

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Applicant

- and -

Western Express Air Lines Inc., Respondent

LEGISLATION:

Aeronautics Act, R.S., c. 33 (1st Supp), s. 7.7

Canadian Aviation Regulations, SOR/96-433, s.706.08(3)

Maintenance Control Manual, Due Diligence

Review Determination
Keith Edward Green

Decision: August 13, 2001

By virtue of the evidence submitted and the testimonies rendered, the Tribunal has decided to uphold the Minister's decision and confirm the monetary penalty of \$1,250.00. That amount is to be made payable to the Receiver General for Canada and received by the Civil Aviation Tribunal within fifteen days of service of this determination.

A **Review Hearing** on the above matter was held July 4, 2001 at 10:00 hours, at the Federal Court of Canada in Vancouver, British Columbia.

BACKGROUND

The Regional Director of Civil Aviation convened an audit of Western Express Air Lines Inc. during an eleven-day period, commencing from January 27, 2000 until February 7, 2000. The intent of the audit was to assess Western Express Air Lines Inc.'s level of competence for correction and compliance with the regulations governing the standards for operation of Canadian air operators. The detailed audit was accomplished according to the policy and procedures as detailed in the Manual of Regulatory Audits. The audit, encompassing all areas of operation with the noted exception of a "Line" and "Ramp" inspection, was conducted at Western Express Air Lines Inc.'s main base of commerce.

On December 14, 1999, approximately six weeks prior the commencement of the said audit, a letter of notification was sent to Western Express Air Lines Inc., providing them with an opportunity for preparation. The audit "entry meeting" was conducted on January 27, 2000, following which the initial "exit meeting" was convened on the 4th of February of the same year. However, due to certain difficulties in locating various aspects and components of the audit's required elements within the company's maintenance system, the audit maintenance team continued in their review of the system beyond this date and eventually exited on February 7, 2000.

The audit recorded seventeen maintenance findings, including the alleged contravention, cited in the Notice of Assessment of Monetary Penalty. In particular, to this hearing, it was insinuated that the company in question did not follow their approved evaluation quality control program with respect to sections 7.1, 7.2, 7.3 and 7.4. of the company maintenance control manual (MCM). The above quoted sections collectively refer to the company's requirements to retain all completed audit forms and non-conformance sheet(s) on file within the maintenance office for a period of five years.

The Notice of Assessment of Monetary Penalty reads in part as follows:

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):

Schedule A

Canadian Aviation Regulation subsection 706.08(3), in that from approximately February 1, 1998 to approximately February 1, 2000, at or near Richmond, British Columbia, as an air operator you failed to comply with the Western Express Air Lines Inc. policies and procedures contained in its Maintenance Control Manual. Specifically, Section 7.4 of the Western Express Air Lines Inc. Maintenance Control Manual, which states in part: 'The Quality Manager shall retain all completed audit forms and non-conformance sheets on file in the maintenance office for a period of five (5) years.'

\$1250.00 Monetary Penalty

The inability to produce the required audit forms and non-conformance sheets, as requested by the Minister of Transport during and after the audit, conflicts with subsection 706.08(3) of the *Canadian Aviation Regulations* (CARs).

PREAMBLE

The Member's opening address was concluded with a precautionary statement over a concern regarding "reasonable apprehension of bias." The Member made it public knowledge that as a consultant, he had known Mr. Oliver, previous to the hearing. In 1987, the Member made a

proposal; whereby, Mr. Oliver's company would operate an aircraft (R4D-8) belonging to another individual whom the Member was consulting for at that time.

The Member also brought it to public attention that he had known Mr. MacNab on a social and business basis. Mr. MacNab lived in Victoria and was the Principle Maintenance Inspector responsible for a company the Member was consulting with.

After having informed the individual parties of the above-mentioned concerns, all parties confirmed the Member's former affiliation presented no conflict or apprehension of bias and there was no substantiation for consternation. The conclusion was entered into the record. There were no further preliminary motions tendered.

