DECISION NO. 342-C-A-2013

August 29, 2013

IN THE MATTER OF Decision No. 204-C-A-2013 in response to a complaint filed by Gábor Lukács against Air Canada.

File No. M4120-3/13-04144

INTRODUCTION

[1] In Decision No. 204-C-A-2013 dated May 27, 2013, the Canadian Transportation Agency (Agency):

- disallowed Rule 245(E)(1)(b)(iv) of Air Canada's *Canadian Domestic General Rules Tariff No. CDGR-1* (Tariff). This provision relieves Air Canada from compensating a passenger if, for operational and safety reasons, the aircraft on which the passenger had a confirmed reservation has been substituted with an aircraft of lesser capacity, thereby preventing Air Canada from accommodating the passenger on that aircraft;
- disallowed Rule 245(E)(2) of the Tariff, which governs the amount of denied boarding compensation tendered to affected passengers. Rule 245(E)(2) provides that, subject to certain conditions, and at the passenger's option, Air Canada will tender liquidated damages in the amount of CAD$100, or will offer a travel voucher in the amount of CAD$200 for travel within Canada, the United States of America or Mexico;
- directed Air Canada, with respect to Rule 245(E)(1)(b)(iv), to show cause why the revised tariff provision should not contain language consistent with the finding in Decision No. 204-C-A-2013 that, in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers, and
- with regard to Rule 245(E)(2), directed Air Canada to show cause why it should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács.

[2] On June 28, 2013, Air Canada filed its answer, and on July 4, 2013, Mr. Lukács filed his reply. In its answer, Air Canada proposed a denied boarding compensation regime that "intertwines Mr. Lukács' proposal with aspects of the U.S. regime." In his reply, Mr. Lukács, among other matters, addressed the form of payment of denied boarding compensation, and the conditions associated with travel vouchers.

PRELIMINARY MATTER

[3] In his submission, Mr. Lukács submits that media reports relating to Decision No. 204-C-A-2013 have referred to a statement by Air Canada that it would consult with the Agency about how to revise Air Canada's denied boarding compensation policies. He suggests that such reports create the impression that Air Canada and the Agency have engaged in private discussions regarding the present proceeding, and that those discussions, if they have occurred, are "grossly inappropriate and would create a reasonable apprehension of bias." Mr. Lukács therefore requests the Agency to confirm that the only communication it has had with Air Canada respecting the present proceeding since the issuance of Decision No. 204-C-A-2013 is Air Canada's submission dated June 28, 2013.

[4] The Agency advises that consultations were not conducted between itself and Air Canada regarding the present matter. The Agency, as an impartial quasi-judicial tribunal, does not meet separately with parties without informing other parties to the matter, as to do so would constitute a breach of natural justice.

ISSUES

1. Has Air Canada shown cause why with respect to Rule 245(E)(1)(b)(iv), the revised provision should not contain language consistent with the finding in Decision No. 204-C-A-2013 that, in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers?

2. Has Air Canada shown cause why, with respect to Rule 245(E)(2), it should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács?

3. If Air Canada has not shown cause with respect to Rule 245(E)(2), what denied boarding compensation regime must Air Canada apply, the regime in effect in the United States of America or the regime proposed by Mr. Lukács?

4. What form of payment should be tendered for denied boarding, and if travel vouchers are offered, what conditions should be associated with those vouchers?

ISSUE 1: HAS AIR CANADA SHOWN CAUSE WHY WITH RESPECT TO RULE 245(E)(1)(b)(iv), THE REVISED PROVISION SHOULD NOT INCLUDE LANGUAGE CONSISTENT WITH THE FINDING IN DECISION NO. 204-C-A-2013 THAT, IN THE ABSENCE OF AIR CANADA DEMONSTRATING THAT ALL REASONABLE MEASURES WERE TAKEN TO AVOID SUBSTITUTION TO A SMALLER AIRCRAFT, DENIED BOARDING COMPENSATION WILL BE TENDERED TO AFFECTED PASSENGERS?

