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March 15, 2012

The Secretary
CANADIAN TRANSPORTATION AGENCY
Complaints and Investigation Division
Air & Marine Investigations Directorate
15, Eddy Street, 19th Floor,
Hull/Ottawa, Canada
K1A 0N9

Attention: Mr. Mike Redmond

**Re: Complaint by Mr. Gábor Lukács against Air Canada
CTA File No. M 4120-3/11-06673**

REVIEWED JANUARY 16, 2012 RESPONSE AS REQUIRED BY LET-C-A-47-2012

We are writing in response to your letter of December 16, 2012 regarding Mr. Lukács' complaint in the above-captioned file.

We understand that Mr. Lukács' complaint is based primarily on the Agency's jurisdiction over unreasonable terms and conditions of carriage, as set out in section 67.2(1) of the *Canada Transportation Act*. As explained below, we hereby request that Mr. Lukács' complaint be preliminarily dismissed based on the lack of proper factual background to determine whether the terms or conditions are unreasonable.

Without prejudice to Air Canada's request that the complaint be preliminarily dismissed, we have provided below our response to the allegations included in complaint regarding unreasonable terms and conditions, should the Agency not consider our preliminary motion to dismiss. Our response to Mr. Lukács' main allegations is structured using the issues outlined by Mr. Lukács.

I- Request to dismiss the complaint on a preliminary basis

The Agency's jurisdiction over the terms and conditions of a domestic licensee is set out in section 67.2(1) of the *Canada Transportation Act*¹:

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

The reasonableness of a term or condition must be interpreted contextually, and on a case by case basis. Indeed, one cannot determine whether a "rational basis" exists if there are no facts to serve as a basis². Similarly, to determine where the balance between the rights of a passenger and the carrier's statutory, commercial and operational obligations must be struck, one must determine on the one hand, what the rights of a passenger are in a specific case, and on the other, what the statutory, commercial and operational obligations of the carrier are in that same case³.

Here, Mr. Lukács' allegations are not based on any specific facts, but rather on simple allegations of unreasonableness. As such, there is no evidence, let alone any allegation by Mr. Lukács, to support his conclusion that Rule 245(E)(1)(b)(iv) or Rule 245(E)(2) are unreasonable. Air Canada cannot respond to Mr. Lukács' allegations of unreasonableness since the evaluation of what is reasonable simply cannot be made *in abstracto*.

(...)

It is procedurally unfair for Air Canada to have to respond to such an abstract complaint before the CTA that is in fact an attempt to be used as a weapon by Mr. Lukács in order to coerce Air Canada into compensating him where no compensation is due. Air Canada submits that such abstract complaints as Mr. Lukács' cause an inefficient use of public resources.

Air Canada therefore respectfully submits that Mr. Lukács' complaint is ill-founded in law, procedurally unfair, inherently contrary to the fundamental principles of administration of justice, and should thus be preliminarily dismissed

¹ S.C., 1996, c. 10 ("CTA").

² In decision *Anderson v. Air Canada* (2001) 666-C-A-2001, the Agency indicated the term generally means "without a rational basis".

³ The Agency recognized in *Black v. Air Canada* (2005) 746-C-A-2005 and in *Zuker v. Air Canada*, (2001) 680-C-A-2001, the necessity for a balanced approach. In those decisions, the Agency stated that it was "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 that passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations."

II- Domestic Tariff Provision at Issue

Air Canada's current Domestic Tariff Rule 245(E) regarding the compensation payable to passengers in cases of denied boarding, is as follows:

