

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Appellant

- and -

Kelly Dean Dube, Respondent

LEGISLATION:

Air Regulations, C.R.C. 1978, c.2, s. 534(2)(a)

Low-flying, Crop spraying, Built-up area

Appeal decision

Fred W.R. Clarke, Robert J. MacPherson, Robert L. Mortimer

Decision: July 26, 1994

The appeal is dismissed, and the revised penalty of \$150.00 is upheld. this amount, payable to the receiver general for canada, must be received by the civil aviation tribunal within fifteen days of service of the present determination.

The Appeal Hearing on the above matter was held Tuesday, July 19, 1994 at 13:00 hours, at Canada Place, in the City of Edmonton, Alberta.

BACKGROUND

On June 26, 1993, Mr. Kelly Dean Dube was conducting an aerial spraying operation over the feedlot of a Mr. Martin. Mr. Martin's feedlot is located close to Brooks, Alberta.

The R.C.M.P. responded to two calls regarding the operations of the aircraft on that morning.

Following the investigation, a Notice of Assessment of Monetary Penalty was issued to the pilot, Kelly Dean Dube, for an alleged contravention of paragraph 534(2)(a) of the *Air Regulations*.

The fine was not paid by the prescribed date, and a Review Hearing was held before Tribunal Member Dr. L. Ohlhauser on January 18, and February 22, 1994 in Brooks, Alberta. Dr.

Ohlhauser determined that Mr. Dube did contravene the *Air Regulations* and upheld the Minister's allegation, but reduced the fine.

By letter dated April 15, 1994, faxed to the Civil Aviation Tribunal, Richard W. Covlin, counsel for Kelly Dean Dube, appealed the decision of Dr. Ohlhauser. The Appeal Hearing was held before the three designated Tribunal members in Edmonton, Alberta on July 19, 1994.

GROUND FOR APPEAL

In a letter dated April 15, 1994, Mr. Covlin made a Request for Appeal on behalf of Mr. Dube, as follows:

- "1. The Review Member erred in law in ruling that it was reasonable for him to take judicial notice of where the built-up area of Brooks, Alberta, is located, in reference to the provisions of Sec. 534 (2) (a) and 534 (3) of the Air Regulations.
2. The Review Member erred in not accepting the evidence of the witness, Bob Breakel, on the grounds that the witness could not remember the specific date upon which the incident occurred."

THE CONTRAVENTION

The Notice of Assessment of Monetary Penalty sent to Mr. Dube was dated September 27, 1993 and reads in part:

"Pursuant to section 7.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a monetary penalty on the grounds that you have contravened the following provision:

Section 534, (2)(A), Air Regulations, in that you, Kelly Dean Dube, as pilot in command of aircraft Canadian registration C-GSVA, on or about the 26th of June 1993, at or near Brooks in the Province of Alberta, did fly said aircraft over a built up area of Brooks at an altitude which was less than 1,000 feet above the highest obstacle within a 2,000 foot radius of said aircraft.

The total assessed penalty of \$500.00 must be paid on or before the 8th of November, 1993".

THE LAW

Paragraph 534(2)(a) of the *Air Regulations* states:

"(2) Except as provided in subsections (4), (5) and (6) or except in accordance with an authorization issued by the Minister, unless he is taking off, landing or attempting to land, no person shall fly an aircraft

(a) over the built-up area of any city, town or other settlement or over any open air assembly of persons except at an altitude that will permit, in the event of an emergency, the landing of the aircraft without creating a hazard to persons or property on the surface of the earth, and such altitude shall not in any case be less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft; or"

Subsection 534(3) of the *Air Regulations* states:

"(3) For the purposes of subsection (2), an aircraft shall be deemed to be over the built-up area of any city, town or other settlement or over any open air assembly of persons where that built-up area or open air assembly of persons is within a radius of 2,000 feet from the aircraft."