Positions of the parties

Air Canada

[5] Air Canada submits that in light of Decision No. 204-C-A-2013, it proposes the following revised tariff provision regarding the exception to the payment of denied boarding compensation in the case of aircraft downgauge for operational and/or safety reasons:

> (iv) if, for operational or safety reasons occurring beyond carrier's control, his aircraft has been substituted with one of lesser capacity.

Mr. Lukács

[6] Mr. Lukács claims that Air Canada's proposed Rule 245(E)(1)(b)(iv) is inconsistent with the Agency's finding in Decision No. 204-C-A-2013 that in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation must be tendered to affected passengers. He therefore submits that Air Canada has failed to show cause respecting this matter, and that Rule 245(E)(1)(b)(iv) ought to be substituted with the following provision, which conforms to Decision No. 204-C-A-2013:

> (iv) if the Carrier can demonstrate both that:
>
> > (1) for operational or safety reasons beyond the Carrier's control, his aircraft has been substituted with one of lesser capacity; and
> >
> > (2) the Carrier took all reasonable measures to avoid the substitution or that it was impossible for the Carrier to take such measures.

Analysis and findings

[7] In Decision No. 204-C-A-2013, the Agency specifically provided Air Canada with the opportunity to show cause why with respect to Rule 245(E)(1)(b)(iv), a revised provision should not contain language consistent with the finding in Decision No. 204-C-A-2013 that, in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers. In its answer, Air Canada simply proposed a tariff provision that does not include the aforementioned language, and failed to make any submissions respecting that language.

[8] In light of the foregoing, the Agency finds that Air Canada has failed to show cause respecting this matter.

ISSUE 2: HAS AIR CANADA SHOWN CAUSE WHY, WITH RESPECT TO RULE 245(E)(2), IT SHOULD NOT APPLY EITHER THE DENIED BOARDING COMPENSATION REGIME IN EFFECT IN THE UNITED STATES OF AMERICA OR THE REGIME PROPOSED BY MR. LUKÁCS?

Positions of the parties

Air Canada

[9] Air Canada maintains that the Agency should adopt its own denied boarding compensation regime as opposed to mimicking the United States of America regime, which was developed following consultations with relevant industry players and accounts for issues specific to the United States of America air transportation market. Air Canada contends that the Agency has departed from the spirit of the United States of America legislation with respect to downgauges, and should do likewise for denied boarding compensation amounts. Air Canada submits that the United States of America Department of Transportation does not require compensation be paid for denied boarding caused by downgauging, even for reasons within the carrier's control. Air Canada claims, therefore, that the requirement to pay denied boarding compensation when substitution to a smaller aircraft occurs goes beyond the obligations imposed by United States of America legislation.

[10] Air Canada submits that the amounts set under the United States of America regime were specifically established to strike a balance between permitting carriers to continue to overbook flights, but limiting the carrier's financial burden from compensating passengers due to oversales, and adequately protecting passengers' interests in oversales situations.

[11] Air Canada proposes the following compensation regime which "intertwines Mr. Lukács' proposal with aspects of the U.S. regime":

Delay at arrival	Air Canada's proposed denied boarding compensation amounts	Air Canada's voucher amounts
0 to 1 hour	CAD$100	CAD$150
1 to 6 hours	100 percent of one-way air transportation charges but no less than CAD$100 and no more than CAD$400	CAD$400
6 hours and more	200 percent of one-way air transportation charges but no less than CAD$100 and no more than CAD$800	CAD$800

[12] Air Canada submits that, for the purpose of its proposal, "air transportation charges" have the meaning set out in section 135.5 of the *Air Transportation Regulations*, SOR 88-58, as amended (ATR) and includes every fee or charge that must be paid upon the purchase of an air service, including the charge for the costs to the carrier of providing the service, but excluding any third party charge.