THE LAW

Paragraph 7.7(1)(a)(b)(2) of the *Aeronautics Act* provides as follows:

7.7 (1) Where the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister shall notify the person of the allegations against the person in such form as the Governor in Council may by regulation prescribe, specifying in the notice, in addition to any other information that may be so prescribed,

(a) subject to any regulations made under paragraph 7.6(1)(b), the amount that is determined by the Minister, in accordance with such guidelines as the Minister may make for the purpose, to be the amount that must be paid to the Minister by the person as the penalty for the contravention in the event that the person does not wish to appear before a member of the Tribunal to make representations in respect of the allegations; and

(b) the time, being not less than thirty days after the date the notice is served or sent, at or before which and the place at which the amount is required to be paid in the event referred to in paragraph (a).

(2) A notice under subsection (1) shall be served personally or by ordinary mail sent to the latest known address of the person to whom the notice relates.

Subsection 706.08(3) of the CARs:

(3) Except where otherwise authorized by the Minister in writing where it is demonstrated that the granting of the authorization will not jeopardize the safety of the product or service, an air operator shall comply with the policies and procedures contained in its MCM.

AGREEMENT BETWEEN PARTIES

The case presenting officer, during his opening address, informed the Member that they (himself and Mr. Oliver) had discussed the disclosure package. Mr. Oliver confirmed this during his brief opening statement, adding they came to an agreement on what evidence was to be issued and that there were witness changes. No other agreements or settlements had been reached between the parties. A copy of the disclosure package, in its final form was submitted to the presiding Member but was not entered as evidence.

THE MINISTER'S CASE (Applicant)

Examination of the Minister's First Witness

The Minister opened his case by calling the first witness, Mary Lou Williams - an inspector with Civil Aviation Enforcement, Transport Canada Safety & Security.

Having been formally sworn, Mary Lou Williams took to the witness stand and proceeded to provide testimony, under examination from the Minister. Inspector Williams related a brief pre and post history of the audit when at this time Aviation Enforcement (Inspector Williams being the investigating officer) became involved in the review of the audit findings. Inspector Williams related that, on December 20, 2000, an interview took place between herself and the then current Director of Maintenance (DOM) for Western Express, Dale Floyd. The interview's intent was to review the findings and determine if there was any additional information that could be added. During the interview with Dale Floyd, Inspector Williams asked Mr. Floyd if he had any evaluation records, referring to former audits, to which Mr. Floyd stated "No".

A Notice of Assessment of Monetary Penalty was prepared and submitted on January 31, 2001. Inspector Williams received the case file approximately two months later, on March 7, 2001. The Minister then proceeded to introduce Exhibit M-1 — copies from a section of Western Express's MCM. The exhibit contained proof that it was an approved manual, current and authenticated. More specifically to the allegation, the exhibit contained reproductions from the MCM relating to section 7.0, specifically 7.1 (Evaluation Program, page 58), 7.2 (Quality Assurance Program, page 59), 7.3 (Policy, page 60) and 7.4 (Internal Audit, page 61). The Minister explained the relevance of the exhibit's content, paying attentive detail to the alleged finding.

The Minister sustained the examination by asking the witness, "when you investigate a situation like this, how much time is given to produce documents?" A summary of the rejoinder indicated that normally "two days" were allotted for a response. Further discussion revealed that when verbally requested information could not be produced, or more time was needed to locate it, a written "Confirmation Request" would be submitted, as in the present situation requesting all completed audit forms and non-conformance sheets, on file, in the maintenance office for a period of five years.

Examination of the Minister's Second Witness

Duly sworn, Inspector MacNab, as the audit manager, explained how he was assigned to manage the audit team during the audit of Western Express. Inspector MacNab was asked to explain how a company is officially notified of an audit. This, Inspector MacNab accomplished and, in so

doing, was asked to comment upon the Minister's Exhibit M-2; being a letter of audit notification, signed by the Regional Director Civil Aviation, Mr. David J. Nowzek. It was revealed Exhibit M-2 is a standard format letter intended to provide a company with sufficient information and warning of a pending audit. The date of the above letter was December 14, 1999.

