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March 7, 2014

**VIA EMAIL**

The Secretary  
Canadian Transportation Agency  
Ottawa, ON K1A 0N9

Attention: Mr. Mike Redmond, Chief, Tariff Investigation

Dear Madam Secretary:

**Re: Dr. Gábor Lukács v. British Airways  
Complaint about rules governing liability and denied boarding compensation  
Answer and opposition to British Airways' motion for an extension  
Motion for Contempt**

Please accept the following submissions as an answer and opposition to British Airways' motion for an extension, dated February 27, 2014, and a cross-motion to close pleadings and find British Airways in contempt of Decision No. 10-C-A-2014, pursuant to Rule 32 of the *Canadian Transportation Agency General Rules*.

**FACTS**

1. On January 17, 2014, in Decision No. 10-C-A-2014, the Agency disallowed certain provisions of British Airways' International Tariff, and ordered British Airways to amend its tariff accordingly by February 17, 2014:

[142] The Agency, pursuant to paragraph 113(a) of the ATR, disallows the following provisions of British Airways' Tariff:

- The introductory text to Rule 55(C);
- Rule 55(C)(6);

- Rule 55(C)(7);
- Rule 55(C)(8);
- Rule 55(C)(10) and the portion of Rule 115(N) that governs liability;
- Rules 85(A) and 85(B)2; and
- Rule 87(B)(3)(B) in respect of sole remedy.

[143] The Agency orders British Airways, by no later than February 17, 2014, to amend its Tariff and conform to this Order and the Agency’s findings set out in this Decision.

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[146] Pursuant to paragraph 28(1)(b) of the CTA, the disallowance of the above Rules shall come into force when British Airways complies with the above or on February 17, 2014, whichever is sooner.

[Emphasis added.]

2. In Decision No. 10-C-A-2014, the Agency also directed British Airways to show cause, by February 17, 2014, why the Agency should not impose certain denied boarding compensation policies upon British Airways:

[144] Further, the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:

1. The regime applicable in the United States of America;
2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or
4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

[Emphasis added.]

3. According to a report published on CBC News on January 20, 2014, a copy of which is attached and marked as Exhibit “A”, British Airways’ spokesperson advised the media “We will be working on the requested tariff updates, in consultation with the CTA.”

4. To this date, British Airways has not amend its International Tariff, contrary to the Order of the Agency in Decision No. 10-C-A-2014.
5. British Airways has also failed to make submissions to show cause why the Agency should not impose certain denied boarding compensation policies upon British Airways.
6. On February 27, 2014, British Airways advised the Agency through its counsel that:

British Airways does not want to revise its tariff to comply with the disallowance order of the Agency in a piecemeal manner, and plans to implement the revisions to the tariff, both removing the disallowed sections and revising the Denied Boarding Compensation section as one revision that can be filed by ATPCO, and then have the revised official pdf version posted on the BA.com website on the 'Legal' page.

[Emphasis added.]

7. British Airways also seeks a 3-week extension to make show-cause submissions to the Agency for the following reasons:

The delay in response has been due to British Airways' Senior Counsel being unavailable for working with the British Airways' commercial personnel in preparing a response for submission to the Agency in this matter. As you are aware, as a European 'community carrier', British Airways is required to comply with (EC) No. 261/2004 which in Articles 3, 4 and 7 deals with flights operated by community carriers departing from airports in Canada for airports in the UK. British Airways needs to ensure that whatever Denied Boarding Compensation it may provide for passengers departing from Canadian airports is compatible with its obligations under (EC) No. 261/2004 and does not result in passengers receiving double compensation. Because of the analysis required and the number of British Airways' personnel involved, some time is required to review and decide how to proceed in making submissions.

[Emphasis added.]

## **HISTORY OF NON-COMPLIANCE**

8. British Airways has a record of failure to comply with the Canadian regulatory requirements. For example, in Decision No. 320-A-2013, the Agency held that British Airways contravened subsections 135.8(2) and 135.8(3) and section 135.91 of the *Air Transportation Regulations*.

