CAT File No. A-1500-33
MoT File No. 6504-P-159400-029439

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Applicant

- and -

James Jeffrey Rowan, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.7, 37
Canadian Aviation Regulations, SOR/96-433, s.602.31(1)(b)

Hearsay, Evidence, Air traffic control clearance

Review Determination
Allister W. Ogilvie

Decision: November 10, 1997

The Minister did not prove, on a balance of probabilities, that the pilot-in-command of aircraft 4610 did not comply with the air traffic control clearance received and accepted by him. In the result, the allegation is dismissed.

A Review Hearing on the above matter was held Wednesday, October 22, 1997 at 10:00 hours at the Federal Court of Canada, in Fredericton, New Brunswick.

BACKGROUND

On February 12, 1997, Air Canada flight 4610, flew between Fredericton and Saint-John, New Brunswick. On departure from Fredericton, flight 4610 was assigned a Capital City Two Departure. The Minister alleged that flight 4610 did not comply with the departure instructions. That allegation formed the basis for the Notice of Assessment of Monetary Penalty which stated, 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(s):

Canadian Aviation Regulations section 602.31(1)(b) in that at approximately 1500 UTC on or about February 12, 1997, while pilot-in-command of an aircraft, to wit: a DC-9 aircraft, bearing Canadian Registration Marks C-FTLS, operating as Air Canada Flight 4610, you did not comply with an air traffic control clearance received and accepted by you, in that after departure from runway 15 at Fredericton, New Brunswick, you failed to follow the Fredericton SID (vector) Capital City Two Departure instructions and did thereby commit an offence contrary to section 7.6(2) of the *Aeronautics Act*, R.S., c. A-3, s.1.

EVIDENCE

The Minister called Mr. Gary Olson, the Nav Canada Flight Service Station (FSS) Manager in Fredericton who was on duty on February 12, 1997. Mr. Olson made the compressed tape of radio transmissions sent and received at the Fredericton FSS at the pertinent time. This compressed tape was entered as Exhibit M-1 and played at the hearing. A transcript of the tape was entered as Exhibit M-2. These were proffered as evidence that the Capital City Two Departure clearance was received and accepted by aircraft 4610.

Exhibit M-5 consisted of a letter to Mr. Moffat of Transport Canada from Air Canada stating that Captain Rowan was the pilot-in-command of flight 4610 on February 12, 1997. Included was an excerpt from the journey log which verified Captain Rowan as pilot-in-command.

Mr. Gordon Richards was an FSS specialist at Fredericton for nine years. He had been working on February 12, 1997. It was his duty to give aircraft clearance for departure. He acknowledged to having listened to the compressed tape and recognized his voice on it. He testified that the pilot of aircraft 4610 had received and accepted the Capital City Two Departure.

On cross-examination, Mr. Richards conceded that he had listened to the tape to refresh his memory and that he did not have any recollection other than what was on the tape.

Mr. Robert Loring, an air traffic controller with extensive years of experience, was the supervisor in the Moncton centre at the pertinent time.

An Occurrence Report of the incident (Exhibit M-7) was entered through Mr. Loring. He identified the report as authored by a W. Dunnett whom Mr. Loring identified as the shift manager in Moncton. The essence of the report was that there had been non-compliance with the SID by aircraft 4610. Mr. Loring stated that it was the duty of Dunnett, as shift manager, to have written the report.

A copy of the Capital City Two Departure was entered through Mr. Loring as Exhibit M-8. The salient portion was read into the record. Mr. Loring identified the particular procedure to be a vectored SID. I accepted that a man of Mr. Loring's experience in air traffic control (ATC) could identify the type of SID in question.

Mr. Loring acknowledged that the low level controller had advised him of the occurrence. It was then Mr. Loring's function to note the occurrence in the unit log as procedure did not allow the controller to do so. The notation was read into the record (Exhibit M-9) as follows:

> AC4610 DC9 FC–SJ Departed on Capital City 2 SID – followed SID until intercepting airway and proceeded on course – No traffic involved. Situation discussed with pilot who subsequently apologized for his error.

This notation was initialled by Mr. Loring.

Mr. Loring conceded that he could not remember which controller had given him the information, and further stated that he had no personal knowledge of the occurrence.

Mr. Paul Bennett was called to give evidence. He was a Transport Canada inspector dealing with commercial and business aviation. He was qualified to do instrument flight tests and as such had familiarity with the *Instrument Procedures Manual*. [1] An excerpt from the Manual was entered as Exhibit M-10. The section read into the record states:

> C. *Standard Instrument Departures (SID).* At certain airports an IFR departure clearance may include a coded departure clearance known as a standard instrument departure (SID). Standard instrument departures are published in the *Canada Air Pilot* as *PILOT NAVIGATION SIDs,* where the pilot is required to use the chart as a reference for navigation to the en route phase; or as *VECTOR SIDs*, where ATC provides radar navigational guidance to a filed/assigned route or to a fix depicted on the chart. (Emphasis added)

Counsel for Captain Rowan chose not to call any witnesses on the captain's behalf. However, a series of exhibits was entered. The Case Presenting Officer for the Minister did not object to the exhibits being received. Five letters were written by counsel for Captain Rowan to Transport Canada on various dates, in May and October of 1997, requesting disclosure of certain documents, such as Area Control Centre tape, tapes which might give pilot/controller communications, a radar plot of the area, and the name of the low level controller responsible for monitoring aircraft 4610.

