

2
1

Halifax, NS

lukacs@AirPassengerRights.ca



3

March 2, 2016

4 **VIA EMAIL**

5 The Secretary
6 Canadian Transportation Agency
7 Ottawa, ON K1A 0N9

8 Dear Madam Secretary:

9 **Re: Dr. Gábor Lukács v. British Airways**
Request of British Airways pursuant to s. 32 of the *Canada Transportation Act*
for review and stay of Decision No. 49-C-A-2016
Answer

10 Please accept the following submissions as an answer in opposition to British Airways' request of
11 January 26, 2016 that:

- 12 (a) the Agency review its Decision No. 49-C-A-2016 pursuant to s. 32 of the *Canada Trans-*
13 *portation Act*, S.C. 1996, c. 10 ("CTA"); and
14 (b) the Agency stay Decision No. 49-C-A-2016 until March 24, 2016.

15 **OVERVIEW**

16 British Airways challenges the procedures followed by the Agency in making its Decision as well
17 as the substance of the Agency's Order.

18 Section 32 of the *CTA* is not an appeal process nor a means of a losing party to reargue a case.
19 As such, British Airways' request is vexatious, frivolous, and is an abuse of process serving the
20 sole purpose of delaying compliance with the Agency's order. Indeed, British Airways provided
21 no basis for its request to stay the Decision.

22 Therefore, it is submitted that British Airways' request should be dismissed in its entirety, with
23 costs payable to Dr. Lukács.

1 **I. THE FACTS**

2 1. In Decision No. 10-C-A-2014, dated January 17, 2014, the Agency determined that British
3 Airways' International Tariff Rule 87(B)(3)(B) was and/or may be unreasonable within the
4 meaning of subsection 111(1) of the *ATR*. In its Order of the same date, the Agency provided
5 British Airways with an opportunity to "show cause" why the Agency should not impose on
6 it one of three denied boarding compensation schemes listed by the Agency or propose a new
7 scheme that the Agency may consider to be reasonable. The undersigned was also provided
8 with an opportunity to file comments on British Airways' response to the show cause Order.

9 2. On March 17, 2014, British Airways made two contradictory submissions in response to the
10 show cause Order:

11 (a) British Airways stated that it was choosing to implement one of the four schemes listed
12 in the Agency's "show cause" Order, namely, "[t]he regime proposed by Air Canada
13 during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*)";
14 and

15 (b) British Airways proposed to amend Rule 87(B)(3)(B) in a manner that addresses
16 only the denied boarding compensation on flights from Canada to the UK ("Proposed
17 Rule").

18 British Airways chose to make no submissions in support of its proposed tariff amendment;
19 nor did it explain why it should be permitted to omit from its tariff the rule governing denied
20 boarding compensation on flights to Canada or flights from Canada to points outside the UK.

21 3. Dr. Lukács objected to British Airways' response, because the proposed tariff amendment
22 failed to address the rights of passengers travelling on flights to Canada and on flights from
23 Canada to points outside the UK, contrary to paragraph 122(c)(iii) of the *Air Transportation*
24 *Regulations* ("*ATR*").

25 4. In Decision No. 201-C-A-2014, on May 26, 2014, the Agency determined that the Proposed
26 Rule was unreasonable, because it applied only to flights from Canada to the UK and not to
27 all flights from Canada to the EU. The Agency ordered British Airways to file a Proposed
28 Rule that would apply to flights from Canada to the EU.

29 5. On November 27, 2015, in *Lukács v. British Airways*, 2015 FCA 269, the Federal Court of
30 Appeal granted the appeal of Dr. Lukács, set aside Decision No. 201-C-A-2014, remitted
31 the matter to the Agency for redetermination, and directed that:

32 The Agency must clearly address how British Airways is to "meet its tariff
33 obligations of clarity" so that "the rights and obligations of both the carrier
34 and passengers are stated in such a way as to exclude any reasonable doubt,
35 ambiguity or uncertain meaning" in situations where the tariff is silent with

1 respect to denied boarding compensation for inbound flights to Canada (De-
2 cision No. 432-C-A-2013, referencing Decision No. 344-C-A-2013 (*Lukács*
3 *v. Porter Airlines Inc.*)). In particular, the Agency must clarify whether the
4 tariff must in all instances set out denied boarding compensation provisions
5 for flights to and from Canada, or whether the fact that British Airways pas-
6 sengers from the E.U. to Canada are covered by E.U. Regulation (EC) No.
7 261/2004 is sufficient.