[13] Air Canada argues that its proposal strikes a balance between Mr. Lukács' proposal and Air Canada's financial burden from compensating passengers due to oversales while adequately protecting passengers' interests in oversales (and downgauge) situations. It submits that its proposal reflects the following commercial realities:

- The denied boarding compensation amount increases depending on the length of delay at arrival. Air Canada recognizes that the inconvenience to passengers likely increases as the length of delay increases.
- The denied boarding compensation will reflect the one-way air transportation charges. The upper limit of the compensation is set as per Mr. Lukács' recommendation and calculations. Using such levels as maximum amounts allows for the assurance that, according to Mr. Lukács' submissions, between 84 percent to 90 percent of persons who purchased economy cabin tickets that may be denied boarding are compensated adequately based on the fares paid. In other words, the capped percentage based approach means that for delays of between 1 to 6 hours, 84 percent and 90 percent of persons that may potentially be denied boarding would travel without assuming one-way transportation charges as they will be reimbursed based on the one-way air transportation charges paid to Air Canada as well as reprotected based on Air Canada's tariff provisions. For delays of over 6 hours, such passengers would receive double the amount of compensation.
- A lower level is set to ensure that passengers purchasing deeply discounted fares are compensated at no less than the current compensation level of CAD$100.

[14] Air Canada points out that it must account for commercial and competitive realities within the Canadian air transportation industry in deciding this matter. It submits that with its proposal, Air Canada would have the most generous denied boarding compensation amounts among Canadian carriers. Air Canada submits that the Agency's final decision will only be imposed on Air Canada, and that other carriers will not be obliged to apply the compensation levels that will be established. Air Canada therefore stresses that, in order to maintain a level playing field, any initiative regarding imposed denied boarding compensation levels should be done via regulation and not adjudication.

Mr. Lukács

[15] Mr. Lukács submits that the following features of Air Canada's proposal are noteworthy:

- Unlike the compensation scheme in effect in the United States of America, the proposed scheme uses "air transportation charges" for the calculation of the amount of compensation. This excludes all taxes and airport fees, which comprise a significant portion of the total cost of transportation.

- The proposed scheme considers delays between 1 and 6 hours as causing the same amount of inconvenience and damage, whereas the regime in effect in the United States of America is based on 3 tiers of delays: 0-1 hour, 1-2 hours, and over 2 hours.
- In many cases, the proposed scheme provides for less than half of the amount of compensation under the regime in effect in the United States of America.
- The proposal is a mere framework, and does not disclose the specific wording of the tariff provision that Air Canada intends to use to replace Rule 245(E)(2). In particular, it fails to address where the choice lies with respect to the form of the compensation (cash or voucher).

[16] Mr. Lukács proceeds to apply each of the compensation regimes under consideration to four specific city pairs. He submits that his examples demonstrate common features that form a pattern:

- In all cases, Air Canada’s proposal provides a lower amount of cash compensation than at least one (and often both) reasonable regimes.
- With the exception of very short delays (less than an hour), the regime in effect in the United States of America provides the highest amount of cash compensation.
- For shorter, cheaper flights (such as Vancouver to Calgary), Air Canada’s proposal provides virtually the same amount of compensation for delays between 0 to 6 hours, and fails to provide an incentive for Air Canada to reprotect passengers in a timely manner.

[17] With respect to Air Canada’s assertion that it has adopted Mr. Lukács’ approach with certain modifications, Mr. Lukács maintains that Air Canada’s proposal is entirely incomparable with the compensation regime that he has proposed. He submits that his examples demonstrate that, in the vast majority of cases, Air Canada’s scheme provides for substantially lower compensation amounts than he has proposed, the only exception being for delays ranging from 1 to 2 hours, where Air Canada’s scheme is more generous in some, but not all cases.