## ISSUES

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## EXHIBITS

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## **ARGUMENT**

The Complainant is asking the Agency to find British Airways in contempt of the Agency's Order contained in Decision No. 10-C-A-2014.

The Complainant opposes British Airways' motion for an extension, and asks that the Agency impose the regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013, with the difference that the compensation amounts ought to be 300.00 EUR and 600.00 EUR, depending on whether the delay caused by the denied boarding exceeds 4 hours.

### **I. Is British Airways in contempt of the Order contained in Decision No. 10-C-A-2014?**

The conduct of British Airways in the present case is unprecedented in that it openly and deliberately defies the Agency's Order requiring British Airways to amend its Tariff by a given date.

British Airways' conduct raises serious public concerns about the ability of the Agency to regulate the airline industry. Allowing airlines to ignore the Agency's orders without any consequences will reduce the Agency's decisions to mere recommendations or friendly requests to airlines, which clearly was not the intent of Parliament.

#### **(a) Jurisdiction of the Agency**

Section 25 of the *Canada Transportation Act* confers upon the Agency all powers and privileges vested in a superior court with respect to all matters necessary or proper for the exercise of its jurisdiction. The power to find a carrier regulated by the Agency in contempt of the Agency's order is "necessary and proper" for the exercise of the Agency's jurisdiction.

#### **(b) Applicable legal principles**

Contempt of court (or the Agency, in the present case) is a matter of public interest, and the principle that orders must be obeyed deserves the greatest protection.

The three-pronged test for civil contempt was summarized by the Ontario Court of Appeal in *Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (ON CA):

[27] The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order. [...]

The Complainant submits that in the present case, this test is amply met.

**(c) Contempt in the present case**

Contrary to the Agency's Order, British Airways did not amend its Tariff in any way, not by February 17, 2014, and not even by the date of the present motion.

**(i) The Order was clear and unequivocal**

The Order contained in Decision No. 10-C-A-2014 of the Agency states clearly and unequivocally that British Airways had to amend its Tariff to conform to the Order and the Agency's findings set out in the Decision "by no later than February 17, 2014."

Furthermore, the statement quoted in Exhibit "A" supports the finding that British Airways clearly understood what it was ordered to do by the Agency.

Thus, it is submitted that the Order breached by British Airways was clear and unequivocal.

**(ii) British Airways disobeyed the Order deliberately and wilfully**

British Airways' submissions of February 27, 2014 clearly demonstrate that British Airways disobeyed the Order deliberately and wilfully:

British Airways does not want to revise its tariff to comply with the disallowance order of the Agency in a piecemeal manner, and plans to implement the revisions to the tariff, both removing the disallowed sections and revising the Denied Boarding Compensation section as one revision that can be filed by ATPCO, and then have the revised official pdf version posted on the BA.com website on the 'Legal' page.

[Emphasis added.]

Thus, it is submitted that the second prong of the test is met.

**(iii) Contempt beyond a reasonable doubt**

The failure of British Airways to comply with the Order is undisputed, and has been explicitly admitted in British Airways' submissions of February 27, 2014.

Therefore, it is submitted that the contempt in the present case is beyond a reasonable doubt.

## **II. Should British Airways be granted an extension?**

On January 17, 2014, in Decision No. 10-C-A-2014, the Agency granted British Airways until February 17, 2014 to make show-cause submissions about whether the Agency should impose a new denied boarding compensation policy on British Airways. Thus, British Airways had 31 days to prepare its submissions.

### **(a) British Airways' reasons for seeking an extension**

British Airways is seeking an extension until March 20, 2014 to make submissions on the basis that:

The delay in response has been due to British Airways' Senior Counsel being unavailable for working with the British Airways' commercial personnel in preparing a response for submission to the Agency in this matter.