- (E) COMPENSATION
UNLESS PASSENGER CHOOSES OPTION (D) (3) ABOVE, IN ADDITION TO PROVIDING TRANSPORTATION IN ACCORDANCE WITH (D) (1) OR (2), A PASSENGER WHO HAS BEEN DENIED BOARDING WILL BE COMPENSATED BY AC AS FOLLOWS:
- (1) CONDITIONS FOR PAYMENT
- (A) THE PASSENGER MUST PRESENT HIMSELF FOR CARRIAGE AT THE APPROPRIATE TIME AND PLACE:
- (I) HAVING COMPLIED FULLY WITH AC'S APPLICABLE RESERVATION, TICKETING, CHECK-IN AND RECONFIRMATION PROCEDURES; AND,
- (II) BEING ACCEPTABLE FOR TRANSPORTATION IN ACCORDANCE WITH AC'S PUBLISHED TARIFFS.
- (B) IT MUST NOT HAVE BEEN POSSIBLE TO ACCOMMODATE THE PASSENGER ON THE FLIGHT ON WHICH HE HELD CONFIRMED RESERVATIONS AND THE FLIGHT MUST HAVE DEPARTED WITHOUT HIM.
EXCEPTION: THE PASSENGER WILL NOT BE ELIGIBLE FOR COMPENSATION:
- (I) IF HE IS OFFERED ACCOMMODATION OR IS SEATED IN A COMPARTMENT OF THE AIRCRAFT OTHER THAN THAT SPECIFIED ON HIS TICKET AT NO EXTRA CHARGE TO HIM. (SHOULD HE BE SEATED IN A COMPARTMENT FOR WHICH A LOWER FARE APPLIES, HE SHALL BE ENTITLED TO THE APPROPRIATE REFUND); OR,
- (II) IF HIS RESERVATION HAS BEEN CANCELLED PURSUANT TO RULE 135 (CANCELLATION OF RESERVATIONS) (C) (AIRPORT CHECK-IN TIME LIMITS); OR,
- (III) WHEN THE FLIGHT ON WHICH HE HOLDS A CONFIRMED AND TICKETED RESERVATION IS CANCELLED OR SPACE HAS BEEN REQUISITIONED BY THE GOVERNMENT; OR,
- (IV) IF, FOR OPERATIONAL AND SAFETY REASONS, HIS AIRCRAFT HAS BEEN SUBSTITUTED WITH ONE HAVING LESSER CAPACITY
- (V) NO DENIED BOARDING COMPENSATION WILL BE PROVIDED TO THE ATTENDANT OF A PASSENGER WITH A DISABILITY PURSUANT TO RULE 33.
- (2) AMOUNT OF COMPENSATION
SUBJECT TO THE PROVISIONS OF (E) (1), AC WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNT OF \$100.00 CASH OR A CREDIT VOUCHER OR MCO (GOOD FOR FUTURE TRAVEL ON AIR CANADA) IN THE AMOUNT OF \$200.00, TO THE PASSENGER'S OPTION FOR TRAVEL WITHIN CANADA OR TO THE USA AND MEXICO. IF ACCEPTED BY THE PASSENGER, SUCH TENDER WILL CONSTITUTE FULL COMPENSATION FOR ALL ACTUAL OR ANTICIPATORY DAMAGES, INCURRED OR TO BE INCURRED.
- (3) TIME OF OFFER OF COMPENSATION
- (A) COMPENSATION WILL BE OFFERED TO, AND IF ACCEPTED, RECEIPTED BY THE PASSENGER ON THE DAY AND AT THE PLACE WHERE THE DENIED BOARDING OCCURS.
- (B) IN THE EVENT THE ALTERNATE TRANSPORTATION DEPARTS BEFORE THE OFFER CAN BE MADE, IT SHALL BE MADE BY MAIL OR OTHER MEANS WITHIN 24 HOURS AFTER THE TIME THE FAILURE TO ACCOMMODATE HAS OCCURRED.

III- Mr. Lukács' Requests

A. Is it reasonable for Air Canada to oversell its domestic flights?

Air Canada submits that the practice of overselling its domestic flights is not unreasonable and that the Agency should not direct Air Canada to cease and desist from the practice of overselling its domestic flights.

Overselling is a consequence of overbooking, which is a practice recognized as being reasonable in light of a carrier's operational and commercial obligations and is the counterpart of flexible fares that allow modifications of itineraries at the last minute, causing passengers to "no-show" for a flight. Overbooking is a known fact in the air transport industry and the carrier's right to deny boarding as well as the appropriate level of compensation is provided for in the relevant tariff. This practice was described by Justice Powell of the U.S. Supreme Court in *Nader v. Allegheny Airlines Inc.*, US 290 (1976):

"Such overbooking is common industry practice, designed to ensure that each flight leaves with as few empty seats as possible despite the large number of "no-shows" – reservation-holding passengers who do not appear at flight time. By use of statistical studies of no-show patterns on specific flights, the airlines attempt to predict the appropriate number of reservations necessary to fill each flight. In this way, they attempt to ensure the most efficient use of aircraft while preserving a flexible booking system that permits passengers to cancel and change reservations without notice or penalty. At times, the practice of overbooking results in oversales, which occur when more reservation-holding passengers than can be accommodated actually appear to board the flight. When this occurs, some passengers must be denied boarding, that is, they are 'bumped'."