The Minister by fax of October 8, 1997 (Exhibit D-5) stated that the Moncton Centre tapes and transcripts relating to flight 4610 on February 12, 1997 were not available, that a copy of the radar plot was not available and further, refused to divulge the name of the controller.

A copy of Air Canada's version of SID was entered as Exhibit D-7. These documents constituted all the evidence called by counsel for Captain Rowan.

ARGUMENT

The Minister submitted that evidence provided showed that, on a balance of probabilities, Captain Rowan did not adhere to a clearance received and accepted by him, in that he did not maintain a 040° heading but turned to intercept the airway without clearance.

Mr. Tataryn argued that all elements of the offence had been made out. Captain Rowan was established as pilot of flight 4610. The clearance was received and accepted by him. The Capital City Two was a vectored SID, but the Captain did not maintain the required heading.

Counsel for Captain Rowan provided extensive argument divided into three main issues:

- Firstly, that the Minister had not made out the violation. That, Mr. Fenn submitted, was because there was no evidence that the Captain did not maintain the heading. He submitted that there was a gap in the evidence concerning what happened after the aircraft had turned to the 040° heading. The Minister had not made out his onus; therefore, there was no violation;
- Secondly, that if the Minister had made out his case, then Transport Canada was under a positive duty to get the aircraft back on course, which was something Transport Canada failed to do;
- Thirdly, that the alleged offender had the right to know the case he has to meet. To that end, the case law pursuant to the Stinchcombe[2] decision put a broad onus on the Minister to investigate the occurrence and to share the fruits of the investigation. He argued that this was not done, as evidence that could or should have been made available was not. Therefore, the alleged offender's rights to fundamental justice under the Charter were violated and on that basis the allegation should be quashed.

DISCUSSION/LAW

Paragraph 602.31(1)(*b*) of the *Canadian Aviation Regulations* provides:

> 602.31(1) Subject to subsection (3), the pilot-in-command of an aircraft shall
>
> (...)
>
> (*b*) comply with all of the air traffic control clearances received and accepted by the pilot-in-command and
>
> (...)

The Minister must prove all the elements of the offence, on a balance of probabilities, to make out his case. In this allegation, he must establish:

1. the identity of the pilot-in-command of the aircraft;
2. that the pilot-in-command received and accepted an air traffic control clearance; and
3. that the pilot-in-command failed to comply with the clearance received and accepted.

Subsection 602.31(1) of the Regulations states that it is subject to subsection (3). Subsection (3) allows the pilot-in-command to deviate from an air traffic control clearance in certain circumstances, involving collision avoidance manoeuvres, which are not germane in this instance.

There is no issue that Captain James Rowan was the pilot-in-command of aircraft 4610 on February 12, 1997. This is established in Exhibit M-5, the letter from Air Canada to Transport Canada's Mr. Moffat, which acknowledges that fact. It is verified by the accompanying aircraft log excerpt.

The evidence that Captain Rowan received and accepted the air traffic control clearance consists of the compressed tape and accompanying transcript as well as the testimony of Mr. Richards, the specialist who conveyed the clearance. He conceded that the tape had refreshed his memory of the event.

Counsel impugned the accuracy of the tape because of the method of its preparation and drew into question whether the compressed tape was a "clean" tape before it was utilized for the proceeding. Mr. Olson had testified that the tape was new, but that he did not play it through to confirm that nothing else was on it.

The points raised by counsel do not persuade me that the compressed tape is improper or tainted or of no evidentiary value. Mr. Richards, having his memory refreshed by the tape, testified that aircraft 4610 had received and accepted the clearance. I accept that that fact was proven.

The last element, that the pilot-in-command failed to comply with the clearance received and accepted, is sought to be proved by the Minister's Exhibit M-7, the Occurrence Report and Exhibit M-9 the excerpt from the ATC unit's log, as well as the testimony of the supervisor of the Moncton centre, Mr. Loring.

Counsel for Captain Rowan had objected to the admissibility of that evidence on the basis that it was hearsay.

The text *The Law of Evidence in Canada*[3] explains the concept of hearsay as follows:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

In this case we have an oral statement made by someone, the low level controller, who is not giving testimony in the proceeding, and the statement is tendered, through Mr. Loring, to prove that the pilot-in-command failed to comply. It can be seen that the statement is, by definition, hearsay.

