



Reference: *Commissioner of Competition v. Air Canada*, 2002 Comp. Trib. 34
File no.: CT2001002
Registry document no.: 0113

IN THE MATTER of an application by the Commissioner of Competition under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER of the *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service*, SOR/2000-324 made pursuant to subsection 78(2) of the *Competition Act*;

AND IN THE MATTER of certain practices of anti-competitive acts by Air Canada.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Air Canada
(respondent)

and

WestJet Airlines Ltd.
(intervenor)



Date of pre-hearing conference: 20020920
Member: Lemieux J. (presiding)
Date of reasons and order: 20020927
Reasons and order signed by: Lemieux J.

**REASONS AND ORDER REGARDING A REQUEST TO COMPEL ANSWERS ON
DISCOVERY CONSIDERED AT PRE-HEARING CONFERENCE ON SEPTEMBER 20,
2002**

I. THE MOTION

[1] The Commissioner of Competition (the “Commissioner”) moves the Tribunal for orders that Air Canada answer all undertakings refused on the examination for discovery of its representatives held at various times on November 22, 2001, February 15, 2002, and on June 18 and 19, 2002.

[2] The questions which the Commissioner seeks to have answered are grouped in the following categories:

- (a) Group 1 - Questions related to Air Canada’s cost and revenue accounting such as whether and how certain expenses are shown in Air Canada’s accounting records and explanations on revenue categories. The most important item sought is the production by Air Canada of the raw data making up its General Ledger. This item will be treated separately in these reasons;
- (b) Group 2 - Questions related to changes made to routes identified as Air Canada’s bottom 20 performing routes such as when, why, the rationale for and the timing of changes made by Air Canada on its least performing routes; and
- (c) Group 3 - Questions which arise directly from documents produced by Air Canada.

II. BACKGROUND

[3] An application has been filed by the Commissioner pursuant to section 79 of the Competition Act, R.S.C. 1985, c. C-34 (the “Act”) and the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service, SOR/2000-324 (the “Airline Regulations”) alleging abuse of dominant position by Air Canada. The application alleges, among others, Air Canada responded to the entry of WestJet Airlines and CanJet Airlines on seven routes in central and Atlantic Canada by increasing its capacity and/or decreasing its fares in a manner that did not cover the avoidable costs of operating the flights on the affected routes, contrary to paragraphs 1(a) and 1(b) of the Airline Regulations.

[4] The Tribunal ordered, with the consent of the parties, the following preliminary issues be determined before proceeding with the balance of the application (“Phase I”). The Order Regarding Issues to be Determined at the Hearing dated May 15, 2001, (the “Phase I Order”) sets out the following questions:

[4] (...)

- (a) Between the period from April 1, 2000, to the date of the application, has Air Canada operated or increased capacity at fares that do not cover the avoidable costs of providing the service, within the meaning of paragraphs 1(a) and 1(b) of the Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service (the “Airline Regulations”), SOR/2000-324, on the Toronto-Moncton/Moncton-Toronto route?

(b) Between the period from July 1, 2000, to the date of the application, has Air Canada operated or increased capacity at fares that do not cover the avoidable costs of providing the service, within the meaning of paragraphs 1(a) and 1(b) of the Airline Regulations, on the Halifax-Montreal/Montreal-Halifax route?

[5] THE TRIBUNAL FURTHER DECLARES THAT in determining these issues, it will consider and answer at least the following questions:

- (a) What is the appropriate unit or units of capacity to examine?
- (b) What categories of costs are avoidable and when do they become avoidable?
- (c) What is the appropriate time period or periods to examine?
- (d) What, if any, recognition should be given to “beyond contribution”?

[5] Phase I of the hearing started on August 29, 2001, and since September 2001, has been adjourned on two occasions: (a) on September 11, 2001, due to terrorist attacks on the United States; and (b) on October 15, 2001, on motion of Air Canada who viewed that the events of September 11, 2001, had changed matters relevant to the issue of avoidable costs and required additional time to assess the effects of such changes.

[6] On February 15, 2002, pursuant to the Tribunal’s Scheduling Order for Recommencement of Hearing of Application dated October 26, 2001, (“Recommencement Scheduling Order”), Luc Piché and Paul Brotto (“Piché and Brotto”), as representatives of Air Canada, were examined for discovery by counsel for the Commissioner. The examination was not completed that day.

[7] On May 22, 2002, the Tribunal ordered Air Canada to answer some of the questions refused at the February 15, 2002, examination, including, but not limited to, the following:

- (a) the production of the entire Air Canada General Ledger for the year 2000 in electronic form;
- (b) the production of the complete General Ledger for Air Canada and Air Canada Regional for 2001;
- (c) the production of documents containing detailed explanations and breakdown of Air Canada General Ledger categories and codes; and
- (d) to advise what adjustments Air Canada made to improve the performance of its bottom 20 performing routes.

[8] On June 18 and 19, 2002, Piché and Brotto re-attended on examination for discovery. They refused to answer questions which the Commissioner, in his motion, seeks answers to and production.

A. GROUP 1 - QUESTIONS RELATED TO AIR CANADA'S COST AND REVENUE ACCOUNTING

[9] Air Canada need not answer the question asked at page 9 (line 25) regarding Schedule Change Advisories prior to September 17, 2001 (from June 2000), as the Tribunal understands the Commissioner had received them prior to the examination for discovery of Air Canada's representatives in June 2001, and should have examined them at that time.

[10] Air Canada shall answer the question asked at page 61 (line 20) and both questions asked at page 62 (lines 2 and 7) as they are necessary to a proper understanding of the General Ledger produced by Air Canada as a result of the Tribunal's May 22, 2002 Order. Air Canada's General Ledger records its expenses from which its costs are derived.

