

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Kevin Snow, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.7

Canadian Aviation Security Regulations, SOR/2000-111, s. 45.2

Review Determination
Allister W. Ogilvie

Decision: May 11, 2005

The Minister has not proven that the document holder refused to surrender his pass after a demand was made to do so. The allegation is dismissed.

A **review hearing** on this matter was held on Friday, April 22, 2005, at the Career and Learning Centre in St. John's, Newfoundland.

BACKGROUND

A Non-Passenger Screening Program (NPS) was initiated at the St. John's International Airport at St. John's, Newfoundland and Labrador on October 25, 2004.

The object of the program is to enhance the security of the workplace at airports. That is to be accomplished by a security screening of persons who have access to restricted areas of airports to prevent them from carrying prohibited items into restricted areas. Persons with such access are issued restricted area passes (RAP). Pass holders include airport personnel, air crews, ramp attendants, baggage handlers and aircraft mechanics, among others.

A team of screening officers sets up a screening location at an access point beyond which lies a restricted area. The screening officers randomly select RAP holders who wish to gain entrance to

the restricted area. The RAP holders and their possessions are screened for prohibited items before being allowed access to the restricted area.

On November 2, 2004, screening officers at the St. John's International Airport selected a location on the second level of the terminal adjacent to gate number 2 to conduct NPS. Mr. Kevin Snow, a pilot, approached the location seeking access to the restricted area. One officer told him that he had been selected for NPS and would he please give the officer his RAP. Mr. Snow indicated that he did not wish to do so and that he would seek another access point. He turned and walked away.

The screening officers filed a report which lead to an investigation of the incident. Subsequently, Transport Canada alleged that Mr. Snow had violated *Canadian Aviation Security Regulation 45.2*. A Notice of Assessment of Monetary Penalty in the following form was issued to Mr. Snow:

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(s):

On or about the 2nd day of November, 2004, at the St. John's International Airport, in the Province of Newfoundland and Labrador, you being the holder of a Restricted Area Pass, refused to submit to an authorized search of your person when requested to do so by a screening officer and failed to surrender your Restricted Area Pass when demanded to do so by the screening officer contrary to Section 45.2 of the Canadian Aviation Security Regulations.

Mr. Snow wished to have the decision of the Minister reviewed. He applied for a hearing of the matter which was then held on April 22, 2005, in St. John's, Newfoundland.

EVIDENCE

The Minister

Evidence regarding the alleged violation was introduced through the testimony of the screening officers who conducted the NPS and the Commissionaire who witnessed it. The two screening officers, Mr. G. Cooper and Ms. W. Noseworthy, were certified and designated screening officers. Mr. J. Skanes is a Commissionaire employed at the airport.

Mr. Cooper testified that on November 2, 2004, he and his co-worker had been assigned to conduct NPS near door 2 on the second level of the terminal building. A person whom he is now able to identify as Mr. Snow approached their location. Mr. Cooper informed him that he had been selected for NPS and asked for Mr. Snow's RAP. Mr. Snow refused to give it to him, turned around and went back down the stairs saying something to the effect that he would look for another way out. In cross-examination, Mr. Cooper stated that he was not able to inform Mr. Snow of the repercussions of that act as Mr. Snow had left the area so rapidly.

Ms. Noseworthy testified that she had been assigned to conduct NPS along with Mr. Cooper at a location at the top of the escalator near gate 2. She observed a man whom she now knows to be Mr. Snow coming toward their location. She stated that Mr. Cooper approached the person, informed him that he had been selected for NPS and asked to see the person's RAP. Mr. Snow then felt his pockets, turned around and said that he would find another way out. He then went down the escalator.

The Commissionaire, Mr. Skanes, testified that he had been stationed in the area of level two close to where the NPS was being conducted. He was able to observe the screening officer, Mr. Cooper, approach a male person. He heard Mr. Cooper inform that person that he had been selected for NPS and requested his pass. The person stepped back, said no and that he would go somewhere else. He then turned and left. Under cross-examination, he stated that Mr. Snow had departed at a normal pace. He did not see the screeners make a second attempt or to say stop.

The Minister also provided information regarding the investigation and subsequent surrendering of Mr. Snow's RAP. Although it is of assistance in understanding all of the events, that information does not pertain to the actual elements of the allegation.

Document Holder

Mr. Snow testified on his own behalf. He stated that he had just completed a flight and was using the terminal's facilities prior to the next departure. To gain access to the airside, he approached door 2. A screening officer there asked him if he could do a random search on him. Mr. Snow said "no", he would just go to another door and then turned to walk away. He stated that after he had refused to be screened there was no demand for his pass, and no one tried to confiscate it.

