJet furnishes the passenger with a travel credit or a full refund. The Agency is of the opinion that this exemption represents a blanket exclusion from liability and is inconsistent with Article 19 of the Convention. The Agency is also of the opinion that, in respect of itineraries where the Convention does not apply, Existing Tariff Rule 110(B) is inconsistent with the principles of Article 19. Therefore, the Agency finds Existing Tariff Rule 110(B) to be unreasonable, contrary to subsection 111(1) of the ATR.

Issue 3: Is part of Existing Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR?

- [16] Mr. Lukács challenges the reasonableness of that part of Existing Tariff Rule 110(E) which states:

For flights to/from Canada (except flights from USA), as WestJet does not commercially oversell its aircraft, no denied boarding compensation will be provided.

- [17] Mr. Lukács points out that the Agency considered the principles governing the amount of denied boarding compensation payable to passengers in Decision No. 666-C-A-2001, and held, in part, that any passenger who is denied boarding is entitled to compensation and evidence of specific damages suffered need not be provided.
- [18] Mr. Lukács submits that the above quoted part of Existing Tariff Rule 110(E) violates the principle that any passenger who is denied boarding is entitled to compensation, and that, as such, that part is inconsistent with the Agency's finding in Decision No. 666-C-A-2001, and is therefore unreasonable.

- [19] Mr. Lukács maintains that there are two components to the obligations of a carrier to a passenger who is denied boarding: denied boarding compensation (which is equal for all passengers) and compensation for damages specific to the passenger's situation (such as meals, accommodation, transportation by another carrier, etc.) He submits that denied boarding compensation is not meant to replace or displace the carrier's liability for reasonable out-of-pocket expenses incurred by passengers. In this regard, Mr. Lukács points out that in Decision No. 268-C-A-2007 (*Kirkham v. Air Canada*), the Agency directed Air Canada to reimburse the complainant's reasonable out-of-pocket expenses and to tender the denied boarding compensation prescribed by its tariff.
- [20] Mr. Lukács submits that it is unclear how the obligation of paying denied boarding compensation would affect WestJet's ability to meet its statutory, commercial and operational obligations, given that WestJet represents in Existing Tariff Rule 110(E) that it does not engage in the practice of overselling its flights. Mr. Lukács argues that if WestJet's representation were true, then it would never have to pay any compensation to passengers, and the introduction of reasonable monetary compensation would not have any impact on WestJet at all. Mr. Lukács maintains that if WestJet does occasionally overbook its flights, perhaps inadvertently and/or as a result of a computer malfunction, then Existing Tariff Rule 110(E) deprives the passengers of being compensated for denied boarding.

Analysis and finding

- [21] As pointed out by Mr. Lukács, the Agency, in Decision No. 666-C-A-2001, held, in part, that any passenger who is denied boarding is entitled to compensation. Given that Existing Tariff Rule 110(E) does not provide for that compensation for flights to and from Canada, it is inconsistent with Decision No. 666-C-A-2001. The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.

Issue 4: Is Existing Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

- [22] Mr. Lukács submits that, in Decision No. 249-C-A-2012, the Agency disallowed a rule similar to Existing Tariff Rule 110(G), which read:

If a passenger accepts the alternative remedies offered by the Carrier, that acceptance shall be in full and final satisfaction of all claims the passenger may have had against the Carrier by reason of the overbooking or cancellation.

- [23] Mr. Lukács points out that the Agency determined that rule to be unreasonable, and stated:

[154] WestJet has argued that obtaining a release, in itself, is permissible under the Convention. However, it has not demonstrated why unilaterally imposing the terms of a release in its tariff does not tend to relieve it from liability under Article 26 of the Convention. The Agency is therefore of the opinion that WestJet has not shown that Proposed Tariff Rule 15.6 is consistent with Article 26 of the Convention.

[155] Accordingly, the Agency finds that this provision would be considered unreasonable under the ATR if filed with the Agency.

- [24] Mr. Lukács contends that subparagraph 122(c)(iii) of the ATR requires carriers to clearly state their policies with respect to denied boarding compensation. He adds that in Decision No. 666-C-A-2001, the Agency held that any passenger who is denied boarding is entitled to compensation for specific damages.
- [25] Mr. Lukács submits that given the disparity between the negotiating powers, positions and resources of a carrier and the passengers affected by denied boarding, permitting a carrier to condition payment of denied boarding compensation upon release of the carrier from any further liability to the passenger undermines the purpose of the obligation to pay denied boarding compensation. Mr. Lukács points out that the Agency confirmed in Decision No. 666-C-A-2001 that the purpose of denied boarding compensation is to address, in a standardized manner, damage that is common to all passengers affected by denied boarding, and it is not subject to the requirement of proof of specific damages suffered.
- [26] Mr. Lukács argues that a carrier's obligation to pay denied boarding compensation is independent of its obligation to compensate passengers for out-of-pocket expenses or other damages specific to the passenger's circumstances. He claims that it is unreasonable for WestJet to unilaterally impose a release from liability as a precondition for payment of denied boarding compensation.
- [27] According to Mr. Lukács, Existing Tariff Rule 110(G) is not necessary for WestJet to meet its statutory, commercial and operational obligations.