B. GROUP 2 - QUESTIONS RELATED TO CHANGES MADE TO ROUTES IDENTIFIED AS THE BOTTOM 20 PERFORMING ROUTES

[11] The four questions related to changes made to routes identified by Air Canada as its bottom 20 performing routes along with the written questions stated at Tab 2C of the Commissioner's Motion Record (Refusals Motion-August 2002) ("Commissioner's Motion Record") constitute, in the Tribunal's view, relevant follow-up questions. Paragraph 33 of the Tribunal's May 22, 2002 Order recognized the relevance of those questions where Justice McKeown wrote:

[33] Finally, I am of the view that Air Canada should advise how long it takes Navitaire to deliver the results of the manipulation of cost and revenue data back to Air Canada and advise if adjustments were made to the routes (apart from Toronto/Moncton) including by way of taking out capacity or changing fares, in an attempt to improve the performance of those bottom 20 performing routes. Indeed, these questions are relevant because they relate to Air Canada's ability to respond in a timely way to information that routes are not performing adequately. Those questions are relevant to paragraph 5(c) of the Phase I Order that deals with the appropriate time period or periods to examine. [emphasis added]

C. GROUP 3 - QUESTIONS THAT ARISE DIRECTLY FROM DOCUMENTS PRODUCED BY AIR CANADA

[12] Air Canada, pursuant to the Tribunal's Recommencement Scheduling Order, produced a number of documents on January 18, 2002, in support of its view of the impact which the events of September 11, 2002, had on its operations.

[13] One of these documents is entitled "Commercial Objectives - Q1 2002" and the other is entitled "Maritimes, Intra Ontario/Quebec Market Review" dated November 22, 2001.

[14] The Commissioner asks Air Canada to undertake to verify and advise whether the objectives or recommendations contained in those documents were adopted and/or implemented by Air Canada.

[15] Counsel for the Commissioner told the Tribunal he was seeking a generalized answer to these questions.

[16] Air Canada must answer these questions following the reasoning of Simpson J. in the Tribunal's Reasons and Order of October 22, 2001, in this same case, holding that generally a party is entitled to examine on documents put by the other side.

D. GENERAL LEDGER

[17] Air Canada seeks an order from the Tribunal requiring Air Canada to produce the raw data, the inputs which make up the aggregated and highly generalized accounting categories recorded in the General Ledger produced by Air Canada, as a result of the May 22, 2002 Order. This raw data was referred to during the pre-hearing conference as "Journal Line" and is described at paragraph 13 of the affidavit of Luc Piché sworn September 18, 2002, as "a massive record of Air Canada's costs as tracked at various levels of detail (i.e., stations, aircraft type, union groups)."

[18] Paragraph 39 of the May 22, 2002 Order on that point reads as follows:

With respect to questions refused by Air Canada on examination for discovery ...and more specifically with the category of information: "General Ledger for 2000 and 2001", Air Canada shall produce the entire Air Canada Ledger for the year 2000 in electronic form, the complete General Ledger for Air Canada and Air Canada Regional for 2001 and to provide a similar document[s] to exhibit 300439 (the extract from Air Canada Mainline's General Ledger Account Cost Information). [the 328 Report] [emphasis added]

[19] By way of further explanation, exhibit 300439 referred to above is also known as the Reconciliation Report and makes the link between Air Canada's 328 Report and its General Ledger. The 328 Report is route specific and lists revenues and allocated expenses to that route to determine its profitability.

[20] The resolution of this issue regarding Air Canada's production turns on what Justice McKeown envisaged in his May 22, 2002 Order when he ordered Air Canada to produce the "entire" or "complete" General Ledger.

[21] I examined the transcript of the hearing before Mr. Justice McKeown on May 2 and 3, 2002, and I am satisfied that by ordering Air Canada to produce the "entire" General Ledger, what Justice McKeown had in mind was the production of the underlying data used in making up the General Ledger. This means the production of the so-called "Journal Line". Counsel for the Commissioner in argument before Justice McKeown requested disaggregated numbers as opposed to the generalized figures in the General Ledger produced. He spoke of needing "the full raw General Ledger."

[22] Further, I note that Air Canada did not raise any concerns as to the availability of the raw data or any difficulties related to its production.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

(a) Group 1 - Questions related to Air Canada's cost and revenue accounting

[23] Air Canada shall answer the questions asked at page 61 (line 20) and both questions asked at page 62 (lines 2 and 7).

(b) Group 2 - Questions related to changes made to routes identified as the bottom 20 performing routes

[24] Air Canada shall answer the four questions related to changes made to routes identified as the bottom 20 performing routes along with those stated at Tab 2C of the Commissioner's Motion Record.

(c) Group 3 - Questions that arise directly from documents produced by Air Canada

[25] Air Canada shall answer the questions asked at page 84 (line 19) and at page 85 (line 25) in relation to exhibits 250051 and 250052.

(d) General Ledger

[26] Air Canada shall produce forthwith the entire Air Canada General Ledger for the year 2000 and the complete General Ledger for Air Canada and Air Canada Regional for 2001 in electronic form which includes the underlying disaggregated data used in making up the General Ledger. This means the production of the so-called "Journal Line".

[27] Air Canada's answers shall be provided no less than seven (7) days from the date of these Reasons and Order or on a date otherwise agreed to by the parties, followed by Luc Piché and Paul Brotto's re-attendance at Air Canada's own expense.

DATED at Ottawa, the 27th day of September, 2002.

(s) François Lemieux

APPEARANCES:

For the applicant:

The Commissioner of Competition

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