[18] Mr. Lukács claims that an additional, qualitative difference between Air Canada’s scheme and the compensation regime that he has proposed is that Air Canada proposes to treat delays between 1 hour to 6 hours as causing the same amount of inconvenience, while the regime he has proposed seeks to do so only with respect to delays between 2 to 6 hours. He explains that this is a substantial difference, for two reasons. First, there is a qualitative difference between the inconvenience of a delay of 1 hour and 5 minutes and a delay of 2 hours and 30 minutes. Second, it is very rare for a carrier to be able to reprotect passengers who are denied boarding so efficiently that their delay at arrival is less than 1 hour; it is far more common and realistic to do so with a delay of less than 2 hours at arrival. Mr. Lukács submits that, consequently, the compensation regime proposed by Air Canada fails to adequately consider the inconvenience caused to passengers and fails to create an incentive for Air Canada to reprotect passengers efficiently.

[19] With respect to Air Canada's submission that it would have the most generous denied boarding compensation amounts in the domestic market, Mr. Lukács asserts that such submission is virtually meaningless, because no other major airline in the domestic market oversells its flights as part of its business model.

[20] Concerning Air Canada's submission related to its financial burden and competitive disadvantage, Mr. Lukács argues that the "financial burden" that Air Canada mentions in its submissions is simply the common and ordinary obligation of every person to compensate others for damage the person causes to them, and it is not special to Air Canada or the airline industry. He submits that there is not even a "scintilla of evidence" to suggest that adequately compensating passengers would create any noteworthy or significant financial burden for Air Canada.

[21] Mr. Lukács asserts that overselling flights is not an act of God that is outside of Air Canada's control, but rather part of Air Canada's business model, and as such, Air Canada has full control over it. He argues that Air Canada can substantially decrease its exposure to the obligation of paying denied boarding compensation by decreasing its oversell rates.

[22] Mr. Lukács points out that, according to Air Canada's representations, only 0.09 percent of Air Canada's domestic passengers are affected by denied boarding. He submits that this means that increasing the amount of denied boarding compensation payable in cash from CAD$100 to CAD$650 (the maximum under the regime in effect in the United States of America, for delays up to 2 hours) would amount to only an additional cost of CAD$0.495 per passenger. Similarly, increasing the amount of compensation to CAD$400 (the amount that he has proposed for delays up to 6 hours) would amount to only an additional cost of CAD$0.27 per passenger. Mr. Lukács submits that if Air Canada is able to reprotect passengers more efficiently, then these costs can be further reduced.

[23] Air Canada submits that any initiative to impose denied boarding compensation levels should be done by way of regulation and not adjudication. In response, Mr. Lukács submits that the ATR already imposes on air carriers the obligation to provide compensation for denied boarding. Mr. Lukács submits that the carrier's policy on this subject must be reasonable within the meaning of subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA). He concludes that there are already regulations governing the subject matter of denied boarding compensation, even if they are perhaps not as comprehensive as Air Canada may wish.

[24] As for the balancing test to establish the reasonableness of terms and conditions of carriage, Mr. Lukács refers to Air Canada's submission that its proposal strikes a balance between his proposal and Air Canada's financial burden in compensating passengers due to oversale while adequately protecting passengers' interests in oversales (and downgauge) situations. Mr. Lukács observes that Air Canada's balancing test misstates the test applied by the Agency under which tariff provisions must strike a balance between the rights of passengers to be subject to reasonable terms and conditions and the air carrier's statutory, commercial, and operational obligations.

[25] With reference to Air Canada's proposed denied boarding compensation regime, Mr. Lukács submits that a key element in that regime is that it provides the same amount of compensation for delays between 1 hour and 6 hours. Mr. Lukács argues that the policy's objective of creating an incentive for efficient reprotection of passengers is defeated by providing the same compensation for delays between 1 hour and 6 hours, because reprotecting a passenger in a way that the delay at arrival is less than 1 hour is uncommon due to the frequencies of domestic flights. As a consequence, Air Canada is unlikely to make a genuine effort to reach an objective that is unrealistic in most cases. Mr. Lukács submits that keeping the delay caused by denied boarding under 2 hours is a challenging, but realistic objective, which Air Canada could achieve using its extensive network, provided that it develops adequate and rapid procedures for reprotecting passengers.