Air Canada carries out its overbooking practice in a reasonable manner, using sophisticated systems to analyze no-show and booking patterns. Air Canada's overbooking levels are half of what they are, on average, for US carriers. Furthermore, the Agency recognized the reasonableness and validity of this practice in its decisions *Del Anderson v. Air Canada*, 666-C-A-2001, *Kathleen Simcock v. Air Canada*, 181-C-A-2005, at para. 33, and *B.J. Simcock v. Air Canada*, 180-C-A-2005, at para. 32, in which the Agency noted:

"With respect to the matter of overbooking, the Agency notes that this practice is commonplace among air carriers and, in general, works to the advantage of both air carriers and passengers because the carriers are able to operate at maximum capacity, thus resulting in reduced prices for consumers."

The Agency further recognized the reasonableness of this practice in its Fly Smart publication⁴ under the heading Overbooking and Denied Boarding:

“Air carriers often over-book their flights (confirm more seats than are available) because some passengers make reservations and then change their plans at the last minute without cancelling their reservations. If the airplane is over-booked and too few passengers volunteer to take another flight, some passengers with confirmed reservations will be “bumped” from the flight. The compensation for such involuntary denied boarding varies from carrier to carrier as set out in their tariffs.”

In addition, the U.S. Department of Transportation has also recognized the legitimacy of a well-controlled oversale system. During the revision of the denied boarding regulations in the U.S., the Department of Transport noted that *“the benefits to most consumers of a well-controlled oversales system outweigh the inconvenience experienced by a few”*⁵.

Air Canada, as opposed to Westjet whose fares are all non-refundable, offers certain products that are fully refundable in order to offer additional flexibility to its customers. The differing business models of Westjet and of Air Canada do not allow for their respective oversale policies to be compared.

Air Canada’s decision to offer refundable tickets (or to allow a credit for non refundable tickets) is a commercial decision as airline customers place a high value on refundable tickets (in case they can't make their flight, don't show up or decide to change travel plans) and on flexibility. By doing so, Air Canada is exposed to additional risk that certain passengers will not show up (“no-show”) for travel. Furthermore, as an international carrier part of a world-wide alliance, Air Canada carries much more connecting traffic, thus more exposed to misconnections, which in turn results in additional no-shows. Therefore, Air Canada engages in the practice of overbooking in order to absorb some of this risk and to, in turn, benefit customers.

(...) For instance, there exist precise reasons why overbooking is recognized as a valid industry practice. Indeed, even where volunteers are sought for a particular flight to relinquish their seat, there will likely be passengers that ultimately “no-show”, and thus enough available seats on the aircraft remain available to accommodate all the passengers, including those who volunteered to relinquish their seat. In fact, at Air Canada, cases of oversold flights rarely entail the requirement to deny boarding to passengers as certain passengers that hold confirmed seats are “no-shows” or have missed their connection. It is precisely such circumstances that have lead courts to recognize the reasonableness of the practice of overbooking flights.

Therefore, given Air Canada’s commercial reality and the fact the practice of a calculated overselling of flights continues to be a widely accepted industry practice, said practice should not be deemed unreasonable.

⁴ Canadian Transportation Agency, *Fly Smart* guide, available online at: <http://www.cta-ctc.gc.ca/eng/fly-smart>.

⁵ Federal Register, Vol. 76 No. 79, 25 April 2011, DOT response regarding Oversales, p. 23135.

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

Air Canada's domestic tariff regarding denied boarding provides that, in the event that the flight is oversold, meaning there are more passengers with confirmed reservations and tickets than there are seats available on a flight, the first thing that Air Canada's staff at the airport will do is make a request for volunteers to relinquish their ticket on that specific flight, as set out in Rule 245(B). The volunteers will instead be provided with a ticket for a later flight as well as the compensation provided for in Rule 245(E) when all the conditions are met. According to Air Canada's policies, if a flight is oversold, no passenger may be involuntarily denied boarding until Air Canada has first requested volunteers to relinquish their seats.

From among the confirmed passengers, Air Canada will request volunteers to relinquish their seats in exchange for the following compensation: in addition to providing transportation in accordance with the tariff, a passenger who has been denied boarding will be compensated by Air Canada in accordance with Rule 245(E)(2). In the event that there are not enough volunteers, other passengers may be involuntarily denied boarding in accordance with Air Canada's boarding priority policy. Passengers with confirmed reservations who have not received a boarding pass will be permitted to board in the following order until all available seats are occupied: (a) passengers with disabilities, unaccompanied children under 12 years of age and others for whom, in AC's assessment, failure to carry would cause severe hardship, (b) passengers paying executive (J cabin) or full economy (Y cabin) class fares, (c) all other passengers will be accommodated in the order they present themselves for check-in.