Inspector MacNab further related that one of the audit team members had noticed Western Express had not conducted an internal audit within the last twelve months, this being written into the company's MCM. Inspector MacNab continued to explain that the finding would have been discussed at both the daily debriefing, either that day or the next day, with the Company President, David Oliver and at the Exit Meeting. Inspector MacNab was asked if he was involved in a "follow-up" of the audit, to which an affirmative answer was returned, followed by explanation of policy. At this point reference was addressed to a "cover letter" attached to the audit report, as provided to Western Express, explaining certain details of the audit. The Member questioned if this letter was to be entered as evidence, and it was indicated that it would not. Mr. Oliver also objected to the letter pointing out that it was not presented to him previously in the disclosure package and that it had no bearing on this charge. Mr. Oliver went on to state: "We, "Western Express", accept the fact that there were post audit meetings and that these letters were sent and received".

Examination of the Minister's Third Witness

Inspector Hrynyk was asked by the Minister, under oath, to tell the Tribunal what his functional area was as a member of the audit team in respect to the quality assurance and evaluation program. Inspector Hrynyk remarked that he had made a finding at the time of the audit, and could not determine through interview or records if any of the functions were being performed by the company. Mr. Hrynyk talked to a Mr. Baker, who at this time was the quality manager, according to the Maintenance Control Manuals as well as the Director of Maintenance.

The Minister at this point in the proceedings submitted Exhibit M-3 —the confirmation request form. Inspector Hrynyk was asked to explain the form and its purpose, which he subsequently did, explaining the form served several purposes: to be used in a situation when a record (technical or other) cannot be located. It would then be presented to a company representative who would try to locate it. The second reason was more specific to this case, being in the event that records do not exist and/or the tasks are not performed, there is a record of audit findings. It is a record for something that does not exist. Inspector Hrynyk elaborated upon this statement by relating a verbal request to the quality manager, asking him for the quality records for the evaluation program, and he did not have any.

Inspector Hrynyk continued his dialogue, reciting the quality manager's reply to the verbal request, being that the Director of Maintenance had passed away a year previously and Mr. Bob Baker had assumed those duties and did not have time to do the quality manager's role. Inspector Hrynyk, after having listened to the above statement, provided the current quality manager, Mr. Bob Baker, with the confirmation request form, thus allowing him time to research the company records. Inspector Hrynyk informed the Tribunal that the quality manager returned later stating, "there are no records; they had not done any evaluations or quality audits in the

company." Mr. Barker explained verbally to Inspector Hrynyk the reason why he had not performed any evaluations or quality functions, being a shortage of manpower.

The Minister asked Inspector Hrynyk if there was any evidence of a quality evaluation program. Inspector Hrynyk indicated that there was not a program in place and that the procedures in the MCM were not being followed. The Minister continued by asking how was this conclusion determined. Inspector Hrynyk replied that there was no evidence, reports, or documentation as per the requirements.

Cross-examination of the Minister's First Witness

Mr. Oliver opened the cross-examination by questioning the witness over the confirmation request form. Mr. Oliver attempted to present a copy of this form as evidence but it was deemed inadmissible by the presiding Member on several grounds. Firstly, Mr. Oliver's document was an uncertified copy and secondly, Mr. Oliver attempted to enter it against a witness who may have never had any connection with it prior to this situation. In justifying the decision, the presiding Member asked the Minister if the original confirmation request form was going to be entered later as an exhibit, to which the Minister responded in the affirmative, indicating that he would be presenting the original confirmation request form. In respect to Mr. Oliver's inadmissible form, which he now used only as a reference, Mr. Oliver continued with his line of questioning, incorporating a series of clarifying queries questioning the witness for details pertaining to a particular time at which the request was apparently written. Mr. Oliver's copy evidently indicated "4:45", whereas the original document entered later by the Minister as Exhibit M-3 clearly indicated that the correct time was 9:45 and not as initially insinuated by Mr. Oliver.