British Airways also reversed its previous position with respect to compliance with *Regulation (EC) No. 261/2004* of the European Community, and now British Airways considers it intimately relevant to the matter before the Agency.

### **(b) Criteria for granting an extension**

According to the Agency's "Practice Regarding Requests for Extensions of Time to File Submissions," a party seeking an extension must address the following criteria:

- the complexity of the matter;
- the impact of the delay on other parties;
- the importance of the information to the case;
- the time required to compile the necessary information;
- the difficulty to obtain the necessary information;
- whether the party made a serious effort to meet the deadline;
- the period of time since the party first became aware of the matter;
- when the party requested the extension of time;
- the number of extensions already granted;
- the availability of key personnel of parties; and
- whether parties will have a reasonable opportunity to comment.

**(c) Application of the criteria to the present case**

The Complainant submits that British Airways has failed to address the vast majority of these factors.

First, given that the Complaint giving rise to the show-cause order was filed and served in January 2013, that is, more than a year ago, British Airways should have any and all information related to *Regulation (EC) No. 261/2004* that may be necessary to make submissions to the Agency. British Airways has provided no explanation why the more than 13 months that have passed since the filing of the complaint have been insufficient to gather all necessary information.

Second, given British Airways' previous position that the Agency has no jurisdiction to enforce *Regulation (EC) No. 261/2004*, it is unclear how the European regulations are relevant to British Airways' submissions. At any rate, Exhibits "I" and "J" to the Complaint of January 30, 2013 are tariff portions of Air France and Lufthansa implementing the obligations set out under *Regulation (EC) No. 261/2004* with respect to denied boarding compensation. British Airways should have no difficulty to copy these provisions.

Third, it is evident that British Airways has made no effort whatsoever to meet the deadline set by the Agency, and that British Airways has been deliberately and in a calculated manner defying all portions of the Agency's Order. Indeed, as noted earlier, British Airways did not amend its tariff as the Agency ordered because it "does not want to revise its tariff to comply with the disallowance order." Apparently, British Airways is of the opinion that not wanting to comply with an Order is a sufficient ground for not complying with it.

Fourth, British Airways has provided no evidence in support of its incredible submission that its Senior Counsel has been unavailable for more than a month to respond to an Order of the Agency.

Fifth, British Airways has sought the extension only after repeated inquiries by Agency Staff and the Complainant about its failure to comply with the Order and to make submissions. Any issues about the availability of British Airways' Senior Counsel ought to have been known several weeks ago, and British Airways could have sought an extension much earlier. The failure of British Airways to do so demonstrates that British Airways is simply engaging in dilatory tactics in order to delay amending its tariff and complying with the Canadian regulatory requirements.

**(d) Conclusion**

Based on the aforementioned factors, the Complainant submits that British Airways is engaging in an abuse of the Agency's proceedings in an attempt to delay compliance and to hinder the Agency in carrying out its mandate.

Therefore, the Complainant submits that the Agency ought to deny British Airways' motion for an extension to make show-cause submissions, and ought to close pleadings with respect to British Airways' denied boarding compensation policy.

### **III. What should British Airways' new denied boarding compensation amounts be?**

Although British Airways has made no submissions in response to the show-cause order concerning how its denied boarding compensation policy is to be amended, the Complainant would like to address this point briefly.

The Complainant agrees that with respect to travel to and from the European Community, 4 hours is the reasonable point of delineation for a reduced amount of denied boarding compensation. This is consistent both with Decision No. 442-C-A-2013 of the Agency and *Regulation (EC) 261/2004*.

With respect to the amount itself, the Complainant submits that since British Airways is a European carrier, it would be most sensible to fix its denied boarding compensation amounts in Euros, so that it will be in full compliance with *Regulation (EC) 261/2004*, which appears to be a concern for British Airways (as per the February 27, 2014 letter).