Where a passenger is denied boarding, they will have the rights set out under Rule 245(D) that provides the following: (1) the passenger will be transported without stopover on the next available Air Canada flight, regardless of the class of service, and at no additional cost to him, or (2) at Air Canada's option, should Air Canada not be able to provide onward transportation acceptable to the passenger on the services of AC, alternate transportation will be provided as follows: (a) the passenger will be accommodated in the class of service and/or booking class applicable to his transportation on Air Canada, or (b) transportation in a different class of service and/or booking class will be provided without additional cost to the passenger only if it will provide for an earlier arrival at his destination or next point of stopover; or (3) at the passenger's option, or if Air Canada is unable to perform options (1) or (2) within a reasonable amount of time, refund the ticket or unused coupon(s) thereof in accordance with the rule on involuntary refunds.

In addition to the above, the passenger who is denied boarding will be compensated in accordance with Rule 245(E).

Under Rule 245(E)(1)(B), there is a list of exceptions to the requirement to pay denied boarding passengers. In particular, Air Canada will not pay compensation to passengers denied boarding if, for operational and safety reasons, the passenger's aircraft has been substituted for one having lesser capacity. Air Canada submits that Rule 245(E)(1)(b)(iv) is reasonable. 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.

This practice has been recognized by the U.S. Department of Transportation, in 14 CFR Part 250.6(b) of the passenger protection Regulation, where it is clearly set out that passengers who are involuntarily denied boarding are not entitled to payment where “*The flight for which the passenger holds confirmed reserved space is unable to accommodate that passenger because of substitution of equipment of lesser capacity when required by operational or safety reason*”.

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

Air Canada submits that Rule 245(2) governing the amount of compensation given to passengers who are denied boarding is reasonable. More precisely, a passenger who has been denied boarding will be compensated by Air Canada either \$100.00 cash or a credit voucher good for future travel on Air Canada within Canada or to the U.S. or Mexico in the amount of \$200.00, as set out under Rule 245(E)(2).

To date, there is no legislation in Canada that sets out the amounts that should be granted in the event that a passenger is denied boarding.

In addition, the Agency has already recognized the reasonable nature of Air Canada’s Rule 245(E)(2). In *Del Anderson v. Air Canada*, 666-C-A-2001, the Agency explicitly set out the following:

“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.

Air Canada’s policy with respect to denied boarding is designed and implemented to compensate passengers who have been denied boarding as a result of overbooking of an aircraft. This type of provision is commonly found in various types of commercial contracts where compensation is predetermined and is not based on the actual amount of the contract or damage that one party suffers if the other party does not respect, partially or entirely, the terms and conditions of the contract. Contrary to an air carrier’s policies on refunds for services purchased but not used, whereby the fare paid by a passenger is inherently linked to the design and implementation of the compensation, the fare paid by a passenger is unrelated to the amount of compensation that the passenger is entitled to receive upon being denied boarding. Further, any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

In light of the foregoing, the Agency finds that, Rules 245(C)(1), (C)(2) and E(2) of Air Canada's domestic tariff are not, in this case, 'unreasonable' within the meaning of subsection 67.2(1) of the CTA." (our emphasis)

With respect to the denied boarding amounts newly implemented by the U.S. Department of Transportation, in 14 CFR Part 250.5, Air Canada underlines that said amounts were recently increased for reasons not associated to Air Canada's current denied boarding policies. In fact, the primary reasons behind the Department of Transportation revision of compensation amounts are (1) to encourage careful overbooking practices on the part of carriers and (2) to protect passengers who purchased the most deeply discounted fares and who, by virtue of the low fares, are most likely to be selected as the candidates for involuntary denied boarding⁶. As such, contrary to the American environment, Air Canada underlines that its overbooking practice is carried out in a reasonable and well-controlled manner. Air Canada's overbooking levels are half of what they are, on average, for US carriers. On domestic Air Canada flights, only 0.09% of passengers are subject to being denied boarding, which includes passengers who volunteer. Further, Air Canada's denied boarding policies apply equally amongst its passengers in a non-discriminatory manner. In other words, no particular group of passengers is targeted as denied boarding candidates based on the type of ticket purchased. This has been recognized by the Agency in *Del Anderson v. Air Canada*, 666-C-A-2001:

"After careful consideration of the complainant's submissions and examination of Rules 245(C)(1), (C)(2) and (E)(2) of Air Canada's domestic tariff, the Agency finds that Air Canada's policy with respect to denied boarding is not, in this case, 'discriminatory' within the meaning of subsection 67.2(1) of the CTA for the following reasons. Firstly, the Agency notes that Rules 245(C)(1), (C)(2) and (E)(2) of Air Canada's domestic tariff apply equally to all passengers. While the Agency acknowledges that discrimination may result from a term or condition of carriage which applies equally to all passengers, in order to constitute discrimination, it must be demonstrated that a burden, obligation, or disadvantage has been imposed on one person or group which is not imposed on others. Accordingly, it could be argued that Air Canada's denied boarding policy discriminates against passengers paying higher fares as such passengers are entitled to the same amount of compensation for denied boarding as passengers paying lower fares for the same service. The Agency is of the opinion, however, that the fare paid by a passenger in no way connected to any burden or disadvantage that may be imposed on that passenger as a result of being denied boarding. The Agency is, therefore, of the opinion that applying denied boarding compensation equally to all passengers in no way discriminates against passengers paying higher fares." (our emphasis)

With respect to European denied boarding compensation amounts, regulation EC No. 261/2004 applies to Community carriers and to all passengers departing from an airport

⁶ Federal Register, Vol. 76 No. 79, 25 April 2011, DOT response regarding Oversales, p. 23136.

located in the territory of a Member State. Air Canada already applies this regulation for its covered flights. However, in doing so, Air Canada is not at a competitive disadvantage, since all its competitors on the same routes are subject to the same regulation. 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 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, and compensation are at levels that are based on the particular imperatives of the European economy and political framework. This methodology is not necessarily adaptable to a country like Canada.

Air Canada submits that the re-protection mechanism offered is extensive within its domestic flight network due to the number of frequencies with which Air Canada operates domestic routes. Indeed, where a passenger is denied boarding, they will likely be placed on a subsequent Air Canada flight and arrive at their destination within a few of hours from their originally scheduled arrival time. For example, on a typical November travel date such as November 23, 2011, Air Canada was scheduled to operate the following six (6) direct flights between Ottawa and Halifax:

- AC672 at 7:10;
- AC674 at 8:55;
- AC676 at 12:25;
- AC678 at 14:50;
- AC118 at 17:30; and
- AC680 at 19:55.

Therefore, had a passenger been denied boarding on that day, they would have been entitled to be accommodated on another Air Canada direct flight between Ottawa and Halifax. Further, given the extensive Air Canada domestic network, it would have also been possible to accommodate said passenger on flights *via* Toronto or Montreal.

For example, a passenger having missed flight AC676 at 12:25 from Ottawa to Halifax would have had the following re-protection options:

Option 1: Carriage from Ottawa to Halifax on subsequent direct flights:

- AC678 YOW – YHZ at 14:50
- AC118 YOW – YHZ at 17:30
- AC680 YOW – YHZ at 19:55

Option 2: Carriage from Ottawa to Halifax *via* Toronto:

- AC459 YOW – YYZ at 16:00 to AC614 YYZ – YHZ at 17:55
- AC461 YOW – YYZ at 17:00 to AC620 YYZ – YHZ at 19:15
- AC465 YOW – YYZ at 19:00 to AC624 YYZ – YHZ at 20:55
- AC467 YOW – YYZ at 20:00 to AC140 YYZ – YHZ at 22:55

Option 3: Carriage from Ottawa to Halifax via Montreal

- AC104 YOW – YUL at 14:50 to AC686 YUL – YHZ at 17:05
- AC8982 YOW – YUL at 16:00 to AC176 YUL – YHZ at 18:40
- AC8986 YOW – YUL at 17:35 to AC670 YUL – YHZ at 20:30

Finally, Air Canada submits 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.

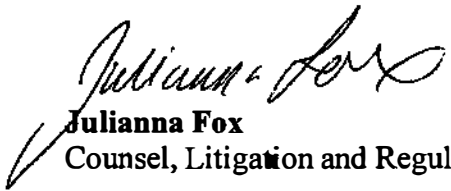
Therefore, Air Canada's compensation amounts are reasonable.

IV-Conclusion

In light of the above, Air Canada asks that Mr. Lukács' complaint be dismissed.

We look forward to hearing from you.

Best regards,



Julianna Fox
Counsel, Litigation and Regulatory

c.c. Mr. Gábor Lukács, by email