THE ISSUES

On the first ground for appeal, Mr. Covlin argued the following points regarding the definition of a built-up area:

- 1) That an essential element of the case presented by Transport Canada must prove that Mr. Dube did fly over a "built-up" area of Brooks, Alberta. (emphasis added)
- 2) That such a "built-up" area should be recognizable, by a pilot, from the air. (Emphasis added)
- 3) That Transport Canada had to define a "line" that defense counsel could argue against, as to what was and was not a "built-up" area. (emphasis added)

Transport replied:

- 1) That the job of the Minister is to present the evidence of where the aircraft flew, and that this was done through pictures, maps and direct testimony.
- 2) That the Hearing Officer, based on the evidence presented, is the person charged with deciding whether or not a built-up area exists.

The second ground for appeal concerned the evidence of Mr. Bob Breakel. Mr. Covlin also referred to the evidence given by Mr. Dube and by Mr. Cameron at the Review Hearing. In particular, Mr. Covlin argued that: .

- 1) Mr. Covlin had not been allowed to enter the affidavit of Mr. Breakel.
- 2) The Hearing Officer relied too heavily on the missing date of Mr. Breakel's aircraft sighting.
- 3) The Hearing Officer unfairly discounted Mr. Dube's testimony because it was given from memory and without notes.

4) Mr. Cameron's testimony was overlooked as it pertains to Constable Popein's testimony.

DISCUSSION

We have determined that, based on the evidence, no special authorization for the flight in question was requested, or issued by the Minister, as allowed in subsection 534(2) of the *Air Regulations*.

Witness Patricia Laux in Exhibit M- 5 stated:

"I was in my residence ... on the first pass.

...

On the second pass of the aircraft I was outside

...

On the third pass I wrote down the registration number from the bottom of the right wing

...

On the 4th pass I was on the phone to the police.

...

On the fifth pass I was outside again

...

On the sixth pass I was ... talking to Cst. LENARCIC. I struck (sic) the phone out the window for him to hear the plane. He made 2 or 3 more passes ..."

Constable Popein of the RCMP left the detachment office to investigate the complaint after he and Constable Lenarcic heard the aircraft noise over the telephone from Mrs. Laux.

Constable Popein observed one low pass of the aircraft from the area of 2nd Street and the Cemetery, flying West to East, about 2/3 the height of an AGT Tower.

Constable Popein drove up 2nd Street and parked in front of the "Red Basket" and watched "an aircraft coming towards me" "from the west" "the aircraft flew directly over top of me. I watched the aircraft continue past me. It went over top of the trailer court".

Constable Popein observed the aircraft make two more turns, one over the Victory Church and one west of it.

Jean Moynaugh states in Exhibit M- 8 that she was upstairs, sleeping in her home and was awakened by a very loud noise.

"I went to the window. I saw ... bright yellow plane"

"He flew over at least 10 times."

(Transcript Page 42, Line 21)

"I saw the letters, like the licence plate on the bottom of the wings".

Ms. Moynaugh further testified she had received a complaint from one of her tenants regarding the disturbance.

All three of the Transport Canada witnesses could read the registration letters of the aircraft from the underside of the wings. Two of the witnesses testified the aircraft was over or very near their houses.

The third witness, Constable Popein, watched the aircraft fly over the trailer park.

The evidence shows that the three observations put the aircraft C-GSVA over a residential area at the same time on the same day.

We were presented with several definitions of a "built-up" area:

- Mr. Covlin: (CAT File No. O-0067-33 referring to R. vs Crocker)

"The regulations are designed for aircraft pilots and would undoubtedly be made with the fact in mind that built-up areas should be recognizable from the air."

