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Porter Airlines' International Tariff Challenged

To ring in the new year, Gabor Lukács gives rise to yet another successful challenge of an air carrier's tariff before the Canadian Transportation Agency. This time, the carrier is Porter Airlines, a regional airline operating out of Toronto City Centre Airport with flights largely serving eastern Canada and the northeastern United States.

The nub of Mr. Lukács complaint is two fold:

First, that certain provisions of Porter's international tariff are unreasonable and therefore contrary to section 111 of the *Air Transportation Regulations*, SOR/88-58 (the "*ATR*s") because they are inconsistent with various articles of the *Montreal Convention*, including Article 19 which provides that:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage and cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid damage or that it was impossible for it or them to take such measures.

Second, that portions of the Porter tariff are drafted in an unclear manner, contrary to section 122(c) of the *ATR*s, which require tariffs to contain:

> ...the terms and conditions of carriage, ***clearly stating*** the air carrier's policy in respect of at least the following matters, namely,
>
> (v) failure to operate the service or failure to operate on schedule, ...
>
> (x) limits of liability respecting passengers and goods,
>
> (xi) exclusions from liability respect ing passengers and goods, and
>
> (xii) procedures to be followed, and time limitations respecting claims.
>
> [***emphasis added***]

Regarding the conformity with the *Montreal Convention*, in the preamble to the decision the Agency made reference to section 111(1) of the *ATR*s which requires tariff provisions to be "just and reasonable". The Agency also noted "in keeping with past Agency decisions, where the Agency has determined that a tariff provision that is contrary to the *[Montreal] Convention* is unreasonable, the Agency will consider the submissions of the parties and the issue of conformity with the *[Montreal] Convention*."

Also in the preamble, with respect to the 'clarity' aspect of this complaint, the Agency referred to its decision in *Lukács v. WestJet*, Decision No. 249-C-A-2012, where it held that "an air carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning."

In response to certain aspects of the complaint, Porter proposed alternative tariff wordings to address the issues raised by Mr. Lukács. In its decision, the Agency addressed both the original wording, as well as Porter's proposed amendments.

The first issue addressed by the Agency in its decision was whether Porter's tariff on flight delays violates section 111 of the *ATR*s. More particularly, this relates to Rules 18(a) and (c), which mirror the old IATA standard form Condition 9.

Rules 18(a) and (c) provide as follows:

> 18(a) Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract. ...
>
> (c) Schedules are subject to change without notice. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change in the schedule of any flight. The Carrier is not liable for any special, incidental or consequential damages arising from the foregoing (including the carriage of baggage) whether or not the Carrier had knowledge that such damages might be incurred.

Mr. Lukács argued that this language has been explicitly disallowed by Courts in the United Kingdom as well as the Quebec Small Claims Court in *Assaf v. Air Transat A.T. Inc.,* [2002] J.Q. No. 8391 and in *Zikovsky v. Air France*, 2006 QCCQ 948.

The argument advanced by Mr. Lukács was that the effect of Condition 9-like language in air carrier tariffs is to pre-empt the remedies available to delayed passengers under Article 19 of the *Montreal Convention* by "rendering the notion of 'delay' meaningless."

In response, Porter argued that the tariff provisions in question do not, in fact, have the effect described by Mr. Lukács. Instead, argued Porter, these provisions "simply provide passengers with notice of the possibility that scheduled operations may change, that schedules are not guaranteed and that nothing in [these] Rules exempts Porter from liability for delays." Moreover, Porter argued that the *Montreal Convention* does not require precise departure and arrival times to form part of the contract of carriage.

The Agency, for the most part, accepted Porter's arguments on this issue and held that Mr. Lukács did not adequately explain how

(Continued on page 2)

Inside This Issue

Porter Airlines' International Tariff Challenged *(cont'd)*

(Continued from page 1)

the *Montreal Convention* could be read to compel air carriers to assume the onerous obligation of guaranteeing precise departure and arrival times as part of the contract of carriage.

Accordingly, Rule 18(a) and the first part of 18(c) were found to be reasonable and in compliance with section 111 of the *ATR*s. The Agency made an explicit (and helpful) finding that "carriers should have the latitude required to amend flight schedules based on commercial and operational obligations, including the management of the air carrier's fleet so as to achieve optimal results, which may benefit both the carrier and the passengers, in order to conduct business in a dynamic environment."

The Agency parted ways with Porter's argument in one respect, however. It found that the final sentence of Rule 18(c), where Porter disclaims liability for failure to make connections, operate flights according to schedule or changing the schedule of any flight was unreasonable on the basis that it conflicts with Article 19 of the *Montreal Convention*.

