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May 23, 2016

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, ON K1A 0N9

Dear Madam Secretary:

Re: Mr. Christopher C. Johnson and Dr. Gábor Lukács v. Air Canada
Application concerning failure to apply the tariff and application of terms and conditions not set out in the tariff and with respect to delayed passengers
Case No.: 15-05627
Reply with respect to request to submit rebuttal evidence and for an extension

Please accept the following submissions as a reply to Air Canada's submissions of May 20, 2016 pursuant to Rules 30(3) and 34(3) of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("*Dispute Rules*").

Scope of the Application

1. Air Canada misstates at paragraph 18 of its May 20, 2016 submissions the scope of the present Application, which encompasses Air Canada's practices with respect to the reimbursement of expenses incurred by delay of passengers for any reason, and is not confined to "flight cancellation for uncontrollable circumstances." The Applicants allege that Air Canada has been applying the Impugned Policy and/or other unofficial policies instead of the *Montreal Convention*.

Application, p. 1, item (iii)

2. The *Montreal Convention* establishes liability, not fault. Unlike fault, which depends only on causation, liability under the *Convention* does not require establishing causation, and depends also on how the airline reacts to a delay, even if the delay was caused by third parties over whom the airline has no control.

***Lukács v. United*, Decision No. 467-C-A-2012, para. 42**

3. Air Canada erroneously uses the fault-based terminology of “controllable” and “uncontrollable” delays and cancellations, and thus conflates fault with liability. As it will be explained in the Applicants’ Reply in the main proceeding, Air Canada’s terminology itself is inconsistent with the regime of the *Montreal Convention*, and is part of Air Canada’s scheme to evade its obligations to passengers.

No “New Claimants”

4. Dr. Hymie Rubenstein and Ms. Nopsie Rubenstein are witnesses, and not parties to the present proceeding. As such, contrary to Air Canada’s position, the Rubensteins are not “New Claimants.”

Relevance of the Rubensteins’ evidence

5. Air Canada misstates the evidence of the Rubensteins at paragraph 14 of its May 20, 2016 submissions. As a matter of fact, the uncontradicted evidence is that:

- (a) The Rubensteins were not offered accommodation by Air Canada.

**Dr. Rubenstein’s Statement, para. 9
Ms. Rubenstein’s Statement, para. 9**

- (b) Instead, the Rubensteins were given a “Customer Relations” card and were directed to submit their claim for expenses to Air Canada, which they did.

**Dr. Rubenstein’s Statement, Exhibit “G”
Ms. Rubenstein’s Statement, Exhibit “G”**

- (c) Dr. Rubenstein informed Air Canada that they were not offered accommodation:

You are mistaken in believing that we were offered accommodation by an Air Canada agent in Toronto. As I clearly told you on three occasions during our conversation on Thursday, April 21, this was not the case. We were not offered any accommodation, and instead were told to submit a claim to Air Canada later based on the approval of the agent of the on-line reservation I made at the Pearson airport Sheraton Hotel [...]

Dr. Rubenstein’s Statement, Exhibit “I”

- (d) Dr. Rubenstein then also made a claim explicitly based on the *Montreal Convention*:

You are reminded that our travel was subject to the Montreal Convention. Article 19 of the convention renders Air Canada liable for delays of passengers, up to approximately \$9,000 per passenger.

Accordingly, we request that Air Canada comply with its legal obligation by reimbursing us for the accommodation expenses we incurred as a result of delay in transportation by air, in the amount of \$633.81.

Dr. Rubenstein's Statement, Exhibit "I"

- (e) Instead of addressing the Rubensteins' claim based on the *Montreal Convention*, Air Canada responded:

Please be assured we truly regret your dissatisfaction. The compensation offered as a measure of goodwill was based on guidelines that are used consistently. We believe these guidelines are fair and respectfully, we are unable to offer additional compensation.

While we wish to assure you that we value your patronage, we are unable to offer further consideration to this matter. Our previous correspondence has provided our explanations and the continual exchange of emails will not alter our position.

[Emphasis added.]

Dr. Rubenstein's Statement, Exhibit "J"

6. Thus, the evidence of the Rubensteins demonstrates that Air Canada was ignoring not only the provisions of the *Montreal Convention*, but also a claim that was made explicitly under the *Convention*, and instead Air Canada applied the Impugned Policy ("guidelines that are used consistently") and/or other unofficial policies, as alleged by the Applicants.
7. Therefore, the Rubensteins' evidence is relevant, because it tends to increase the probability of what is alleged by the Applicants.

Mitigation affects quantum, not liability

8. Air Canada's reference, at paragraph 15, to the principle of mitigation of damages is a red herring, because this principle affects only the *quantum* of damages, and not liability. Consequently, whether or not the Rubensteins were offered accommodation by Air Canada is irrelevant to the question of liability under the *Montreal Convention*; it could only possibly affect the question of the *quantum* of damages. (For example, Air Canada remains obligated to pay for reasonable meal expenses regardless of whether it offered accommodation.)

Procedural fairness

9. If Air Canada had any evidence to contradict the statements of the Rubensteins, it could have and should have submitted it as part of its response to the present request. The failure of Air Canada to do so demonstrates that such evidence does not exist.
10. In these circumstances, Air Canada will suffer no prejudice if the Agency accepts the statements of the Rubensteins. On the other hand, refusal to accept the rebuttal evidence will significantly prejudice the Applicants, who would be deprived of their opportunity to contest the allegations advanced by Air Canada.

The Agency's jurisdiction

11. Air Canada improperly questions the Agency's jurisdiction at paragraph 19 of its submissions. The Agency's mandate is not to simply duplicate the roles of small claims courts with respect to the enforcement of the rights of individual passengers; rather, under s. 113.1 of the *ATR*, the Agency has sweeping powers to order corrective measures to ensure that an airline abides by the tariff, and in particular, by the provisions of the *Montreal Convention*.

Air Transportation Regulations, s. 113.1

All of which is most respectfully submitted.

Dr. Gábor Lukács
Co-applicant and
representative for Mr. Johnson

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