[26] Mr. Lukács submits, with respect to Air Canada's proposal to base denied boarding compensation only on the "air transportation charges" paid by passengers, that such proposal unreasonably reduces the compensation payable to passengers by 20-30 percent, depending on the itinerary. In this regard, Mr. Lukács notes that the denied boarding compensation regime in effect in the United States of America is based on the "fare" being defined as "the price paid for air transportation including all mandatory taxes and fees" and "does not include ancillary fees for optional services." He submits, therefore, that the Canadian equivalent of this notion is the "total price" and not the "air transportation charges" used in Air Canada's proposal.

[27] Mr. Lukács submits that under its proposed regime, Air Canada proposes to pay 100 percent of the air transportation charges in the case of delay ranging from 1 hour to 6 hours, and 200 percent for delays over 6 hours. He submits that Air Canada provided no explanation as to how it reached these percentages, and what led it to the conclusion that these percentages are reasonable. Mr. Lukács argues that these percentages are not reasonable in the realities of 2013, and that such percentages are based on an outdated version of the denied boarding compensation regime that was in effect in the United States of America, which required compensation in the amount of 100 percent of the fare and up to a maximum of US$400 for shorter delays, and for 200 percent of the fare and up to a maximum of US$800 for longer delays. He submits that in 2011, the United States of America Department of Transportation concluded that this compensation regime was no longer adequate, and revised the regime to its current state.

[28] Mr. Lukács submits that a comparison between the denied boarding compensation scheme proposed by Air Canada and the two regimes that the Agency held to be reasonable reveals that the amount of compensation payable according to Air Canada's proposal is substantially lower than what at least one of the reasonable regimes requires. According to Mr. Lukács, this difference is particularly striking in the case of delays over 1 hour, where the denied boarding compensation regime in effect in the United States of America provides the highest amount of cash compensation among the three that were considered. Mr. Lukács claims that Air Canada has provided no explanation or justification for offering significantly lower compensation to passengers who are denied boarding than what was deemed fair and adequate in the United States of America.

[29] Mr. Lukács submits that Air Canada has not tendered any evidence with respect to the financial burden of increasing the denied boarding compensation amount. He states that in light of the Agency's finding that Air Canada failed to demonstrate how a higher level of compensation would place it in a disadvantageous position, Air Canada's proposed compensation scheme fails to strike a balance between the rights of passengers and Air Canada's statutory, commercial, and operational obligations. Mr. Lukács concludes, therefore, that Air Canada has failed to address the Agency's show cause respecting this matter, and that the only question remaining is whether Air Canada should be required to apply the regime that he has proposed, or that is in effect in the United States of America.

Analysis and findings

[30] Air Canada submits that the Agency should adopt a denied boarding compensation regime that is unique from that applied by the United States of America, and that in considering the present matter, the Agency must recognize the commercial and competitive realities of the Canadian air transport industry. Air Canada maintains that its proposal strikes a balance between Mr. Lukács' proposal and Air Canada's financial burden in compensating passengers who are affected by oversales. Air Canada argues that, with its proposal, Air Canada would have the most generous denied boarding compensation regime among Canadian carriers. According to Air Canada, the Agency's decision only applies to Air Canada, and in order to establish a level playing field, revised denied boarding compensation levels should be determined by regulation, and not by adjudication.