As a remedial measure, Porter agreed to make changes to Rules 18(a) and (c) to read as follows:

> 18(a) The carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed. Schedules are subject to change without notice.
>
> 18(c) Notwithstanding the foregoing, passengers will be entitled to compensation or other remedies for delays, including delays in the delivery of baggage, in certain circumstances as set out below.

Mr. Lukács took issue with the revised wording. First, he argued that the new language creates ambiguity as to what constitutes a "schedule change" (which does not trigger liability) and a "delay" (which may do so). This argument was rejected by the Agency, which reiterated the statement from earlier in the decision, cited above, dealing with the need to allow carriers the flexibility to amend schedules.

Mr. Lukács also argued that because the Porter tariff ties check-in times to published departure times, in order for Rule 18(a) to be "reasonable", the tariff would have to be amended in such a manner as to require Porter to make reasonable efforts to provide passengers with timely information about delays and schedule changes and the reasons for them. In considering this argument, the Agency noted that other Canadian airlines have such provisions in their tariffs and ordered Porter to do likewise. It held that "the absence of similar provisions in Porter's Existing Tariff Rules would render the [Proposed Amended Tariff] Rule 18(a) unreasonable.

Mr. Lukács also took issue with the manner in which the amended Rule 18(c) was drafted. He argued that by referring to "other remedies", passengers may get the false impression that their compensation for a flight delay would be something other than a monetary payment — which would conflict with Article 19 of the *Montreal Convention*.

Further, he argued that the term "in certain circumstances" is misleading in that it suggests that compensation would only be applicable in narrowly defined circumstances.

The Agency accepted Mr. Lukács' submissions on both points, ruling that the proposed wording "seems to broaden the conditions, beyond the condition set out in Article 19 [all reasonable measures], under which a carrier can relieve itself of liability."

The issue then turned to the interpretation of Rule 18(d), which provides that:

> 18(d) Without limiting the generality of the foregoing, the Carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.

With respect to this provision, Mr. Lukács argued that it is well established that air carriers are required to carry passengers' bags on the same flight on which they are travelling. In support of this argument, he quoted *Cohen v. Varig Airlines*, 380 N.Y.S.2d 450 (aff'd 405 N.Y.S.2d 44), where the Civil Court of New York court held that:

> … The rights of the travelling public includes *(sic)* the right to stop and receive their baggage at any regular station or stopping place for the (vehicle) on which they may be traveling. Any regulation that deprives them of that right is necessarily arbitrary, unreasonable and illegal …

The Agency did not accept this argument, noting that the same argument was rejected in *Lukács v. WestJet*, Decision No. 252-C-A-2012, in the context of a WestJet tariff. In that decision, the Agency held that:

> [The analogous WestJet tariff rule] recognizes that situations may arise where, because of insufficient space on the aircraft, WestJet is unable to carry a passenger's baggage on the flight on which the passenger is being transported. The Agency does not agree with Mr. Lukács' submission that the Rule represents an exemption from liability. The Agency finds that, in accordance with the principles of the *Convention*, WestJet would remain liable for any damages incurred by a passenger to whom this may apply.

The Agency held that Porter's Rule 18(d) was reasonable, noting that Mr. Lukács had "not introduced any submissions … that would persuade the Agency to reach a different finding ..."

The attention then turned to Rule 18(e) which provides as follows:

> 18(e) Subject to the *Warsaw Convention*, or the *Montreal Convention*, as the case may be, the carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights.

Mr. Lukács argued that this wording was contrary to section 122 of the *ATR*s because it is not clearly drafted — leaving the impression that Porter is not liable for delay/cancellation expenses when, in reality, it is pursuant to the provisions of the referenced conventions. He cited a ruling made in *Lukács v. Air Canada*, Decision No. LET-C-A-2011, where the Agency held:

> ...The substantive wording of [analogous Air Canada tariff rule], on its face, indicates that Air Canada has no liability for loss, damage or delay of baggage and only in exceptional situations (i.e., "Subject to the *Convention*"). In fact, it is the reverse which applies, namely Air Canada does have liability for loss, damage or delay of baggage and only in exceptional circumstances is Air Canada able to raise a defence to a claim for liability or invoke damage limitations. The wording of the existing and proposed [analogous Air Canada tariff rule] is more likely to confuse passengers, rather than clearly inform passengers, regarding the applicability of Air Canada's limit of liability. Accordingly, the Agency finds [the analogous Air Canada tariff rule] in itself is unclear and that the phrase "Subject to the *Convention*, where applicable" renders the application of [analogous Air Canada tariff rule] unclear. …

The Agency upheld Mr. Lukács complaint with respect to Rule 18(e) and found that it contravened section 122 of the *ATR*s because it was "likely to confuse passengers, rather than clearly inform them of the applicability of Porter's limit of liability."