8 *Lukács v. British Airways*, 2015 FCA 269, para. 40

- 9 6. In light of the conclusion to return the matter to the Agency for redetermination, the Fed-
10 eral Court of Appeal declined to address the argument of procedural fairness raised by
11 Dr. Lukács, and held that:

12 The Agency is best positioned to determine the extent of submissions it will
13 require for the redetermination of the issue set out above.

14 *Lukács v. British Airways*, 2015 FCA 269, para. 41

- 15 7. British Airways was fully aware of the judgment and reasons of the Federal Court of Appeal.
16 Indeed, according to the records of the Federal Court of Appeal in File No. A-366-14, British
17 Airways acknowledged the receipt of the judgment and its reasons.
- 18 8. British Airways did not make any request to the Agency to be permitted to make additional
19 submissions before the Agency redetermines the question before it, namely, which denied
20 boarding compensation policy should be imposed in British Airways.
- 21 9. Thus, on February 18, 2016, the Agency issued Decision No. 49-C-A-2016 without seeking
22 additional submissions from the parties, determining that the British Airways' tariff must
23 clearly state the carrier's policy with respect to flights from the European Union to Canada,
24 and ordering British Airways to fully implement its election to reflect the denied board-
25 ing compensation regime of Air Canada, including the incorporation of *Regulation (EC)*
26 *261/2004* by reference.

27 **II. ISSUES**

- 28 10. The questions to be determined are:

- 29 (a) whether the Agency should review Decision No. 49-C-A-2016;
- 30 (b) whether the Agency should stay Decision No. 49-C-A-2016 until March 24, 2016; and
- 31 (c) whether the Agency should order British Airways to pay Dr. Lukács costs.

1 **III. SUBMISSIONS**

2 **(a) Decision No. 49-C-A-2016 should not be reviewed by the Agency**

3 11. Section 32 of the *CTA* provides that:

4 **32** The Agency may review, rescind or vary any decision or order made by
5 it or may re-hear any application before deciding it if, in the opinion of the
6 Agency, since the decision or order or the hearing of the application, there has
7 been a change in the facts or circumstances pertaining to the decision, order
8 or hearing.

9 [Emphasis added.]

10 12. The review process contemplated by s. 32 of the *CTA* is not an open-ended authority for the
11 Agency to sit in appeal of its own decisions. Where it is being alleged that the Agency erred
12 in arriving at its decision, the proper procedure is appealing the decision pursuant to s. 41 of
13 the *CTA*.

14 *Fowlie v. Air Canada, Decision No. 488-C-A-2010, paras. 26-27*
15 *SAA v. Khawaja et al, Decision No. 386-C-A-2015, para. 13*

16 13. In dealing with an application for review of a decision, the Agency must follow a two-step
17 approach:

- 18 (i) first, the Agency is to determine whether a change in the facts or circumstances has
19 occurred “since the decision or order”; and
- 20 (ii) then, the Agency is to determine whether the change is sufficient to warrant a review,
21 rescission or variance of the decision.

22 *Fowlie v. Air Canada, Decision No. 488-C-A-2010, para. 32*
23 *SAA v. Khawaja et al, Decision No. 386-C-A-2015, para. 12*

24 **(i) No change in the facts or circumstances**

25 14. British Airways is seeking a review of Decision No. 49-C-A-2016 on the basis that:

26 The changed circumstances are that the Agency did not provide notice that it
27 was proceeding to make a redetermination without hearing submissions from
28 British Airways and Lukacs.

