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**By Email**

August 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**

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*Note: This document contains confidential information. A request for confidentiality is set out under section III of the present submissions.*

We are writing in response to the Agency's letter LET-C-A-105-2012 of July 19, 2012, regarding Mr. Lukács' complaint on Air Canada's overselling and denied boarding policies for its domestic flights. In said letter, the Agency is requesting that Air Canada answers three questions on Domestic Tariff Rule 245(E)(1)(B) and seven questions on Domestic Tariff Rule 245(E)(2) in order to enable the Agency to gain a fuller understanding of the matter.

**I- Responses Re: Domestic Tariff Rule 245(E)(1)(B)**

- 1. Agency's Question: Rule 245(E)(1)(B) exempts Air Canada from tendering denied boarding compensation to passengers when, for operational and safety reasons, the passengers' aircraft has been substituted for one of lesser capacity. Provide specific examples of the (a) operational reasons and (b) safety reasons which would provide the basis for a decision by Air Canada to substitute aircraft?**

A downgauge is the change in aircraft fleet with decrease in seat capacity between the aircraft scheduled to operate a flight and the aircraft that actually operates the

flight. An equipment change ideally occurs between same aircraft types in order to not create additional crew costs and crew scheduling issues.

As specified in Air Canada's Answer of March 15, 2012 ("Answer"), 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 practice to include downgauges for safety or operational reasons as an exception to the requirement to pay denied boarding compensation has been recognized by the U.S. Department of Transportation in 14 C.F.R. Part 250.6(b), following wide scale industry consultations. This highlights the recognition by the U.S. D.O.T. and relevant industry stakeholders that the substitution of an aircraft for operational or safety reasons should not have negative commercial repercussions on carriers.

These exceptions to the requirement to pay denied boarding compensation do not constitute a "back door" allowing Air Canada to oversell its flights without being required to pay denied boarding compensation as such reasons are not foreseeable at the flight planning stage.

A downgauge due to safety reasons may be associated to, amongst other reasons, weather conditions. For example, in the absence of Instrument Landing Systems for specific runways at certain airports, an aircraft not equipped with a GPS may not be able to safely land in certain weather conditions. A downgauge due to safety reasons may also be linked to an unplanned mechanical issue with the aircraft scheduled to operate the flight. Unplanned mechanical issues usually occur within 48 hours of the departure time. For example, if a bird strikes an Air Canada aircraft on landing, it will be subject to unplanned maintenance procedures and may not be able to operate a subsequent flight, which may require a downgauge. It is not possible to take into account such unplanned problems or to consistently have a same-capacity aircraft available to operate a flight. Given the extensiveness of Air Canada's network, the planning of aircraft movement cannot foresee such considerations as Air Canada does not have sufficient aircraft to have back-up aircraft available at each airport out of which it operates.

A downgauge due to pure operational reasons may be associated to, for example, noise curfews, such as the one in Montreal between midnight and 7:00AM, which would require the use of an aircraft that can be operated 24 hours a day due to their weight and noise profiles. Operational reasons for downgauge are also commonly related to and a consequence of an upline safety reason. For example, a downgauge may be due to a delayed inbound flight, which may also be caused by an upline safety-related reason such as an unplanned mechanical or weather issue.

Downgauges associated with uniquely commercial concerns would not be included in this exception. In any event such commercially driven downgauges only occur in exceptional circumstances where flight capacity is at a low for reasons beyond Air Canada's control, such as the 2003 SARS epidemic in

Toronto. Commercially driven downgauges may also happen in limited circumstances where a route requires an aircraft of a greater capacity, which in turn, would require that the larger aircraft be taken from another route that will consequently be subject to a downgauge. In such circumstances, the aircraft-swap will not be done if it creates a situation of denied boarding on the downgauged route.

The Declarations in **Annex A** and **Annex B** provide evidence in support of the above submissions.

- 2. For the most recent two-year period for which data are available, how many times was a smaller aircraft substituted for a larger aircraft for (a) operational reasons and (b) safety reasons?**

**[CONFIDENTIAL]**

For domestically operated flights between June 2010 and July 2012, [REDACTED] (see [Confidential] Documents in **Annex C**) out of a total of 795 019 domestically operated flights in the same period (see summary of Air Canada's total domestic frequencies in **Annex D**), [REDACTED].