[31] Mr. Lukács submits that the financial burden assumed by Air Canada in compensating passengers affected by denied boarding represents the common and ordinary obligation of every person to compensate for damage caused by that person. He further submits that Air Canada has failed to produce a "scintilla of evidence" to substantiate Air Canada's contention that adequately compensating passengers would impose a financial burden. Mr. Lukács challenges the significance of Air Canada's submission that Air Canada's proposed denied boarding compensation regime constitutes the most generous regime in the domestic market among Canadian carriers, pointing out that Air Canada is the only carrier in the domestic market that oversells flights as part of its business model. With respect to Air Canada's submission that revised denied boarding compensation amounts should be imposed by regulation, and not by adjudication, Mr. Lukács maintains that the ATR require air carriers to provide denied boarding compensation, which must be reasonable within the meaning of subsection 67.2(1) of the CTA.

[32] In Decision No. 204-C-A-2013, the Agency directed Air Canada to show cause why it should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács. The Agency did not provide Air Canada with the opportunity to propose a denied boarding compensation regime other than that governing denied boarding in the United States of America, or proposed by Mr. Lukács. In answer to Decision No. 204-C-A-2013, Air Canada proposed a denied boarding compensation regime that "intertwines Mr. Lukács' proposal with aspects of the U.S. regime." Air Canada's submission briefly commented on the denied boarding compensation regime in effect in the United States of America, and did not specifically address Mr. Lukács' proposed denied boarding compensation regime.

[33] The Agency agrees with Mr. Lukács that Air Canada has failed to provide a "scintilla of evidence" to demonstrate that either the United States of America denied boarding compensation regime or Mr. Lukács' regime will impose a financial burden on Air Canada. The Agency also agrees with Mr. Lukács that the significance of Air Canada's submission respecting the generosity of Air Canada's proposed denied boarding compensation regime relative to other Canadian carriers is dubious given the unchallenged assertion by Mr. Lukács that no other Canadian carrier engages in oversales as an element of the carrier's business model. Further, the Agency is of the opinion that the matter of oversales is completely within Air Canada's control, and that if Air Canada wishes to restrict those oversales, it may do so.

[34] With respect to Air Canada's submission that denied boarding compensation amounts should be imposed by regulation, rather than by adjudication, the Agency notes that its actions in the present matter are consistent with the regulations and legislation governing the Agency's activities, particularly subsection 67.2(1) of the CTA that requires, in part, that terms and conditions applicable to domestic carriage not be unreasonable.

[35] As for Air Canada's concern about establishing a level playing field for denied boarding compensation among Canadian carriers, Air Canada is at liberty to propose and advocate for any regulatory changes it considers necessary to achieve such a level playing field and engage in discussions in other fora where permitted by law.

[36] In light of the foregoing, the Agency finds that Air Canada has failed to show cause why it should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács.

ISSUE 3: IF AIR CANADA HAS NOT SHOWN CAUSE WITH RESPECT TO RULE 245(E)(2), WHAT DENIED BOARDING COMPENSATION REGIME MUST AIR CANADA APPLY, THE REGIME IN EFFECT IN THE UNITED STATES OF AMERICA OR THE REGIME PROPOSED BY MR. LUKÁCS?

[37] Mr. Lukács submits that both the United States of America denied boarding compensation regime and the regime that he has proposed have numerous advantages. He states that the United States of America denied boarding compensation regime provides a high amount of compensation after a delay of only 2 hours; however, it depends on the fare ("total price") paid by the passenger. Mr. Lukács further submits that the regime that he has proposed is egalitarian, depending only on the length of the delay caused, and it is more straightforward, easier to understand both for passengers and for Air Canada agents, and therefore leaves less room for calculation errors and disputes. He concludes that his proposed regime creates a substantial incentive to reprotect passengers within 2 hours, but does not disproportionately punish carriers if they succeed in doing so, with only a delay of less than 6 hours.