Mr. Oliver continued with his cross-examination, asking the witness to read from various documents that she had authored, attempting to provide clarification. One document Mr. Oliver asked Inspector Williams to read was contained in the disclosure package, as presented to the Member but not entered as evidence. It should be noted Mr. Oliver, having signed the agreement sheet as contained on the first page of the disclosure package, agreed to the following: "That the information supplied to you in the disclosure package contains true, admissible copies of the existing relative original documents referring to this case." Although not evidence in the strictest sense of the word, the Member lends the package considerable weight as all parties agreed that the content reflected true and accurate copies of documents. Therefore, Inspector Williams' citation is significant to this case. During a meeting with the new Director of Maintenance (Dale Floyd) on December 20, 2000, he confirmed that there were no records available for the evaluation program up to the time of the audit completion on February 7, 2000. Mr. Oliver continued with his clarifying questioning, asking Inspector Williams to quote from Schedule A of the Notice of Assessment of Monetary Penalty. This section is also contained in Exhibit M-1 referencing Western Express's MCM section 7.4 paragraph 5 and reads: "The Quality Manager shall retain all completed audit forms and non-conformance sheets on file in the maintenance office for a period of five (5) years.

Cross-examination of the Minister's Third Witness

During the cross-examination of the Minister's third witness, Mr. Oliver requested that section 6.4 (Location of Records, page 57) of Western Express MCM, be entered into evidence (D-1). The Member, after having reviewed the proposed evidence, asked Mr. Oliver if he intended to take the stand. Mr. Oliver replied to the negative. At this point, the Member explained to Mr. Oliver, unless he was prepared to take the stand and be sworn in accordingly, there would be no further opportunity for him to enter evidence via the cross-examination process. The Member on this occasion accepted the proposed document as evidence for the following reasons: One, it was a document that the Minister would have referenced in the course of the audit/investigation. Two, Mr. Oliver was not aware of certain protocol relating to the application of evidence, and three: the Member thought it might be relevant to the case and without Mr. Oliver taking the stand, there would be no opportunity for him to submit it at a later time.

Section 6.4 (Location of Records, page 57) states: "All long term storage of technical records will be at the company head office. Records of less than one year will be maintained at the maintenance office in a dry and safe area."

The questioning of Inspector Hrynyk by Mr. Oliver dealt largely with the clarification of what constitutes a technical record and what might be considered a technical record. Inspector Hrynyk explained to the best of his abilities, without referencing official definitions, what the differences are. He suggested the requested records — as required to be maintained in accordance to section 7.4 (Internal Audit, page 61) — are non-technical records that might contain technical matter. Section 6.4 (Location of Records, page 57) deals primarily with the long-term storage of technical records at the company's head office.

Mr. Oliver had no further questions.

THE DOCUMENT HOLDER'S CASE (Respondent)

Mr. Oliver called no witness to testify and declined to take the stand himself.

THE ARGUMENTS

The Applicant

The Minister opened his argument by citing subsection 706.08(3) of the CARs:

(3) Except where otherwise authorized by the Minister in writing where it is demonstrated that the granting of the authorization will not jeopardize the safety of the product or service, an air operator shall comply with the policies and procedures contained in its MCM.

The Minister informed the Tribunal that Western Express did not comply, the proof being in the confirmation request form and the fact that they did not produce the documents as required on

demand. Additionally, the Minister quoted from the Western Express MCM, Section 7.4, page 61, first and fifth paragraphs respectively.

Section 7.4 Internal Audit

An internal audit will be carried out annually by the QA Manager in accordance with company audit forms (**WestEx 09** A/B/C). A copy of the Audit Report shall be submitted to both the DOM and Company President for review.

The Quality Manager shall retain all completed audit forms and non-conformance sheets on file in the maintenance office for a period of five (5) years.

