Gábor Lukács

Halifax, Nova Scotia

January 24, 2012

VIA EMAIL

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

To the attention of Mr. Mike Redmond

Dear Madam Secretary:

Re: Gábor Lukács v. Air Canada
Overselling practices and denied boarding compensation rules (domestic)
File No. M 4120-3/11-06673

Please accept the following submissions in relation to the above-noted matter as a reply to the submissions of Air Canada, dated January 16, 2012.

ISSUES

I. Preliminary matters

(a) Irrelevant and prejudicial statements in Air Canada's submissions

Air Canada refers in its submissions to an incident that took place on November 23, 2011, where the Applicant and his partner witnessed Air Canada's agents providing misleading and incorrect information to passengers, and failing to compensate three volunteers who gave up their seats and did not board the flight, contrary to Rule 245. On November 27, 2011, the Applicant complained to Air Canada, and requested that it compensate not only him individually, but also the other passengers, who held confirmed reservations, but did not board the flight.

The Applicant did, indeed, "threaten" to file a complaint with the Agency under s. 67.1(b) concerning the November 23, 2011 incident. Parliament chose to explicitly recognize such "threats" as legitimate actions by enacting s. 346(2) of the *Criminal Code*, c. C-46.

The Applicant genuinely intended and still intends to bring a complaint in relation to the November 23, 2011 incident, but independently and separately from the present complaint. Since the present complaint affects far more passengers than a complaint about a concrete incident, the Applicant made the choice to proceed first and separately with the present complaint.

It is important to emphasize that the November 23, 2011 incident is currently *not* before the Agency, and the Applicant does not wish to make the incident of November 23, 2011 part of the present complaint. Indeed, while the present complaint was brought under s. 67.2(1) of the *Canada Transportation Act*, 1996, c. 10, a future complaint concerning the November 23, 2011 incident would likely be brought under s. 67.1(b).

Therefore, the November 23, 2011 incident is irrelevant to the issues currently before the Agency. It is submitted that the manner in which Air Canada misrepresented the details of the incident is highly prejudicial to the Applicant, because it purports to attribute malice to him, and is aimed at derailing the present proceeding and bogging it down with a factual dispute that in no way will assist the Agency in determining the substance of the complaint.

Hence, the Applicant is requesting that the Agency strike out all references and documents related to the November 23, 2011 incident from the record pursuant to Rule 14(3)(b).

(b) Air Canada's preliminary motion to dismiss: Abuse of process

(i) Issue estoppel and/or res judicata and/or abuse of process

The Applicant submits that Air Canada's preliminary motion ought to be dismissed on the grounds of *res judicata* and/or abuse of process. Indeed, Air Canada has made the *same* preliminary motion on the *same* grounds in a proceeding between the *same* parties in File No. M4120/09-03560 on September 15, 2009. On October 14, 2009, in Decision No. LET-C-A-155-2009, the Agency

dismissed Air Canada's preliminary motion:

> Air Canada has not provided the Agency with any evidence demonstrating that it does not have enough information to respond to Mr. Lukács' complaint. The test for determining whether a term or condition of carriage applied by a domestic carrier is "unreasonable" requires that a balance be struck between the rights of the passenger to be subject to reasonable terms and conditions of carriage and the particular air carrier's statutory, commercial and operational obligations (*Del Anderson* v. *Air Canada*, Decision No. 666-C-A-2011).
>
> Air Canada knows what tariff provisions are at issue; it has been provided with the complainant's submissions to that end and it is reasonable to assume that Air Canada has all the information relating to its statutory, commercial and operations obligations: the factors to be submitted by air carriers for consideration by the Agency in determination of reasonableness.
>
> Finally, with regards to Air Canada's submission that abstract complaints are an inefficient use of public resources, the Agency refers to the following policy statement made in the context of the *Black* decision:
>
> > Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.

A landmark case on issue estoppel and the doctrine of *res judicata* is *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, where the Supreme Court of Canada reviewed the preconditions to the operation of issue estoppel and established a two-step test. The preconditions are (para. 25):

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The two-step test is (at para. 33):

> The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied

It is submitted that in the present case, the preconditions are met due to the aforementioned Decision No. LET-C-A-155-2009 of the Agency. It is further submitted that Air Canada's preliminary motion is an attempt to re-litigate a matter that has already been determined by the Agency, namely, whether a complaint can be brought under s. 67.2(1) of the *Canada Transportation Act* "*in abstracto*," and as such the preliminary motion also constitutes abuse of process.