Analysis and findings

[38] In Decision No. 204-C-A-2013, the Agency determined that both the United States of America denied boarding regime and the regime proposed by Mr. Lukács, are reasonable. To now determine which of the regimes the Agency will direct Air Canada to apply, the Agency will consider the following factors:

- the degree to which the compensation regime mitigates the inconveniences suffered by passengers affected by denied boarding
- the extent to which the denied boarding compensation regime is understandable; and,
- the ease of implementation of the regime

[39] With respect to the mitigation of inconveniences, the Agency finds that, in comparison with the United States of America regime, Mr. Lukács' proposed regime provides a more significant incentive for a carrier to accommodate passengers who are denied boarding within a short period, i.e., 2 hours, therefore lessening the possible inconveniences suffered by passengers because of the delay in their journey. Mr. Lukács' proposed regime is also cognizant of the carrier's position as that regime does not severely punish carriers who are able to carry passengers on another flight within 6 hours of the passengers being denied boarding for their originally booked flight. As such, the Agency finds that, with respect to this particular matter, Mr. Lukács' proposed denied boarding regime is reasonable as it strikes a balance between the consumers' interests and Air Canada's commercial obligations.

[40] As for understandability and ease of implementation, the Agency agrees with Mr. Lukács' submission that his proposed regime is more straightforward and is easier to understand than the United States of America regime, for both passengers and carriers. The Agency finds it extremely important that passengers be able to easily comprehend and predict the compensation that may be due in the event of denied boarding so as to allow those passengers to exercise their rights. In this sense, the Agency finds that Mr. Lukács' proposed regime accomplishes this objective.

[41] The Agency also notes, as submitted by Mr. Lukács, that the denied boarding compensation regime he has proposed is egalitarian, unlike the United States of America regime, in that affected passengers are tendered the same amount of compensation, regardless of the fare paid. This approach is consistent with Decision No. 666-C-A-2001 (*Anderson v. Air Canada*).

[42] In light of the foregoing, the Agency concludes that the regime proposed by Mr. Lukács is the preferable option to apply to passengers who are involuntarily denied boarding. The Agency emphasizes that the regime that the Agency has determined to be reasonable applies solely to involuntary denied boarding, and does not relate to situations where a passenger volunteers to be denied boarding for whatever compensation Air Canada offers.

ISSUE 4: WHAT FORM OF PAYMENT SHOULD BE TENDERED FOR DENIED BOARDING, AND IF TRAVEL VOUCHERS ARE OFFERED, WHAT CONDITIONS SHOULD BE ASSOCIATED WITH THOSE VOUCHERS?

[43] Mr. Lukács submits that, in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency determined 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 states that this principle was recently endorsed by the Agency in Decision No. 227-C-A-2013 (*Lukács v. WestJet*), in the specific context of denied boarding compensation.

[44] Mr. Lukács argues that while passengers may choose to accept compensation in a form other than cash or equivalent, the passengers' decision to do so must be an informed one, and passengers are entitled to a reasonable opportunity to fully assess their options. He submits that the airport does not provide an adequate setting and opportunity for passengers to make an informed decision about their choice of denied boarding compensation. Mr. Lukács concludes that requiring carriers to pay denied boarding compensation in cash or equivalent, and not by travel voucher, offers the most protection for passengers.

[45] Mr. Lukács maintains that, in practice, travel vouchers tend to be nearly worthless because of the following restrictions applied to their use:

- Unlike cash, vouchers are valid only for one year, after which they expire and become worthless.
- Unlike cash, vouchers are valid only on transportation on Air Canada or Jazz, and on Air Canada Vacations; they cannot be used on itineraries that also involve a code-sharing partner of Air Canada.
- Unlike cash, taxes, fees, charges and surcharges related to an itinerary cannot be paid by a voucher. The sum of these charges is often equal to or even exceeds the base fare.
- Although travel vouchers can be combined, only a maximum of three vouchers may be used for the purchase of a new ticket.
- It appears from Air Canada's submissions that vouchers received as denied boarding compensation on domestic flights are valid only for domestic flights, or perhaps flights within North America; they are not valid for transatlantic travel.