1 15. The text of section 32 expressly refers to new facts and circumstances arising “since the
2 decision.” Consequently, only facts or circumstances that did not exist at the time or were
3 indiscoverable with due diligence can be a valid basis for an application for review.

4 *Fowlie v. Air Canada, Decision No. 488-C-A-2010, para. 33*

5 16. British Airways’ argument is fundamentally flawed for a number of reasons:

6 (a) The Agency itself was certainly aware of its choice of procedure not to seek additional
7 submissions from the parties before it made Decision No. 49-C-A-2016. Consequently,
8 the Agency’s own choice of procedure is not a new fact or circumstance “since the
9 decision.”

10 (b) The Agency did not owe a duty to notify British Airways about its choice of procedure
11 to not seek additional submissions from the parties, because British Airways had no
12 reasonable expectation that it would be permitted to make additional submissions be-
13 fore the redetermination of the matter before the Agency. The Federal Court of Appeal
14 did not require the Agency to receive further submissions.

15 (c) Had British Airways acted with due diligence, it could have easily discovered the
16 Agency’s choice of procedure by seeking directions or leave from the Agency about
17 making additional submissions. British Airways had more than 80 days to do so be-
18 tween November 27, 2015 (the date of the judgment of the Federal Court of Appeal)
19 and February 18, 2016 (the release of Decision No. 49-C-A-2016). Instead, British
20 Airways chose to remain silent and do nothing.

21 17. Thus, it is submitted that British Airways’ application for review fails to disclose any change
22 in the facts or circumstances within the meaning of s. 32 of the *CTA*. The application not
23 only lacks any merits, but is also a vexatious and/or frivolous attempt to blame the Agency
24 for the litigation strategy of British Airways.

25 18. Therefore, British Airways has failed to meet the burden of proof for invoking the Agency’s
26 limited jurisdiction to review Decision No. 49-C-A-2016.

27 **(ii) Abuse of process**

28 19. In its application for review, British Airways goes on to state that it is “asking for the recon-
29 sideration of Decision No. 49-C-A-2016” on the following bases:

30 (1) The Agency failed to comply with the FCA decision in making its redetermination in
31 Decision No. 49-C-A-2016.

32 (2) The Agency breached its duty of procedural fairness and deprived British Airways of
33 its right to be heard.

1 (3) The FCA decision requires a two-step process, but the Agency used a different process.

2 (4) The Order contained in Decision No. 49-C-A-2016 of the Agency requires British
3 Airways to include in its tariff wording that “is so vague as to result in nothing other
4 than mischief.”

5 20. These grounds challenge the procedures followed by the Agency in making Decision No.
6 49-C-A-2016 and the substance of the decision in an attempt to reargue the case.

7 21. Section 32 of the *CTA* is not meant to provide the losing party an opportunity to complete
8 the record or to reargue a case. Alleged flaws in the procedures followed by the Agency or
9 the substance of the decision do not constitute a change of the facts or circumstances within
10 the meaning of s. 32 of the *CTA*. The proper procedure for raising these concerns is by way
11 of an appeal to the Federal Court of Appeal.

12 *Fowlie v. Air Canada, Decision No. 488-C-A-2010, para. 35*
13 *Bates v. Air Canada, Decision No. 52-C-A-2012 (last paragraph of Analysis)*

14 22. Therefore, it is submitted that British Airways’ application for review of Decision No. 49-
15 C-A-2016 based on the grounds asserted constitutes an abuse of the Agency’s processes.

16 **(b) Decision No. 49-C-A-2016 should not be stayed by the Agency**

17 23. Decision No 49-C-A-2016 is a final decision of the Agency. The “extension of the time for
18 compliance” sought by British Airways is simply a request for stay of the final decision
19 until March 24, 2016. Indeed, according to the *Annotated Dispute Adjudication Rules* of the
20 Agency:

21 When the Agency stays a decision or order, it means that it will not enforce
22 compliance with that Agency decision or order for the duration of the stay.