Unfortunately, Air Canada is unable to precisely respond to this question as it cannot provide specific data pertaining to aircraft substitutions occurring for operational vs. safety related reasons because:

- i. The distinction between operational and safety reasons is not clear cut. As explained in the response to the previous question, a downgauge for operational purposes are commonly associated to an upline safety-related issue.
- ii. Comments related to downgauges by reason of safety and operational issues are entered into the Air Canada master system for aircraft movement by Air Canada's Systems Operation Control. These comments do not consistently distinguish between operational vs. safety related downgauges (see Declaration in **Annex B**).

As such, Air Canada cannot provide the proportion of downgauges that occurred in the past two years due to operational vs. safety reasons simply because Air Canada does not track these numbers in this way. Consequently, this comparison cannot be made.

- 3. For the most recent two-year period for which data are available, how many passengers were unable to be carried on the flight for which they held reservations because of the substitution of a smaller aircraft for a larger aircraft?**

**[CONFIDENTIAL]**

[REDACTED]

[REDACTED]

**II- Responses Re: Domestic Tariff Rule 245(E)(2)**

For the reasons set out below, the current denied boarding amounts of \$100.00 cash and \$200.00 in credit voucher are reasonable.

Air Canada notes, however, on a preliminary basis, that it proposes to increase the amounts in credit voucher offered from \$200.00 to \$300.00. This increase will only be put in place once the Agency issues a final decision on the present complaint.

- 1. 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 \$100, or a travel voucher in the amount of \$200 for travel within Canada, or to the United States or Mexico. What methodology did Air Canada apply to determine that level and form of compensation?**

*\*\* Please note that Canada – U.S. flights are governed by Air Canada's Transborder Tariff Rule 245 (Part II) and Canada – Mexico flights are governed by Air Canada's International Tariff Rule 89 (Part 1). On this date, Air Canada's Domestic Tariff Rule 245 has been filed in order to no longer refer to denied boarding compensation for flights from Canada to the U.S. and to Mexico. As such, we consider that those routes and respective denied boarding compensation policies are out of scope with the present complaint as they are not domestic Canada routes and were already covered by Transborder Tariff Rule 245 – Part II and Air Canada's International Tariff Rule 89 – Part 1 since the beginning of the present proceedings.*

A passenger who has been denied boarding will be compensated by Air Canada either \$100.00 cash or a \$200.00 credit voucher good for future travel on Air Canada within Canada, as set out under Rule 245(E)(2).

This level of compensation was determined by various factors (see Declaration in Annex A).

One of these is the benchmark to the average Air Canada domestic economy cabin fare, the amount of which remains fairly stable and within the range of the compensation offered. For domestic operated Air Canada flights, the average economy cabin fare for the past five years was \$185.00 and, for the past nine years, \$178.00, based on the following yearly averages:

2012: \$189.00	2007: \$182.00
2011: \$181.00	2006: \$176.00
2010: \$181.00	2005: \$173.00
2009: \$175.00	2004: \$159.00
2008: \$189.00	

Another factor is the benchmark against competitors based on the following aspects:

- i. The amounts paid by competitors: Air Canada refers to the table below, which was created using publicly available tariffs of domestic competitors, in order to demonstrate that Air Canada's denied boarding compensation amounts are in line with those of competitor airlines.

Competitor	Section	Amount	Value of fare	Notes
Westjet	7.2(b)	\$0	Value of fare	7.2(c) applicable to overbooking and space limitation. No DBC provided in such circumstances.
Porter	18	\$0	\$0	N/A
Air Creebec	100 (2)(d)	\$0	\$400	Yes (safety)
Provincial Airlines	75	\$0	\$0	N/A
Canadian North	31	\$0	\$200 (+costs)	No
Central Mountain Air	19	\$100	\$200	No
Bearskin Airlines	34 35	\$100 (+costs)	\$300 (no costs)	Yes (operational or safety)
Air North	None	\$0	\$0	3.1(B) applicable to space and weight limitations causing denied boarding. No DBC provided in such circumstances.
First Air*	245	\$100	\$300	Yes (operational and safety)
Air Inuit*	245	\$200	\$300	Yes (operational and safety)

*\* Note: Lowest retail selling fares are significantly higher than Air Canada's average domestic economy fares.*

- ii. The available re-protection possibilities: As set out in Air Canada's Answer at p. 9-10, Air Canada's extensive domestic network allows the fast re-protection of passengers on subsequent flights, and, as a result of the principles set out in *Lukacs against Air Canada*, Decision No. 251-C-A-2012, more re-protection options are now available. As such, Air Canada is often able to re-protect passengers within narrow timeframes. It bears to be noted that, both the U.S. and E.U. denied boarding legislation have a waived or reduced requirement to pay denied boarding compensation when re-protection occurs within a certain timeline. Air Canada's domestic competitors do not have such an extensive network, and the more limited re-protection options would necessarily entail a higher compensation level due to passenger inconvenience.