- Ms. Ellard:

"built- up, round, in, surround (person, place, etc.) with houses etc., block-up"
(R. vs Crocker, quoting the Concise Oxford Dictionary)

"Any place where a population of persons may be found." (R. vs Maguire)

"... structures that are, especially those that are not abandoned, erected or built by man and includes such structures as private dwelling residences, schools, elevators, service stations and so forth." (R vs Stoesz)

"The wording of the Regulation in both English and French suggests that the legislator did not want to be confined to areas within incorporated or recognized cities, towns and urban districts but was dealing with the factual situation on the ground." (Emphasis added) (R. vs Crocker).

We have determined, based on the evidence, that it was quite proper of the Hearing Officer at the Review Hearing to take judicial notice of the evidence and testimony and render his decision of a built- up area accordingly.

We have no conflicting evidence regarding the flights over a built- up area, and therefore find no cause to disturb the Review Hearing Officer's finding on this issue.

Mr. Covlin argued the matter of the affidavit sworn by Mr. Breakel not being allowed at the January 18, 1994 portion of the Review Hearing. This was resolved when Mr. Breakel was subsequently allowed to testify personally at the February 22, 1994 conclusion of the Review Hearing.

Evidence entered by affidavit does not attract the same weight as personal testimony. Any information in his written statement could have been put on the record at the Review Hearing. In any event the evidence given in person is much more compelling than a sworn statement.

Dr. Ohlhauser gave counsel an open door to introduce evidence by Mr. Breakel. We find the handling of the affidavit evidence to be very fair to Mr. Dube.

The evidence of Mr. Bob Breakel has been scrutinized by the Appeal Panel after hearing Mr. Covlin's arguments on same.

The evidence shows Mr. Breakel did see an aircraft engaged in aerial application. The evidence does not show positive identification of the aircraft (the registration). The evidence does not show any identification as to color of the aircraft. The evidence shows that the sighting took place on a Saturday morning and that Mr. Breakel observed "about four passes."

In summary, Mr. Breakel saw "about 4 passes." Mrs. Laux phoned the RCMP on the "sixth pass". Constable Popein observed "4 passes", after Mrs. Laux had called, and he had arrived at the north end of 2nd Street.

If we conclude that Mr. Breakel was observing the correct aircraft on the correct date, then we must also conclude he did not observe the entire operations of the day. We have no evidence to lead us to believe any of the foregoing to be true.

Mr. Dube acknowledged the difficulty of complying with the requirements of section 534 of the *Air Regulations* when spraying Mr. Martin's feed lot, and stated his normal course reversal is achieved through a teardrop turn 45 degrees to the right and then a left turn back onto the reverse course. He also stated that he was not over the town of Brooks at any time during the flight in question, and that all his turns at the east end of the runs that day were straight ahead pull- ups followed by a turn to the left. Nevertheless, we find no reason to override the Hearing Officer's view that Mr. Dube unintentionally flew over a built- up area of Brooks.

Regarding the witness Mr. Cameron, we believe he did talk to Constable Popein. The conversation did not directly affect the investigation of the incident. Notes were not made by

Constable Popein. Seven months after the fact, it is reasonable to not expect total recall of all conversations not directly applicable to the subject matter.

CONCLUSION

We do not agree that the onus is on Transport Canada to "draw the line" delineating built-up areas. Hearing Officers have made their own determination of such areas in previous cases (for example, CAT File No. P-0032-02, Abramson and Minister of Transport - February 24, 1988). The Hearing Officer in this review, from a map, photographs, and witnesses' testimony, reasonably and correctly concluded that the areas of concern were built-up areas.

We have testimony that the aircraft was "very low" over residences occupied by the witnesses. We have registration identification by two witnesses, and color identification by three.

The witnesses' testimony is in harmony as to time, place, and aircraft identification. Based on the evidence, we find no reason to disturb the findings of the Review Determination. The evidence of Mr. Breakel is not sufficiently strong to offset the positive identification of the aircraft by three witnesses.

The appeal is therefore denied, and the revised penalty of \$150.00 is upheld.

Reasons for Appeal Determination by:

Robert J. MacPherson.

Concurred:

Robert L. Mortimer
Fred W.R. Clarke