

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Jerry Melvin Brodt, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

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

Canadian Aviation Regulations, SOR/96-433, s. 801.01(2)(a)

Review Determination
William Thornton Tweed

Decision: June 6, 2005

I confirm that Mr. Jerry Melvin Brodt contravened paragraph 801.01(2)(a) of the Canadian Aviation Regulations and uphold the Minister's assessment of \$250.00. This amount is to be made payable to the Receiver General for Canada and must be received by the Tribunal within thirty-five days of service of this determination.

A **review hearing** on this matter was held Wednesday, March 30, 2005 at 10:00 hours, at the Federal Court of Canada, in Winnipeg, Manitoba.

FACTS

On April 13, 2004 at 0137Z there was a loss of separation between an east bound 737 (Westjet 606) and a west bound 767 (Air Canada 145). Both aircraft were operating at flight level (FL) 410. At approximately 15 miles separation the controller instructed both aircraft to turn. The aircraft passed at the same altitude with 4.9 miles lateral separation.

Both aircraft had been issued clearances. However, their initial clearances were issued prior to entering the air traffic control sector where the loss of separation occurred. The 767 was operating at the wrong altitude for the direction of flight. The flight progress strips were both in place. The 767 flight progress slip was circled in red indicating it was at the wrong altitude for the direction of flight.

ALLEGATION

The Minister alleges that the applicant issued a clearance to the westbound 767 that was not in accordance with the *Canadian Domestic Air Traffic Control Separation Standards* when he issued a clearance to the 767 at FL 410 (wrong way) when the 737 was already at FL 410 on a converging course.

DEFENCE

The applicant states that he did not issue the clearance to the aircraft and that he should not be held responsible. Alternatively that if he is responsible, he exercised all due diligence and should therefore not be held accountable.

DISCUSSION

The applicant's argument that he did not issue the clearance is not consistent with the evidence. An aircraft travelling through Canadian airspace on long flights such as the subject aircraft would pass through several sectors. The controller that issues a clearance to an aircraft departing Toronto for Calgary is not responsible for the provision of separation of that aircraft from other aircraft for the entire trip. As the aircraft moves from one sector to the next the system advises the controller of the next sector of the aircraft's pending arrival, its altitude and track. In this case the evidence showed that the flight progress slips had both been passed to the applicant, controller responsible for the sector.

Both aircraft had called the sector controller confirming their entry into the sector and their altitude. The controller acknowledged the transmissions and did not alter the existing clearance, thereby assuming responsibility for the clearance. The controller has in fact issued a clearance for the aircraft to continue through his sector on the existing clearance. If, as was the case here, a conflict is to occur in the sector, the responsible controller must revise the clearance as necessary to ensure the required separation is maintained. In the circumstance of this incident, the controller did not issue a revised clearance until a warning bell alerted him to the converging aircraft.

FINDING

All of the elements of the offence were proven at the hearing. Mr. Brodt was the controller responsible for the sector in which the loss of separation occurred. He had accepted the wrong way 767 and confirmed its routing from the prior sector and spoke to and acknowledged the clearance directly to the aircraft. Approximately twelve minutes later he spoke to the east bound 737 acknowledging its altitude and approximately four minutes later he spoke to Sault sector confirming the 737 altitude and routing. Approximately four minutes later after an alarm sounded, he issued an instruction directing the 767 to turn right 40 degrees. Seventeen seconds later the 737 was instructed to turn right 10 degrees. The two aircraft passed with 4.9 mile of lateral separation. The required separation was lost.

DUE DILIGENCE DEFENCE

Notwithstanding that all of the elements of the offence have been proven, Mr. Brodt has alleged that he exercised all due diligence and should be excused from responsibility for the offence. In the Marsh appeal determination, diligence is defined as "the attention and care legally expected or required of a person".^[1]

The Minister referred me to the Norris appeal determination^[2] wherein the appeal panel set out the elements necessary to succeed with a due diligence defence:

To succeed with a due diligence defence the Appellant has to prove one or more of the following:

1. That the document holder took reasonable steps to obtain all relevant information necessary for the discharge of his or her obligations set out in the CARs;
2. That notwithstanding the document holder's obligations as set out in the CARs he or she was not in control of the events that led to the infraction;
3. That the appropriate exercise of the authority and responsibility given the document holder did not prevent the infraction;
4. That the document holder did not have a reasonable opportunity to discover an error made by another document holder from whom he or she accepted responsibility;
5. That an equipment failure prevented the document holder from discharging his or her duty.

The evidence described Mr. Brodt as a very competent controller. Nothing in the evidence would suggest otherwise. However, he did fail to recognize the conflict even after being alerted to the wrong way aircraft. His sector was described as busy but not overwhelmed by Mr. McDonald. Mr. Brodt, however, stated that he was overwhelmed. The evidence established that Mr. Brodt did not ask the supervisor for assistance. The only explanation offered for the loss of separation was that Mr. Brodt was concerned about a different conflict. In the circumstance of this matter, based on criteria previously established, Mr. Brodt has not discharged his onus to prove that on the balance of probabilities he exercised all due diligence required of an air traffic controller.

DETERMINATION

I confirm that Mr. Jerry Melvin Brodt contravened paragraph 801.01(2)(a) of the *Canadian Aviation Regulations* and uphold the Minister's assessment of \$250.00.

June 6, 2005

William T. Tweed
Member
Transportation Appeal Tribunal of Canada

^[1] *Leslie G. Marsh v. Minister of Transport*, appeal determination, [1996], C-1095-02.

^[2] *John Henry Norris v. Minister of Transport*, appeal determination, [2000], W-1931-39.