The Agency also disallowed Rule 18(e) on the basis that it conflicts with Article 19 of the *Montreal Convention* as the provision, as worded, is alleged to "create a blanket exclusion of liability that relieves Porter from any and all liability for damages to its passengers occasioned by delay and or cancellation of flights" when, in reality, the *Montreal Convention* only allows a carrier to limit its lia-

(Continued on page 3)

Porter Airlines' International Tariff Challenged *(cont'd)*

(Continued from page 2)

bility for delay in very specific circumstances. In making this determination, the Agency cited *Lukács v. Air Canada*, Decision No. 291-C-A-2011.

This ruling can be viewed with some skepticism. In our view, the tariff wording explicitly states that the limitation of liability is subject to the relevant conventions. It appears, on the face of the decision, that the Agency has conflated this argument with the section 111 ("clarity") argument discussed above.

Given the fact that some of the tariff provisions were found inadequate by the Agency, Mr. Lukács requested that the Agency consider the validity of Rule 18(b), even though he did not specifically complain about it. Rule 18(b) provides as follows:

> 18(b) The agreed stopping places are those places shown in the Carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may omit stopping places shown in the timetable.

In support of this submission, he cited *Lukács v. Air Canada*, Decision No. 208-C-A-2009 where the Agency held that:

> When portions of a section of a contract are determined to be null and void, consideration has to be given as to whether the defective portions can be severed from the section and leave meaning to the remaining wording in the section.

The Agency did undertake such an analysis, but found that Rule 18(b) retains its meaning, despite the disallowance of the Porter tariff provisions set out above.

Given the proposed changes to Rule 18(c), as discussed above, Porter drafted two additional Rules to add to its tariff: Rule 18.1 (dealing with passenger expenses resulting from delays) and Rule 18.2 (dealing with baggage delays). Predictably, Mr. Lukács also challenged aspects of both of these proposed additions to the Porter tariff.

First, he took issue with Porter's undertaking to reimburse reasonable expenses to delayed passengers (or passengers with delayed baggage), except where its "employees and agents" took all necessary measures to avoid the loss. Mr. Lukács argued that the term "servants and agents" would be more fitting as this is the language used in the *Conventions* and as such, the term has a well established meaning in the case law.

The Agency did not see the merit in requiring a change in terminology, as it held that "the issue of who is a servant or agent of the air carrier can only be determined on a case-by-case basis after an examination as to whether such servant or agent was used to fulfill the carrier's obligations [arising] out of a contract for carriage."

The next contentious issue was the provision in s. 18.1(ii) of the proposed Porter tariff which requires passengers seeking reimbursement of expenses from flight delays to provide notice of the claim, as well as particulars of the expenses together with receipts within 72 hours. Mr. Lukács argued that the only applicable limitation period in the *Montreal Convention* is two years, as set out in Article 35 and, therefore, the proposed provision conflicts with that article.

The Agency accepted this argument and determined that this provision would be found to be unreasonable, if filed.

Also with respect to Rules 18.1 and 18.2, Mr. Lukács argued that, in several places, the tariff uses the words "as determined by the Carrier", when referring to instances where compensation may be payable. He further argued that such language tends to relieve Porter from liability, and therefore should be disallowed, as they contradict Article 19.

The Agency disagreed. It held that, when presented with a claim, it is the carrier that has to determine whether it is legitimate. This disposition is then subject to review by the Agency, which would then determine whether the carrier acted in accordance with its tariff. The Agency ruled that the term "as determined by the Carrier" would be found reasonable in these circumstances, if filed.

Next, Mr. Lukács challenged the language in Rules 18.1 and 18.2, where Porter purports to compensate aggrieved passengers by providing reimbursement for "expenses". He went on to submit that this scope of what is compensable under the Article 19 of the *Montreal Convention* goes well beyond out-of-pocket expenses, giving examples such as lost income, loss of a portion of a cruise trip or inconvenience.

The Agency ruled that it would find the term "expenses" reasonable if used in this context and that it would allow the filing. It noted that "ultimately, it is left to the Agency or the courts to determine whether an air carrier has compensated passengers who are affected by a delay in a flight or in the delivery of baggage that is in a manner that is consistent with Article 19."

The penultimate issue raised by Mr. Lukács deals with two procedural requirements that passengers must comply with in order to pursue a claim for delayed baggage, failing which the claim would be extinguished.

The first of these was proposed Rule 18.2(b)(iii), which requires a passenger to report the delayed baggage within four hours of the completion of the flight. Mr. Lukács argued that this conflicts with Article 31(2) of the *Montreal Convention*, which allows 21 days.