Analysis and findings

- [28] The first part of Existing Tariff Rule 110(G) purports to relieve WestJet from further liability should a passenger who is denied boarding accept the compensation offered by WestJet. The second part of Existing Tariff Rule 110(G) leaves the impression that a passenger can only seek to recover damages in a court of law or in some other manner if the payment offered by WestJet is declined. As indicated by Mr. Lukács, in Decision No. 249-C-A-2012, the Agency found a similar rule to be unreasonable because it established a limit of liability lower than that provided for under the Convention. The Agency finds, therefore, that the first part of Existing Tariff Rule 110(G) is unreasonable. With respect to the second part of that Rule, the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency finds, therefore, that the second part of Existing Tariff Rule 110(G) is unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

PROPOSED TARIFF RULES

Issue 1: Does Proposed Tariff Rule 110(B) conflict with Existing Tariff Rule 75, rendering the application of Proposed Tariff Rule 110(B) unclear, contrary to paragraph 122(c) of the ATR?

- [29] Mr. Lukács submits that Proposed Tariff Rule 110(B), by allowing WestJet to choose the form of payment it offers to a passenger who is denied boarding, contradicts Existing Tariff Rule 75(B), which states that “[i]n cases where the passenger is offered alternative remedies, the choice among the alternatives shall rest with the passenger.”
- [30] Mr. Lukács points out that Existing Tariff Rule 75(B)(3) provides for “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.”
- [31] In addition, Mr. Lukács points out that Existing Tariff 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 by Mr. Lukács]

- [32] Mr. Lukács maintains that Proposed Tariff Rule 110(B) contradicts Existing Tariff Rules 75(B)(3) and 75(D) in that Proposed Tariff Rule 110(B) precludes reimbursement for out-of-pocket expenses for accommodation, meals or additional transportation, and a refund for segments that no longer serve any purpose with respect to the passenger’s travel plans.

Analysis and finding

- [33] The Agency agrees with Mr. Lukács’ submission that, with respect to the party with whom the choice rests regarding alternative remedies, the application of Proposed Tariff Rule 110(B) is unclear given the contradiction between that Proposed Tariff Rule and Existing Tariff Rule 75(B). The Agency also agrees with Mr. Lukács’ assertion that Proposed Tariff Rule 110(B) contradicts Existing Tariff Rules 75(B)(3) and 75(D) for the reason he has stated. As such, the Agency finds that Proposed Tariff Rule 110(B) would be unclear if it were to be filed with the Agency because it is worded in such a fashion as to create reasonable doubt and ambiguity respecting its application.

Issue 2: Is Proposed Tariff Rule 110(B) unreasonable, contrary to subsection 111(1) of the ATR?

- [34] Mr. Lukács submits that Proposed Tariff 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. He maintains that 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 Convention. Mr. Lukács claims, therefore, that Proposed Tariff Rule 110(B) establishes a limit of liability lower than that provided for in the Convention, and as such, it is null and void pursuant to Article 26 of the Convention.

- [35] Mr. Lukács points out that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), 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. He asserts that Proposed Tariff Rule 110(B) 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.

Analysis and findings

- [36] WestJet's Proposed Tariff Rule 110(B) involves the deletion of the provision, appearing in Existing Tariff Rule 110(B), which relieves WestJet from liability for overbooking, irrespective of whether an event of force majeure occurred. The condition of carriage that provides that WestJet will tender, at its discretion, a travel credit or a full refund to passengers who have been denied boarding is retained. As indicated by Mr. Lukács, the retention of that condition of carriage implies that certain reimbursement (for example, for expenses incurred for accommodation and meals), will not be tendered, and that WestJet's maximum liability will be limited to the amount of the fare paid by the passenger. The Agency is of the opinion that Proposed Tariff Rule 110(B) establishes a limit of liability lower than that required under Article 22(1) of the Convention and, as such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.
- [37] With respect to the form of payment to be offered to passengers affected by denied boarding, the Agency concurs with Mr. Lukács' submission that WestJet's restriction of payment to either a travel credit or refund of the fare paid is inconsistent with the Agency's findings in Decision No. LET-C-A-83-2011. As such, the Agency finds that Proposed Tariff Rule 110(B) would be considered unreasonable if it were to be filed with the Agency.