Therefore, it is submitted that Air Canada's preliminary motion ought to be dismissed on the grounds of issue estoppel and/or *res judicata* and/or abuse of process.

(ii) Misstatement of the meaning of "unreasonable" by Air Canada

Air Canada seems to be suggesting at footnote 2 on page 2 of its submissions that the Agency interprets the phrase "unreasonable" used in s. 67.2(1) of the *Canada Transportation Act* as meaning "without a rational basis". The use of this citation from *Anderson v. Air Canada*, 666-C-A-2001 is misleading and misstates the well-known balancing-test established there, which reads as follows:

> The Agency is, therefore, of the opinion that, in order to determine whether a term or condition of carriage applied by a domestic carrier is "unreasonable" within the meaning of subsection 67.2(1) of the CTA, a balance must be struck between the rights of the passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations.

(iii) Public interest

Air Canada vehemently argues that such policy-based complaints as the present one are an inefficient use of public resources. The Applicant respectfully disagrees.

Passengers and carriers have an unequal bargaining power. The contract of carriage is not a result of a free bargain, but rather it is imposed on passengers, whose choice is "take it or leave it." This underscores the importance of regulatory intervention, which in turn is reflected in section 5 of the *Canada Transportation Act*.

Challenging a carrier's tariff on principle is an effective way of protecting the public from unreasonable conditions. In terms of costs and workload for the Agency, the Applicant submits that dealing with tariff provisions on principle relieves the Agency from having to handle numerous after-the-fact complaints of passengers against carriers.

It is further submitted that Air Canada's position contradicts all relevant authorities on this point. Indeed, the Agency held in *Black v. Air Canada*, 746-C-A-2005 that the phrase "any person" in section 67.2(1) of the *Canada Transportation Act* includes persons who have not encountered a concrete situation involving a carrier, but who wish, on principle, to contest a term or condition of carriage:

> [7] Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.
>
> [8] The Agency is therefore of the opinion that it has jurisdiction to consider complaints that, on principle, allege that terms and conditions of carriage are inconsistent with subsection 67.2(1) of the CTA and section 111 of the ATR.

Similarly, in *O'Toole v. Air Canada*, 215-C-A-2006, Air Canada also filed a motion to dismiss on similar grounds, and the Agency, citing with approval its decision in *Black*, denied the motion and proceeded with the evaluation of the complaint. As noted earlier, the Agency cited *Black* with approval also in *Lukács v. Air Canada*, LET-C-A-155-2009.

(iv) Conclusion

Air Canada's preliminary motion is lacking any merits in light of the clear legislative intent of Parliament expressed by ss. 5 and 67.2(1) of the *Canada Transportation Act*.

Air Canada's preliminary motion to dismiss is merely an attempt to derail and/or delay the present proceeding, and bog it down with an irrelevant side-issue. The issue raised in the preliminary motion has already been determined, with finality, by the Agency, and Air Canada never sought nor was granted leave to appeal it to the Federal Court of Appeal. The present preliminary motion is an attempt by Air Canada to re-litigate a matter with respect to which the doctrine of *res judicata* and issue estoppel are applicable, and as such constitutes abuse of process.

Therefore, it is submitted that Air Canada's preliminary motion ought to be dismissed. Since Air Canada has been bringing up the same issue repeatedly, it is further submitted that the unique circumstances of the case warrant awarding costs against Air Canada with respect to the preliminary motion.

(c) Factual statements in Air Canada's submissions unsupported by evidence

(i) Misleading statement of facts

On page 5 of its submissions, Air Canada claims that all fares of WestJet are non-refundable. This is misleading, because WestJet's Domestic Rule 9.2 states that:

> All fares are purchased on a non-refundable basis. Unused transportation credits, less a service charge, may be applied to travel reserved within 396 days of the original coupon date of the first segment.
>
> [Emphasis added.]

(ii) Adverse inference

The doctrine of adverse inference is explained in *The Law of Evidence in Canada* by Sopinka, Lederman, and W. Bryant, 2nd ed. (Toronto: Butterworths, 1999) at paragraph 6.321:

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

Air Canada's submissions contain a number of representations of facts that Air Canada chose to not support by any documentary evidence even though such documents are in Air Canada's exclusive control:

1. On page 5 of its submissions, Air Canada claims that: "Air Canada's overbooking levels are half of what they are, on average, for US carriers."