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

In the event that a customer is denied boarding, Air Canada not only provides an alternate flight to the customer, but it also provides and is responsible for hotel accommodation, meal vouchers and will also cover other incidental costs (food, transportation for the customer, phone calls, reasonable cost claimed etc.). Consequently, the denied boarding compensation is above and beyond the actual damage suffered by the passenger as a result of the denied boarding.

The current denied boarding compensation amounts are based on the current domestic economy average fares. The same denied boarding compensation amount apply to all passengers who are denied boarding, regardless of the amount of the fare paid by a particular passenger, in accordance with the principles set out in *Del Anderson against Air Canada*, Decision No. 666-C-A-2001. The amounts Air Canada currently offers in cash and in credit voucher good for future travel on Air Canada within Canada are reasonable as the compensation amounts fall in the range of the average fares and are reasonable in comparison to domestic competitors' policies. Further, in light of the proposed increase of the amounts in credit voucher offered from \$200.00 to \$300.00, Air Canada will be offering amounts beyond the established average domestic economy fare range.

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

Air Canada offers a higher amount of compensation to customers selecting a travel voucher vs. selecting cash. Travel vouchers are both to the customer and the airline's benefit: for the customer, the amount offered is more than the cash amount, and is therefore of a considerably higher value when used for future travel. For the airline, it is less costly to offer travel vouchers than to offer cash. The offer of travel vouchers is also a common practice throughout the airline industry (as can be seen from the table above) but also around the world (see Declaration in Annex A).

**4. In what year were these amounts established?**

The current compensation amounts were established in 2003 and, as previously explained, were established in order to reflect the average Air Canada domestic economy cabin fare, the amount of which has remained fairly stable and within the range of the compensation offered.

**5. Were these amounts ever updated to reflect inflation or compensation levels provided by competitor airlines?**

Air Canada's current denied boarding compensation amounts in Domestic Tariff Rule 245(E)(2) reflect the average benchmarked Air Canada domestic economy cabin fare as well as to domestic competitors and are therefore not contingent on inflation, particularly since actual costs incurred by the denied boarding situation are already covered by Air Canada.

In Canada, denied boarding compensation for domestic flights is determined on a per carrier basis, as demonstrated by the above-referenced table. As previously set out, Air Canada's rationale is to benchmark the average domestic economy cabin fare in order to determine compensation amounts equally applicable to all passengers who are denied boarding.

Further, Air Canada does benchmark to other domestic carriers denied boarding compensation policies even though certain competitors', such as Westjet's, oversales policies differ due to different business models (see Answer at p. 5). Indeed, oversell and overbooking situations may still occur, particularly in the case of an irregular operation situation.

Any imposition solely on Air Canada, and not on its competitors, of specific denied boarding compensation amounts would create a serious competitive disadvantage as oversell and overbooking situations may still occur on competitor airlines, particularly in the case of irregular operation situations.

**6. In its answer dated January 16, 2012, Air Canada submits that only 0.09 percent of passengers on Air Canada's domestic flights are subject to being denied boarding, including passengers who volunteer. For the most recent two-year period for which data are available, how many passengers were denied boarding (a) voluntarily and (b) involuntarily?**

**[CONFIDENTIAL]**

In its Answer, Air Canada set out that on domestic Air Canada flights, only 0.09% (or 0.089%) of passengers were subject to being denied boarding, which includes passengers who volunteered.

[REDACTED]

For 2010, only 0.070% of passengers were subject to being denied boarding, which includes passengers who volunteered. [REDACTED]

For 2012 (January to July 31<sup>st</sup>), only 0.097% of passengers were subject to being denied boarding, which includes passengers who volunteered. [REDACTED]

The [Confidential] Document in Annex E provides evidence in support of the above submissions.

7. **What was the total amount of denied boarding compensation tendered by Air Canada for that two-year period for each (a) voluntary and (b) involuntarily denied boarding?**

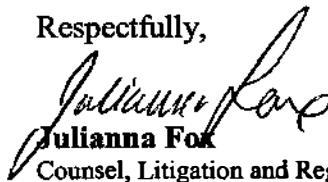
Air Canada is unable to respond to this question as it does not track the compensation amounts issued by its Canadian stations in this manner. Air Canada cannot provide specific data limited to compensation for domestic travel and whether compensation was issued for involuntary vs. voluntary denied boardings.