Issue 3: Is part of Proposed Tariff Rule 110(E) unreasonable, contrary to subsection 111(1) of the ATR?

- [38] Mr. Lukács submits that while WestJet proposes to remove a provision that explicitly deprives passengers travelling to and from Canada of their rights to denied boarding compensation, Proposed Tariff Rule 110(E) provides denied boarding compensation only to passengers departing from the United States of America. He asserts that this situation is inconsistent with the Agency's findings in Decision No. 666-C-A-2001, and that WestJet has failed to explain how paying denied boarding compensation would affect its ability to meet its statutory, commercial and operational obligations.

Analysis and finding

- [39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

Issue 4: Is Proposed Tariff Rule 110(G) unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

- [40] Mr. Lukács points out that Proposed Tariff Rule 110(G) states, in part, that “[t]he passenger may decline the payment and seek to recover damages in a court of law or in some other manner.”
- [41] Mr. Lukács maintains that this proposed 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, the provision does not state so explicitly.
- [42] Mr. Lukács also asserts that the proposed 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. He indicates that this issue has already been settled by the Agency’s disallowance of a similar provision in Decision No. 249-C-A-2012.

Analysis and findings

- [43] With respect to the clarity of Proposed Tariff Rule 110(G), the Agency agrees with Mr. Lukács’ submission that the phrasing of that Rule, without being explicit, suggests that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by WestJet. The Agency finds, therefore, that Proposed Tariff Rule 110(G) would be considered unclear if it were to be filed with the Agency given that it is phrased in such a manner as to create reasonable doubt and ambiguity respecting its application.
- [44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács’ submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

Additional comments

- [45] On June 28, 2012, the Agency, in Decision No. 249-C-A-2012, ordered WestJet to make certain revisions to its Tariff. The appropriate revisions were filed shortly afterwards. As evident by this complaint, several provisions appearing in Rule 110 of the Tariff conflicted with the revisions made in response to Decision No. 249-C-A-2012. The Agency is of the opinion that WestJet has

been irresponsible in failing to ensure that consequential tariff revisions were not promptly made in relation to the revisions filed respecting that Decision. In the future, WestJet should exercise greater care in considering Agency decisions and in ensuring that its tariffs are amended in the appropriate manner, not only to conform to those decisions, but also to address inconsistencies.

CONCLUSION

[46] In light of the foregoing, the Agency concludes the following:

Existing Tariff Rules

1. With respect to the clarity of Existing Tariff Rule 110(B)

[47] The Agency has determined that the application of the tariff provision is unclear, contrary to paragraph 122(c) of the ATR.

2. With respect to the reasonableness of Existing Tariff Rule 110(B)

[48] The Agency has determined that the tariff provision is unreasonable, contrary to subsection 111(1) of the ATR.

3. With respect to Existing Tariff Rule 110(E)

[49] The Agency has determined that the tariff provision is unreasonable, contrary to subsection 111(1) of the ATR.

4. With respect to the clarity and reasonableness of Existing Tariff Rule 110(G)

[50] The Agency has determined that the tariff provision is unclear, contrary to paragraph 122(c) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR.

Proposed Tariff Rules

1. With respect to the clarity of Proposed Tariff Rule 110(B)

[51] The Agency has determined that if Proposed Tariff Rule 110(B) were to be filed with the Agency, the application of that Rule would be determined to be unclear, contrary to paragraph 122(c) of the ATR.

2. With respect to the reasonableness of Proposed Tariff Rule 110(B)

[52] The Agency has determined that if Proposed Tariff Rule 110(B) were to be filed with the Agency, that Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

3. With respect to Proposed Tariff Rule 110(E)

[53] The Agency has determined that if Proposed Tariff Rule 110(E) were to be filed with the Agency, that Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

4. With respect to the clarity and reasonableness of Proposed Tariff Rule 110(G)

[54] The Agency has determined that if Proposed Tariff Rule 110(G) were to be filed with the Agency, the application of that Rule would be determined to be unclear, contrary to paragraph 122(c) of the ATR, and the Rule would be determined to be unreasonable, contrary to subsection 111(1) of the ATR.

ORDER

[55] The Agency disallows Existing Tariff Rules 110(B), 110(E) and 110(G).

[56] The Agency orders WestJet, by no later than July 15, 2013, to revise Existing Tariff Rules 110(B), 110(E) and 110(G) to conform to the findings set out in this Decision.

[57] Pursuant to paragraph 28(1)(b) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, the disallowance of Existing Tariff Rules 110(B), 110(E) and 110(G) shall come into force when WestJet complies with the above or on July 15, 2013, whichever is sooner.

(signed)

Geoffrey C. Hare
Member

(signed)

J. Mark MacKeigan
Member