2. On page 6 of its submissions, Air Canada claims that: "Air Canada engages in the practice of overbooking in order to absorb some of this risk and to, in turn, benefit customers.

3. On page 8 of its submissions, Air Canada claims that: "On domestic Air Canada flights, only 0.09% of passengers are subject to being denied boarding, which includes passengers who volunteer."

Air Canada has not placed any evidence before the Agency concerning its overbooking levels on domestic itineraries even though it has exclusive control of the data and documents. Furthermore, it fails to specify which US carriers it refers to, what the source of the data for the overbooking levels of US carriers is, and what the reference period is.

Therefore, it is submitted that these submissions of Air Canada are inadmissible as evidence, and the Agency ought to draw adverse inference as to Air Canada's levels of overbooking.

Air Canada has not placed any evidence and/or concrete calculation of the alleged risks referred to on page 6 of its submissions. There is no evidence before the Agency of how Air Canada turns the practice of overbooking to benefit customers. Risks can be calculated and quantified, and thanks to the insurance industry, there is a wealth of mathematical tools for assessing them. However, for reasons that are known only to Air Canada, it chose to not place any evidence to support its claims before the Agency.

Therefore, it is submitted that these submissions of Air Canada are mere speculations, and the Agency ought to draw adverse inference as to the existence of the alleged risk for Air Canada.

II. Is it reasonable for Air Canada to oversell its domestic itineraries?

The present complaint focuses on Air Canada's domestic tariffs, and not on its international ones. While overselling flights might have been an industry standard in the 20th century, this is manifestly not the case in the Canada of 2012. Air Canada's main competitor, WestJet, has an explicit policy of guaranteeing passengers their seats, and to never oversell its flights. In spite of this policy, WestJet has remained profitable, and is able to offer competitive fares.

Air Canada is referencing general information on the Agency's Web site, which is not an authority. Indeed, in *Lukács v. Air Canada*, LET-C-A-29-2011, the Agency held (at para. 23):

> [...] the material appearing on the Agency's Web site is provided solely for information purposes and due to timing of posting of amendments may not always reflect the most recent determinations in Agency decisions. Pleadings should refer to and reflect the actual decisions made by the Agency, which are also posted on the Web site.

The Agency's decisions in *B. J. Simcock v. Air Canada*, 180-C-A-2001 and *Kathleen Simcock v. Air Canada*, 181-C-A-2011 are of no assistance in advancing Air Canada's position, as the reasonableness of the practice of overselling flights was not in issue. Indeed, in these decisions, the Agency articulated the issues to be addressed as follows (at para. 11):

> 1. whether Air Canada applied the terms and conditions relating to denied boarding as set out in the carrier's tariff, and
>
> 2. whether Air Canada's tariff provision, which establishes a 30-day deadline for redemption of a travel voucher, issued in response to a denied boarding situation, is just and reasonable within the meaning of section 111 of the *Air Transportation Regulations*, SOR/88-58, as amended (hereinafter the ATR).

These decisions can also be easily distinguished from the case at bar by observing that they concerned international itineraries, while the present complaint is focused on domestic ones.

The present complaint is focused on Canadian domestic itineraries because of the unique nature of this market, where Air Canada's main competitor does not engage in the practice of overselling its flights. This is a unique circumstance specific to the Canadian domestic market that significantly diminishes the relevance of the comments of the US Department of Transportation on oversale of flights.

While the practice of oversale of flights is clearly preferable for Air Canada, there is no evidence before the Agency on how abolishing this practice on domestic itineraries would impact Air Canada's ability to meet its statutory, commercial and operational obligations. In *Griffiths v. Air Canada*, 287-C-A-2009, the Agency held (para. 25) that there is no presumption that a tariff is reasonable, and a mere declaration or submission by the carrier that a term or condition of carriage is preferable is not sufficient to lead to a determination that the term or condition is reasonable.

At the same time, it is common ground that oversale of flights significantly inconveniences passengers. It is also common ground that Air Canada has been engaging in deliberately overselling its domestic flights to maximize its profit at the expense of bumped passengers.

Therefore, based on the evidence before the Agency, the right of passengers to performance of the contract of carriage by Air Canada outweighs Air Canada's commercial benefit from the practice of overselling its domestic flights. Hence, it is submitted that it is unreasonable for Air Canada to maintain its practice of overselling its domestic flights.