23 24. Obtaining a stay of a final decision or order is an exceptional and extraordinary remedy.
24 Indeed, according to the *Annotated Dispute Adjudication Rules* of the Agency:

25 The Agency’s position is that its decisions and orders are properly made and
26 final and binding unless and until they are overturned by either an appeal
27 court or the Governor-in-Council. As such, the Agency’s policy is to ensure
28 compliance with its decisions and orders regardless of whether reviews or
29 appeals are pursued. Should a respondent against whom a decision or an order
30 is made wish to obtain a stay of the decision or order pending a review or
31 appeal, it is the responsibility of that party to either seek a stay of the decision
32 or order from the Agency or from the appeal court in the context of the appeal
33 proceedings.

1 25. The Agency's *Annotated Dispute Adjudication Rules* spells out the legal test applied by the
2 Agency to determine requests of this nature:

3 To decide whether a stay should be granted, the Agency is guided by the
4 three-part test in the Supreme Court of Canada decision *RJR - Macdonald*
5 *Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (RJR Macdonald).
6 The Agency must determine whether:

- 7 1. There is a serious question to be tried based on a preliminary assess-
8 ment of the merits of the case;
- 9 2. The party seeking the stay would suffer irreparable harm if the stay
10 wasn't granted; and,
- 11 3. The party seeking the stay will suffer the greater harm if the stay is
12 refused than the other party(ies) if the stay is granted (referred to as the
13 balance of inconvenience to the parties).

14 26. British Airways has provided no reason or rationale for the extension being sought, nor did
15 it explain what kind of harm it would suffer if the stay were denied.

16 27. In Decision No. 49-C-A-2016, the Agency held that:

17 [14] The Agency notes that in submissions during the proceedings related
18 to Decision No. 10-C-A-2014, British Airways stated that it complies with
19 Regulation (EC) 261/2004.

20 Thus, British Airways will suffer no harm whatsoever by being required to incorporate by
21 reference *Regulation (EC) 261/2004* into its Tariff, and certainly it will suffer no irreparable
22 harm by complying with the Agency's Decision No. 49-C-A-2016 by March 10, 2016.

23 28. The current state of affairs, where British Airways' tariff fails to clearly state its policy with
24 respect to denied boarding compensation on flights from the EU to Canada, is harmful to the
25 travelling public, because currently Canadian passengers are unable to enforce their rights in
26 Canada.

27 29. Therefore, it is submitted that British Airways's request for a stay until March 24, 2016
28 should be denied.

1 (c) **Costs**

2 (i) **Costs of the application for review**

3 30. It is submitted that British Airways should be ordered to pay Dr. Lukács the costs of the
4 present application for review in the amount of \$250.00 for the following reasons:

5 (1) British Airways' application for review is meritless, vexatious, frivolous, and consti-
6 tutes an abuse of process, brought for the purpose of delaying compliance with a final
7 decision of the Agency.

8 (2) Pursuant to s. 25.1 of the *CTA*, the Agency has all the powers that the Federal Court
9 has to award costs in any proceeding before it.

10 (3) In the past, the Agency awarded costs on the basis of public interest in the proceeding.

11 **Letter Decision No. 2015-10-06**

12 (4) The Federal Court of Appeal recognized that the present proceeding is in the nature of
13 litigation in the public interest, and awarded costs to Dr. Lukács notwithstanding the
14 fact that he was self-represented.

15 ***Lukács v. British Airways*, 2015 FCA 269, para. 43**

16 (ii) **Costs thrown away – if extension is granted**

17 31. Dr. Lukács has already registered Decision No. 49-C-A-2016 in the Federal Court under
18 File No. T-316-16 and incurred expenses to do so: \$20.00 in filing fees and \$5.00 of trans-
19 portation costs (bus fares). Should the Agency grant the stay sought by British Airways, it is
20 submitted that British Airways should be ordered to reimburse Dr. Lukács for costs thrown
21 away totaling \$25.00.

22 All of which is most respectfully submitted.

23 Dr. Gábor Lukács
24 Applicant

25 Enclosed: Certificate of Filing, dated February 22, 2016 (Federal Court File No. T-316-16)

26 Cc: Ms. Carol E. McCall, counsel for British Airways