Mr. Snow was able to gain access to the restricted area through door 1. He then completed a flight to St. Anthony. Upon his return a customer service agent informed him that the Commissionaires were looking for him. On completion of his flight duties, he went to the Commissionaire's office where he spoke to Mr. Minnett and Mr. Butt. There he was informed of his alleged transgression and surrendered his RAP.

THE LAW

Canadian Aviation Security Regulations

Interpretation

"restricted area" means any area of an aerodrome that is identified as an area to which access is restricted to authorized persons.

"restricted area access point" means a point in a security barrier at which an access control system is in place that controls access to a restricted area from a non-restricted area.

"restricted area pass" means a document issued by or under the authority of an aerodrome operator or by an air carrier with the approval of the aerodrome operator that entitles the holder to have access to a specific restricted area during a specified period.

"screening" means the checking, identification, observation, inspection or authorized search of persons, goods and other things in the possession or control of persons who are screened and vehicles under the care or control of persons who are screened to prevent the carrying or transport, contrary to these Regulations, of weapons, explosive substances, incendiary devices or their components or other dangerous items that could be used to jeopardize the security of an aerodrome or aircraft.

Control of Access to Restricted Areas

45.1 The holder of a restricted area pass who is being screened by a screening officer at a restricted area access point or at a location inside a restricted area must, on demand, present the restricted area pass to the screening officer making the demand.

45.2 The holder of a restricted area pass who refuses to submit to an authorized search of their person or goods or other things in their possession or control or a vehicle under their care or control when requested to do so by a screening officer must, on demand, surrender the restricted area pass to the screening officer making the demand.

DISCUSSION

It is incumbent upon the Minister to prove each element of the alleged violation on a balance of probability. The alleged violation found at Schedule "A" of the Notice of Assessment of Monetary Penalty may be broken into its essential elements. The Minister must prove:

- on or about November 2, 2004
- at the St. John's International Airport
- Mr. Snow was the holder of a restricted area pass
- he refused to submit to an authorized search when requested by a screening officer
- he refused to surrender his RAP when demanded to do so by the screening officer

The evidence that relates to each of the elements is as follows:

- Testimony of the witnesses verifies that the incident took place on November 2, 2004 at the St. John's International Airport.
- The agreed statement of fact establishes that Mr. Snow was the holder of a restricted area pass at that time.
- The agreed statement of fact also establishes that Mr. Cooper and Ms. Noseworthy are screening officers. Their testimony establishes that Mr. Snow refused to submit to an

authorized search. Mr. Skanes corroborates that testimony and Mr. Snow concedes that he refused to be screened.

- There is no evidence to establish the last element. For section 45.2 to be operable there must be a demand for the surrender of the RAP.
- The "demand" for the pass in section 45.1 must be differentiated from that found in 45.2. Section 45.1 addresses a pass holder being screened. The holder must *present* the pass to the screening officer on demand. Once the pass is presented, the screening officer is able to scrutinize it. Section 45.2 addresses circumstances where the pass holder refuses an authorized search. After a refusal of the search, the demand is for the *surrender* of the document. Once the pass is surrendered the screening officer is able to confiscate it. That latter demand was not made in this instance and that is the deficiency in the Minister's case.
- The evidence shows that Mr. Snow approached the screening station. The screening officer told him that he had been selected for NPS and demanded that he present his RAP to him. I find that this demand is the one addressed in section 45.1 when the screening was being initiated, as up until that time there was no refusal.
- Mr. Snow then refused, turned around and walked away. The demand for surrender of the pass is a condition precedent to the surrender. One could not know that he must surrender the pass unless the demand was made.
- Here the evidence of both the screeners and the Commissionaire is that Mr. Snow was asked for his pass as he approached their area. After he refused the search there is no evidence that a demand to surrender the pass was made by the screening officers. To the contrary, Mr. Snow stated that no demand was made after his refusal to be screened. Both screeners remarked upon the rapidity of his departure. Implicit in that is that they may have made a demand if they had more time. Mr. Cooper's statement shows that he did not have time to tell Mr. Snow that there could be consequences for the refusal.

CONCLUSION

The Minister has not proven that the document holder refused to surrender his pass after a demand was made to do so. The allegation is dismissed.

May 11, 2005

Allister Ogilvie
Vice-Chairperson
Transportation Appeal Tribunal of Canada