III. Is Air Canada's Rule 245(E)(1)(b)(iv) reasonable?

The effect of this subrule is to exonerate Air Canada from paying denied boarding compensation to affected passengers if "for operational and safety reasons, his aircraft has been substituted with one having lesser capacity."

Air Canada's main submission on this point is found on page 7:

> It is of utmost importance that Air Canada is able to decide, for operational and safety reasons, to substitute an aircraft for one of lesser capacity and such a decision should not have negative commercial repercussions on the carrier nor should it entail the payment of denied boarding compensation.

The Applicant respectfully disagrees, and submits that this is no more than a declaration of the carrier that a term or condition is preferable, which is not sufficient for supporting reasonableness. The Applicant submits that there are a number of points that must be distinguished and addressed separately.

(i) Clarity and scope

It is submitted that the phrase "operational and safety reasons" is vague, and broad to the point that it can be turned into a catch-all excuse for not paying any compensation to victims of the practice of overbooking. Furthermore, the phrase mixes two reasons that can potentially be substantially different, namely, "operational reasons" and "safety reasons".

(ii) Safety reasons

It is plain and clear that in certain circumstances, a carrier has no choice but to substitute an aircraft with one having lesser capacity for safety reasons. It is also common ground that a carrier should not risk the safety of its passengers under any circumstance. The Applicant, however, disagrees with Air Canada as to who should bear the financial consequences of such events.

The Applicant submits that it is the carrier that has to bear the financial consequences of the need to substitute an aircraft for safety reasons, because the carrier can reasonably be expected to maintain its fleet, and to take into consideration the possibility of mechanical failures. The Applicant's position is consistent with the current state of the law in Canada as articulated in *Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, and reiterated in *D'Onofrio c. Air Transat A.T. inc.*, [2000] J.Q. no 2332. Recently, the same principles were cited with approval and applied in *Lukacs v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111).

(iii) Operational reasons

Operational reasons are, presumably, reasons related to the operational needs of Air Canada. It is submitted that this phrase creates a back door for overselling flights, namely, by advertising and selling tickets for a particular route on a given aircraft, and then substituting the aircraft with a smaller one. A consistent interpretation of the phrase leads to the absurd conclusion that Air Canada might be able to escape paying denied boarding compensation to passengers in this case.

It is submitted that this consequence is absurd, patently unreasonable, and amounts to contravention of the obligation to pay denied boarding compensation found in s. 107(1)(n)(iii) of the *Air Transportation Regulations*, SOR/88-58.

(iv) 14 CFR Part 250.6(b)

As a preliminary matter, it is to be noted that the US Department of Transportation regulation cited by Air Canada uses the disjunctive language "operational or safety reasons" as opposed to Air Canada's ambiguous conjunctive wording "operational and safety reasons".

It is the Applicant's understanding that this language was originally created and promoted by IATA, which represents the interests of the carriers, and was unfortunately adopted by the US Department of Transportation. The Applicant submits that the Canadian jurisprudence differs on this point from the American one, and is more onerous for carriers. Indeed, in *Lukács v. United Airlines*, 2009 MBQB 29 (leave to appeal denied; 2009 MBCA 111), the court cited of *Quesnel*, *supra* with approval:

> [32] The court held that the airline must take into consideration the possibility of mechanical failures and provide for efficient solutions to assure the service contracted with the public. I agree.

(v) Conclusions

Rule 245(E)(1)(b)(iv) creates a catch-all blanket exclusion for payment of denied boarding compensation, which exonerates the carrier from the obligation to pay the compensation even in cases where it is liable under Canadian jurisprudence. This is a manifestedly carrier-centred approach

that fails to take into consideration the significant inconvenience caused to passengers who are denied boarding as a result of substitution of the aircraft for reasons that are within the control and responsibility of the carrier. As such, it is submitted that Rule 245(E)(1)(b)(iv) is unreasonable.

IV. Is Air Canada's Rule 245(E)(2), governing the amount of denied boarding compensation, reasonable?

(a) Crucial questions left unanswered

Although Air Canada has made detailed submissions on its domestic network and the various possibilities to reroute passengers, it chose to ignore a number of crucial questions related to the reasonableness of the *amount* of the denied boarding compensation:

1. What methodology did Air Canada apply to arrive at the domestic denied boarding compensation of $100 cash or $200 travel voucher?