The rule against hearsay is an example of one of the many legal or technical rules of evidence developed for courts to help them accomplish their mandates. However, these rules do not necessarily serve the purpose of an administrative tribunal.

This has been recognized by providing a legislated exemption from the strict adherence to the legal and technical rules, in the form of section 37 of the *Aeronautics Act* where it states:

> 37. (1) Subject to subsection (5), the Tribunal or a member thereof is not bound by any legal or technical rules of evidence in conducting any matter that comes before it or the member and all such matters shall be dealt with by the Tribunal or member as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.
>
> (...)
>
> (5) The Tribunal or a member thereof may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

The exemption from the legal and technical rules of evidence is because of the characterization of evidentiary rules, as procedural. It is clear from subsection 33(3) of the *Aeronautics Act* that the Civil Aviation Tribunal is the author of its own procedure.

> (3) The Tribunal may, with the approval of the Governor in Council, make rules not inconsistent with this Act governing the carrying out of the affairs of the Tribunal and the practice and procedure in connection with matters dealt with by it. (Emphasis added)

That evidence is to be considered a procedural matter is illustrated in the text of *Hearings Before Administrative Tribunals*:[4]

> 'Evidence' is considered, on the whole, to be a matter of procedure. It is an aspect of how one enforces or goes about bringing into effect one's rights rather than being a substantive right itself.[1.2]
>
> As I have noted repeatedly in this text, administrative decision-makers are masters of their own procedure. They do not have to do things the way a court would do them. Subject to the dictates of statute law and natural justice, an agency has the authority to determine its own procedure. It follows, then, that because evidence is a matter of procedure an agency's mastery over its procedure means that it is not bound by the legal rules of evidence.
>
> [1.2] *Wildman v. R.* (1984), 14 C.C.C. (3d) 321 (S.C.C.); *R. v. Bickford* (1990) 51 C.C.C. (3d) 181 (C.A.).

This view is similarly expressed in *Administrative Law in Canada*[5] where it is stated:

> Unless expressly prescribed, the rules of evidence applied in court proceedings do not apply to proceedings before an administrative tribunal. This is, in part, because tribunal members, being lay people, are not schooled in the rules of evidence and are expected to apply common sense to their consideration of evidence. It also reflects the public interest mandate of many tribunals.

That is not to say that no rules apply regarding evidence. The constraints on evidence found in the Act, are that it must be fair and within the bounds of natural justice. The Tribunal cannot accept evidence that is inadmissible in a court by reason of any privilege under the law of evidence. Of course, the basic criterion is that it must be relevant. However, not all relevant evidence is of equal probative value. The hearing member must decide what weight to ascribe to relevant evidence.

Therefore, although Exhibits M-7 and M-9 are hearsay, they are nevertheless admissible. As the statement given, if true, would go to prove that the pilot-in-command did not comply with the clearance, it is relevant.

Hearsay evidence can be of value, especially if verified or corroborated by other evidence or if it forms the corroboration of some other evidence. However, that is not the case here. Exhibit M-7, the Occurrence Report, is merely a formal reiteration of the unit log excerpt. Mr. Loring, the author of the report in the unit log, quite candidly stated that he had no personal knowledge of the situation that he recorded, nor could he remember from whom he had received the information.

From the testimony received, it has become clear that evidence of a non-compliance may have been given directly from the low level controller who reported the occurrence to Mr. Loring. Physical evidence such as a radar plot of the area control centre might have been of assistance in proof of the allegation as might the tapes of controller/pilot communications. The Minister is, of course, free to present his case and evidence as he sees fit. In this case, the evidence he offers on one essential element of the offence, whether or not the pilot complied with the clearance, is uncorroborated hearsay. The actual witness to the event has given a statement, not under oath, and not subject to cross-examination, nor can the Tribunal make an assessment of the credibility of that witness. The statement is merely repeated by Mr. Loring and transcribed into Exhibits M-7 and M-9. Consequently, I am unable to afford it any weight.

DETERMINATION

The Minister did not prove, on a balance of probabilities, that the pilot-in-command of aircraft 4610 did not comply with air traffic control clearance received and accepted by him. In the result, the allegation is dismissed.

Allister Ogilvie
Vice-Chairperson
Civil Aviation Tribunal

---

[1] Transport Canada Aviation, *Instrument Procedures Manual*, Document No. TP 2076E at 4-11.

[2] *R.* v. *Stinchcombe* (1991), 83 Alta. L.R. (2d) 193 (S.C.C.) (7:0).

[3] J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada* (Toronto and Vancouver: Butterworths, 1992) at 156.

[4] R.W. Macaulay & J.L.H. Sprague, *Hearings Before Administrative Tribunals* (Scarborough: Carswell, 1995) at 17-2 – 17-2.1

[5] Sara Blake, *Administrative Law in Canada*, 2d ed., (Toronto and Vancouver: Butterworths, 1997) at 50.