Therefore, the Applicant submits that British Airways' denied boarding compensation amounts ought to be revised as follows:

- (a) 300.00 EUR, if the delay caused by the involuntary denied boarding is less than 4 hours;
- (b) 600.00 EUR, if the delay caused by the involuntary denied boarding is 4 hours or more.

Similarly to Air Canada's proposal in the context of Decision No. 442-C-A-2013, it is submitted that all denied boarding compensations ought to be paid by British Airways in cash or money draft.

**RELIEF SOUGHT**

The Complainant is asking the Agency that:

- A. the Agency find that British Airways is in contempt of the Order contained in Decision No. 10-C-A-2014;
- B. the Agency deny British Airways' motion for an extension to file submissions in response to the show-cause order;
- C. the Agency close pleadings with respect to British Airways' denied boarding compensation;
- D. the Agency order British Airways to amend its denied boarding compensation amounts to be 300.00 EUR in cash for delays of less than 4 hours, and 600.00 EUR in cash for delays of 4 hours or more as a result of the involuntary denied boarding.

All of which is most respectfully submitted.

Dr. Gábor Lukács  
Complainant

Cc: Ms. Carol E. McCall, counsel for British Airways

Bumped British Airways passengers to get more...

<http://www.cbc.ca/news/canada/nova-scotia/bump...>

## **Bumped British Airways passengers to get more money**

### **Passenger rights advocate Gabor Lukacs complained to Canadian Transportation Agency**

[CBC News](#) Posted: Jan 20, 2014 7:56 PM AT Last Updated: Jan 20, 2014 8:00 PM AT

British Airways has been ordered by the Canadian Transportation Agency to improve financial compensation for passengers it bumps from overbooked flights, potentially bringing the carrier in line with the same changes Air Canada was ordered to make last year.

The ruling came after Gabor Lukacs, a Halifax mathematician and air passenger rights advocate, complained to the regulator that British Airways does not adequately compensate bounced passengers.

"Some people just enjoy the power. They know that they are the lords of life and death. You can have a wedding, you can have a funeral, but if they say you are bumped, you are bumped," Lukacs said Monday.

"That makes people extremely angry, for good reason. Not only because of the bumping itself but how it's being done."

The [Canadian Transportation Agency said the London-based carrier must rewrite its policies](#) governing the rights of passengers who are denied boarding or who face flight delays or cancellations. Policy changes are also being required to cover damaged or delayed baggage.

The regulator ruled British Airways "fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage, and British Airways' statutory, commercial and operational obligations."

The airline bumps about 180 Canadian passengers a year from its flights to Europe.

Lukacs said he doesn't understand why British Airways had to be forced to do the right thing.

"Why did they resist? Why did they waste valuable judicial resources here?" he said.

Bumped British Airways passengers to get more...

<http://www.cbc.ca/news/canada/nova-scotia/bump...>

"Other than just the corporate bloody-mindedness, that we as a corporation cannot be wrong. If you think we are wrong, then probably you are wrong."

## **Response ordered by Feb. 17**

Lukacs has, in the past, [successfully challenged Air Canada's compensation policies](#). He started investigating compensation issues in 2011 after discovering his flight was overbooked.

His complaint led to new rules for Air Canada requiring that passengers be compensated \$200, \$400 or \$800 per passenger depending on whether the delay is less than two hours, between two and six hours, or more than six hours.

The CTA also imposed strict conditions on offering travel vouchers instead of cash, including a one-to-three exchange rate — for example, \$1 in cash is equal to \$3 in travel vouchers. Passengers can now insist on receiving cash as compensation for being bumped from a flight.

British Airways is required to revise its policies by Feb. 17 or explain why it shouldn't apply the same formulas imposed on Air Canada or used in the United States.

In the U.S., the compensation is as much as \$650 US of the airfare for delays less than two hours and as much as \$1,300 US for delays over two hours.

"British Airways has always strived to provide fair compensation to Canadian customers," a spokesperson for British Airways wrote in an email.

"We will be working on the requested tariff updates, in consultation with the CTA."