2. What was the rationale in determining that these amounts were reasonable?

3. What was the rationale in determining that a compensation by travel voucher is reasonable?

4. In what year were these amounts established?

5. Were these amounts ever updated to reflect inflation?

(Questions of this nature were directed to WestJet by the Agency in relation to WestJet's baggage liability on domestic itineraries, in Decision No. LET-C-A-173-2009.)

(b) Contradictions in Air Canada's submissions

On page 9 of its submissions, Air Canada states that:

> It is also important to keep in mind that the compensation level in EC No. 261/2004 are based on distance of flight in a geography where countries are small and close by [...]

At the same time, on page 10, Air Canada states that:

> [...] denied boarding compensation amounts are lower on domestic flights because the average distance traveled and fare paid by a passenger for a domestic itinerary is lower than the fare paid for a transborder or international itinerary.

It is submitted that Air Canada's position is self-contradictory. Similarly, although Air Canada conceded that WestJet does not engage in the practice of oversale of flights, Air Canada provides

the following explanation for why it cannot adopt a denied boarding compensation scheme similar to the one established by the European Union:

> If Air Canada were to apply this same compensation for its domestic flights, without its competitors doing the same, it would be at a significant competitive disadvantage.

It is submitted that Air Canada's position is absurd, because its main competitor, WestJet, does not oversell its flights. In other words, Air Canada may suffer some financial consequence only if it chooses to continue to oversell its domestic itineraries at the current rate. This is consistent with the purpose of the newly implemented 14 CFR Part 250.5 regulation, namely, to encourage careful overbooking practices on the part of Air Canada.

(c) The *Anderson v. Air Canada* case

The *Anderson v. Air Canada*, 666-C-A-2001 case can easily be distinguished from the case at bar. Indeed, Mr. Anderson argued that Air Canada should develop a denied boarding policy that allows for the "displacement of the lowest fare travellers first". In other words, the thrust of Mr. Anderson's complaint was against the egalitarian nature of the denied boarding compensation provided by Rule 245(E)(2). This is clearly not the case here.

In the present complaint, the Applicant submits that the amount of $100 cash or $200 travel voucher is simply unreasonably and extraordinarily low compared to what is standard in the year 2012 in the airline industry.

In 2001, when the *Anderson* case was decided by the Agency, the amount of $100 cash or $300 travel voucher (as Rule 245(E)(2) read at the time) were reasonably in par with compensation schemes of other airlines and countries. However, in 2012, these amounts are no longer in line with the rest of the developed world. Indeed, *Regulation 261/2004 (EC)* imposes a *cash* compensation scale of EUR 150/300/600 (equivalent to $200/$400/$800), while 14 CFR Part 250.5 adopted compensation ceilings of $650/$1,300.

Therefore, it is submitted that due to the time elapsed since the *Anderson* decision, the inflation that has taken place since then, and the substantial regulatory changes that have taken place in the area of denied boarding compensation in the past eleven years, the conclusion of the *Anderson* case concerning the reasonableness of Rule 245(E)(2) is outdated, and ought to be revisited.

(d) Cash v. travel voucher

In Decision No. 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. Based on this finding, it is submitted that the present proceeding ought to focus on the amount of cash compensation only.

(e) Conclusions

While Rule 245(E)(2) and the denied boarding compensation amounts set out in it might have been reasonable in 2001, at the time of the *Anderson* decision, in the eleven years since then, a number of significant changes have taken place in the airline industry of the developed world insofar as denied boarding compensation is concerned.

Consequently, in the year 2012, the amounts provided by Rule 245(E)(2) no longer reflect the industry standards, and are extraordinarily and unreasonably low.

The scheme provided by 14 CFR Part 250.5 is a possible reasonable way of regulating denied boarding compensations, but it is not the only reasonable one, and the scheme of the European Union provided by *Regulation (EC) 261/2004* is also reasonable. Air Canada would not suffer any competitive disadvantage by implementing either of them on its domestic itineraries, since it is the only large domestic carrier in Canada that engages in oversale of flights.

Rule 245(E)(2) is unreasonable because it fails to strike the balance 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.

All of which is most respectfully submitted.

Gábor Lukács
Applicant

Cc: Julianna Fox, Counsel, Regulatory and International, Air Canada