[46] Mr. Lukács submits that if carriers are permitted to provide, at the passengers' option, travel vouchers in lieu of denied boarding compensation, the amount of the travel voucher ought to be determined as a multiple of the amount due in cash. Mr. Lukács points out that in a submission dated August 15, 2012, related to another matter before the Agency, Air Canada proposed to increase the amount of the travel voucher to CAD$300, representing a ratio of 1:3 based on the existing level of compensation of CAD$1 in cash. He submits that if compensation by travel vouchers is acceptable at all, then the 1:3 ratio is reasonable, given the restrictions associated with vouchers, and is consistent with the ratio of 1:2.5 applied by Air Canada for international travel.

[47] Mr. Lukács requests that the Agency disallow Air Canada's proposal that permits paying denied boarding compensation by travel vouchers, or in the alternative, impose the following restrictions:

(1) Air Canada must inform passengers of the amount of cash compensation that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;

(2) Air Canada must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;

(3) Air Canada must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;

(4) the amount of the travel voucher must be not less than 300 percent of the amount of cash compensation that would be due;

(5) passengers are entitled to exchange the travel vouchers for cash at the rate of CAD$1 in cash being equivalent to CAD$3 in travel vouchers within one (1) year.

Analysis and findings

[48] Mr. Lukács submits that in previous decisions, the Agency has determined that compensation must be tendered to passengers in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He adds that if travel vouchers remain an option for passengers to choose instead of a cash payment for denied boarding, the choice must be an informed one. Mr. Lukács argues that, in practice, travel vouchers tend to be meaningless given the numerous restrictions associated with them. He proposes that certain conditions be applied to the vouchers, and that the value of those vouchers be based on a ratio of 1:3.

[49] The Agency agrees with Mr. Lukács' submission that passengers must be afforded ample opportunity to determine whether they wish to choose travel vouchers in lieu of a cash payment as denied boarding compensation, and that this choice should only be made after Air Canada fully informs passengers of the conditions attached to those vouchers. The Agency finds that, in light of the ratio applicable to cash compensation versus values of travel vouchers for international carriage, the ratio of 1:3 proposed by Mr. Lukács is reasonable.

[50] In light of the foregoing, the Agency finds that the restrictions that Mr. Lukács proposes be imposed on the issuance of vouchers are reasonable, with the exception of the one-year period proposed by Mr. Lukács for persons to exchange travel vouchers for cash. The Agency is of the opinion that the proposed period is excessive, and finds that a one-month period for an exchange is more reasonable.

ORDER

[51] In this Decision, the Agency has determined that:

1. Air Canada has failed to show cause why Rule 245(E)(1)(b)(iv) should not include text providing that in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers;

2. Air Canada has failed to show cause why, with respect to Rule 245(E)(2), it should not apply either the denied boarding compensation regime in effect in the United States of America or the regime proposed by Mr. Lukács;

3. The regime proposed by Mr. Lukács is preferable to that in effect in the United States of America; and,

4. Should Air Canada choose to offer the option of travel vouchers as a form of denied boarding compensation, the conditions proposed by Mr. Lukács are reasonable, with the exception of the one-year period for the exchange of travel vouchers for cash for which the Agency finds that a one-month period for an exchange is reasonable.

[52] The Agency orders Air Canada, by September 18, 2013, to:

1. revise Rule 245(E)(1)(b)(iv) to reflect the findings of this Decision, failing which the Agency may prescribe the appropriate text;

2. revise Rule 245(E)(2) to incorporate the denied boarding compensation regime proposed by Mr. Lukács; and,

3. include in Rule 245(E)(2) the conditions proposed by Mr. Lukács if Air Canada chooses to offer the option of travel vouchers as a form of denied boarding compensation. As set out in this Decision, there would be a one-month period for the exchange of travel vouchers for cash.

(signed)

J. Mark MacKeigan
Member

(signed)

Geoffrey C. Hare
Member