The second complaint was with respect to proposed Rule 18.2(b)(iv) which provides that the passenger must submit a complaint in a form prescribed by Porter. He argued that this leaves much room for ambiguity — and that the *Montreal Convention* does not "bestow upon a carrier the right to determine in which form the complaint may be made, failing which the complaint must be rejected." He also noted that Article 31(3) requires only that the complaint be in writing.

Finally, Mr. Lukács objected to Porter's proposed Rule 18.2(c)(i) which placed a temporal monetary limit on delayed baggage claims. The proposed language provided maximum compensation limits as follows:

> After the initial 24 hours following completion of the flight, authorize incidental expenses up to CAD$25 per day for up to a maximum of 5 days, to be reimbursed by the Carrier subject to the passenger's submission of receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred and arose from the delay.

Mr. Lukács argued that "there is a very good reason for the decision of the drafters not to include such a 'per day' provision in the *Convention* as passengers often incur the greatest expenses in the first 24 to 48 hours of a delay in the delivery of baggage."

The Agency agreed with Mr. Lukács' position on all three counts and held that the proposed provisions would be found unreasonable, if filed.

In the end, there are two notable observations arising from this decision. First, that the Agency is reiterating a point often made before — namely that, if a complaint is made, it will require air carriers to revise their tariffs in a manner that conforms to the requirements of the *Montreal Convention*.

Secondly, and perhaps more notably, is the extent to which Mr. Lukács has been able to build a record of precedents before the Agency, which are now being used by him in numerous contexts. We trust that, in reading this article in isolation, it is clear that this latest decision is the culmination of the various and sundry battles Mr. Lukács has had against other carriers in the previous few years.

Lukács v. Porter Airlines Inc.,
Canadian Transportation Agency,
Decision No. 16-C-A-2013

End of the Line: *(Cancellation of Air Tickets for Non-Payment)*

On June 25, 2010, Mohamed Tawil purchased two return tickets from Montreal to Casablanca, Morocco for his son and brother-in- law.

The purchase was made on Royal Air Maroc's website using Mr. Tawil's Bank of Montreal credit card as a form of payment. The price of the tickets was CAD$2,307.02.

At the time, the Royal Air Maroc website advised prospective passengers that when a booking was made outside of the EU, additional charges would be applicable. It is not clear from the decision whether Mr. Tawil was aware of this condition.

A few hours after making the online bookings, Mr. Tawil learned that the charge processed for the tickets was, in fact, CAD$2,402.89 — meaning that the amount quoted online and the amount actually charged to his credit card differed by $95.87 to the detriment of Mr. Tawil.

At that point, Mr. Tawil advised the Bank of Montreal that he wanted to challenge the charge, but that he wanted to maintain the validity of his tickets. The representative of the Bank confirmed that the amount would be challenged and that he would be advised of the result in four to six months.

He also learned around this time that the Bank had actually reimbursed the entire value of the tickets to Mr. Tawil's credit card and, further, Mr. Tawil was advised by the Bank that this was the normal procedure in these circumstances

Two days later, Mr. Tawil's son and brother in law travelled on the outbound portion of the journey using the tickets in question. There was no issue raised by Royal Air Maroc as to the validity of the tickets.

Unfortunately for Mr. Tawil's son and brother-in-law, Royal Air Maroc cancelled the remaining portions of the booking as soon as the charges were reversed by the Bank. Nevertheless, Mr. Tawil's son and brother-in-law were permitted to take the outbound leg of the journey, because it took several days for the cancellation to register in Royal Air Maroc's reservation system.

On August 30, 2010, Mr. Tawil's sister-in-law became aware that her family members would not be able to return on the same tickets because they had been cancelled as a result of the action taken by the Bank. Accordingly, arrangements were be made to purchase new return tickets in the amount of CAD$2,653.78.

Mr. Tawil commenced legal proceedings in the Cour du Québec claiming the additional cost of the return ticket, as well as $2,000 in general damages.

Justice Renaud considered the order of events and paid particular attention to the sequence in which Mr. Tawil became aware of the relevant facts. He found that, in the first instance, Mr. Tawil should have contacted Royal Air Maroc to reconcile the price difference.

He also ruled that when Mr. Tawil communicated with the Bank (before the passengers had departed on the outbound leg), the Bank became his agent in cancelling the tickets.

Because Mr. Tawil had advance knowledge that the credit card charges would be reversed, Justice Renaud found that Mr. Tawil was the author of his own misfortune — noting that he could not find any fault in the actions of the airline.

He held that once Mr. Tawil knew that the charges were reversed, it was incumbent upon him to make further arrangements with Royal Air Maroc to confirm whether the tickets would be honoured in the circumstances.

The claim was dismissed, with no costs payable.

Tawil c. Royal Air Maroc,
2013 QCCQ 464

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