### **III- Request for Confidentiality**

Air Canada hereby requests, pursuant to section 23 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, that the underlined content of Air Canada's response to questions 2 and 3 for the Domestic Tariff Rule 245(E)(1)(B) and question 6 for the Domestic Tariff Rule 245(E)(2), as well as the Documents in support of said submissions in Annex C and Annex E, all pertaining to downgauge statistics over the past two-year period, be kept confidential. This information and the content of the Documents in Annex C and Annex E, include internal confidential operational information that is extremely commercially sensitive and that has consistently been treated in a confidential manner by Air Canada. If disclosed, they could significantly affect Air Canada's competitive position in the marketplace. In addition, they may result in unquantifiable damages and will affect Air Canada's reputation.

As such, prior to transmitting this information to the complainant, Mr. Lukacs, Air Canada requests that Mr. Lukacs sign a *Confidentiality and Non-Disclosure Undertaking*. Should the Agency decide to reject this request for confidentiality, Air Canada hereby requests that the concerned portions of Air Canada's response to questions 2 and 3 for the Domestic Tariff Rule 245(E)(1)(B) and question 6 for the Domestic Tariff Rule 245(E)(2) as well as Documents in support of said submissions in Annex C and Annex E be removed from the file and never be included in the public record.

Respectfully,

  
**Julianna Fox**  
Counsel, Litigation and Regulatory





**AIR CANADA**

## **Annex A**



# AIR CANADA

IN THE MATTER OF A COMPLAINT FROM GABOR LUKACS AGAINST AIR CANADA  
- CANADIAN TRANSPORTATION AGENCY FILE NO. M4120-3/11-06673

I, GORDON NG, declare as follows:

1. I am the manager premium revenues for Air Canada.
2. I am also a part of the revenue management operations team and, therefore, participate in the establishment of commercial policies for Air Canada operations.
3. In this capacity, I am familiar with the consequence of aircraft downgauges on denied boarding numbers. I am also familiar with how denied boarding amounts are established.

Canadian Transportation Agency's questions on Domestic Tariff Rule 245(E)(1)(B):

4. A downgauge is the change in aircraft fleet with decrease in seat capacity between the aircraft scheduled to operate a flight and the aircraft that actually operates the flight.
5. An equipment change ideally occurs between same aircraft types in order to not create additional crew costs and crew scheduling issues.
6. Downgauges due to operational and safety reasons are not foreseeable at the flight planning stage. Downgauges are not done with the intention of being relieved from Air Canada's obligation to pay denied boarding compensation. As such, we do not consider that these exceptions to the requirement to pay denied boarding compensation constitute a "back door" allowing Air Canada to oversell its flights without being required to pay denied boarding compensation.
7. Downgauges associated with uniquely commercial are not included in the exception to pay denied boarding compensation. In any event, such downgauges are infrequent and only occur in exceptional circumstances where:
  - i) Flight capacity is at a low for reasons beyond Air Canada's control; for example, the 2003 SARS epidemic in Toronto.
  - ii) A route requires an aircraft of a greater capacity, which in turn, would require that the larger aircraft be taken from another route that will consequently be subject to a downgauge. In such circumstances, the aircraft-swap will not be done if it creates a situation of denied boarding on the downgauged route.

Canadian Transportation Agency's questions on Domestic Tariff Rule 245(E)(2):

8. Presently, a passenger who has been denied boarding will be compensated by Air Canada either \$100.00 cash or a \$200.00 credit voucher good for future travel on Air Canada within Canada.
9. The reason for which Air Canada offers a higher amount of compensation to customers selecting a credit voucher instead of selecting cash is because vouchers are both advantageous to the customer, as the amount is more than cash and is therefore of considerable higher value when used for future travel, and to the airline, as it is less costly to offer vouchers than to offer cash. Further, the offer of credit vouchers is a common practice throughout the airline industry.
10. These amounts in cash and in credit voucher for denied boarding compensation were determined by, notably, the following factors:
- i) The benchmark to the average Air Canada domestic economy cabin fare, the amount of which remains fairly stable and within the range of the compensation offered. For domestic operated Air Canada flights, the average economy cabin fare for the past five years was \$185.00 and, for the past nine years, \$178.00, based on the following yearly averages:

2012: \$189.00	2007: \$182.00
2011: \$181.00	2006: \$176.00
2010: \$181.00	2005: \$173.00
2009: \$175.00	2004: \$159.00
2008: \$189.00	
  - ii) Another factor is the benchmark against competitors based on the amount of denied boarding compensation paid by competitors and the fact that, given Air Canada's extensive network, Air Canada's re-protection options are numerous, which allows for the re-protection of passengers within narrow timeframes.
11. The amounts in cash and in credit voucher currently offered by Air Canada are reasonable as the compensation amounts fall in the range of the average fares and are reasonable in comparison to domestic competitors' policies.
12. Any imposition on only Air Canada of an obligation to pay specific denied boarding compensation amounts, without extending such an obligation to competitor airlines, would create a serious competitive disadvantage as oversell and overbooking situations may still occur on competitor airlines, particularly in the case of an irregular operation situation.

And I have signed on this 15<sup>th</sup> day of August, 2012

  
\_\_\_\_\_  
Gordon Ng



**AIR CANADA**

## **Annex B**



# AIR CANADA

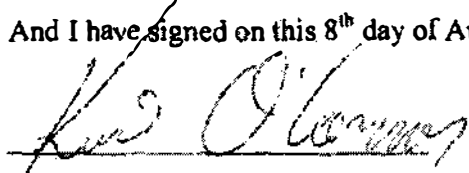
IN THE MATTER OF A COMPLAINT FROM GABOR LUKACS AGAINST AIR CANADA  
– CANADIAN TRANSPORTATION AGENCY FILE NO. M4120-3/11-06673

I, KEVIN O'CONNOR, declare as follows:

1. I am the director of Air Canada's System Operations Control.
2. In this capacity, I am familiar with how downgates are handled by Air Canada's System Operations Control.
3. A downgate may occur for safety reasons, such as weather conditions or unplanned mechanical issues.
4. An example of a downgate due to safety weather-related reason is where, in the absence of Instrument Landing Systems for specific runways at certain airports, an aircraft not equipped with a GPS may not be able to safely land in certain weather conditions.
5. With respect to unplanned mechanical issues that cause downgates, they are not foreseeable and it is not possible to take into account such unplanned mechanical issues and consistently have a same-capacity aircraft available to operate a given flight.
6. Unplanned mechanical issues, which require unplanned maintenance procedures, primarily occur within 48 hours of the departure time. An example of an unplanned mechanical issue is where a bird strikes an aircraft on landing; the aircraft may be subject to unplanned maintenance procedures and may not be able to operate a subsequent flight, which may require a downgate.
7. As Air Canada operates an extensive network, it is not possible to foresee such unplanned mechanical issues and to plan aircraft movement accordingly as Air Canada does not have sufficient aircraft to have back-up aircraft available at each airport out of which it operates.
8. A downgate due to pure operational reasons may be associated with noise curfews. For example, there are noise curfews in Montreal between midnight and 7AM, which requires at those times the use of an aircraft (such as the Embraer ERJ-175) that can be operated 24 hours a day due to their weight and noise profiles.
9. Other operational downgates are intrinsiquely linked with an upline safety issues, such as a delayed inbound flight cause by unplanned mechanical or weather issues.

10. Air Canada does not document consistently whether a downgauge is due to operational or safety reasons as the internal coding does not reflect whether the situation was actually an operational or a safety related. Air Canada's Systems Operation Control enters comments related to downgauge in the Air Canada master system for aircraft movement but does not consistently distinguish between operational versus safety related downgauges.

And I have signed on this 8<sup>th</sup> day of August, 2012

A handwritten signature in black ink, appearing to read "Kevin O'Connor", written over a horizontal line.

**Kevin O'Connor**



**AIR CANADA**

**Annex C  
(Confidential)**



**AIR CANADA**

## **Annex D**



## ANNEX D

### Total Frequencies

Jun-10	30,585
Jul-10	32,240
Aug-10	32,774
Sep-10	30,528
Oct-10	30,056
Nov-10	28,181
Dec-10	29,356
Jan-11	29,100
Feb-11	26,493
Mar-11	30,035
Apr-11	28,703
May-11	31,938
Jun-11	31,897
Jul-11	33,683
Aug-11	34,028
Sep-11	31,714
Oct-11	31,255
Nov-11	28,776
Dec-11	29,743
Jan-12	29,488
Feb-12	28,206
Mar-12	29,974
Apr-12	29,365
May-12	32,162
Jun-12	31,393
Jul-12	33,346
Total Period:	795,019



**AIR CANADA**

**Annex E  
(Confidential)**