The Minister pointed out that Inspector Hrynyk asked only for those records relating to the preceding twenty-four months for which no documents were received. The Minister reiterated the amount of time given to Western Express to prepare for the audit and to produce the missing records, being both fair and adequate. He explained that an MCM is in effect a contract between an air operator and the Minister of Transport where the air operator details how they are going to comply with the CARs, carrying on a safe operation that will not endanger the public. The MCM is written by the air operator, and if policies and procedures are acceptable, the manual is then approved for use by Transport Canada. It is a living document the operators can amend any time. It contains the policies and procedures which the company has chosen to use in order to comply with the regulations. The Minister concluded his argument by reasoning that without any evaluation records produced to date, and the high number of findings generated in the last Transport Canada audit, Western Express did not perform any QA evaluation functions. Without any QA evaluations records being kept, Western Express Air Lines was not following the policy and procedures in its approved MCM as per CAR 706.08(3).

The Respondent

Mr. Oliver opened his argument by acknowledging the Minister's remarks in respect to: "it being a very serious responsibility to have an air operator's certificate, and specifically the maintenance control manual and all the checks and balances that go with it. It is written for a specific reason and that is the safety of the travelling public in Canada."

Mr. Oliver then proceeded to cite the charge as provided in Schedule A, drawing attention to the dates of the alleged contravention and the specifics of Section 7.4 of the Western Express MCM: "The Quality Manager shall" Mr. Oliver referenced what the Minister's witnesses had implied while under oath, being that the Minister's Inspectors never got to examine any completed audit forms or non-conformance sheets, quoting their testimony, "they did not exist". Mr. Oliver informed the Tribunal that the reason for the hearing was not to talk about whether Western Express kept records or did not keep records, but to address the charge. Mr. Oliver continued with his emotional argument by hypothesizing that if there are no such forms that exist, whether or not they do, has not been addressed here and was not asked to be addressed here. If they do not exist, which was their testimony - they cannot ask us to file them.

Mr. Oliver elucidated that the allegation was very specific, quoting once again from the MCM Section 7.4, fifth paragraph. Mr. Oliver informed the Tribunal that paragraphs one through four deal with "who is to do it, what is to be done." Mr. Oliver elaborated further: "so what we are dealing here with, specifically, is the Quality Manager shall retain the completed Audit Forms and Non-Conformance, yet they did not produce them, so they cannot say we did not file them. In fact, they say, we do not have them, so we cannot file them. So they did not prove their case - as there is nothing to file, or that we did not file them as they claim; there is nothing to file".

Mr. Oliver rebuked the Minister's summation that the records were not filed from February 1, 1998 to February 1, 2000, as the Minister had no evidence entered to support this assumption. "They did not prove they were not filed then, they just said, they were not available. Yet they did not prove they were not available".

Mr. Oliver made a final argument that the documents requested by the Minister were technical in nature and therefore controlled under Section 6.4 of the MCM – "long term storage of technical records will be at the company head office...." Mr. Oliver informed the Tribunal that Transport Canada did not enter evidence demonstrating that the quality manager had access to the head office for long-term storage. Mr. Oliver finalized his argument in three paradoxes:

(i) The Minister did not prove that it [referring to the requested records] was not there during the whole period of the charge.

(ii) The Minister did not prove that they [referring to the requested records] were there at all to be filed.

(iii) The Minister did not prove that the Quality Manager had access to them [referring to the requested records].

ANALYSIS

As with most regulatory offences covered under the *Aeronautics Act*, the case involving Western Express Air Lines Inc. is a "strict liability offence". As such, the Minister need only prove "*actus reus*" (a state of "omission or commission"), i.e., a person "shall not" do something or a person "shall" do something as in accordance with the legislation made pursuant to the *Aeronautics Act*. Once the Minister has proved *actus reus*, the evidentiary burden shifts to the alleged offender, behoving the document holder to prove due diligence was exercised in the prevention of the contravention.

actus reus

The Minister, in the presentation of his case, provided the Tribunal with sufficient evidence in both testimony and documentation, to prove, on a balance of probabilities, that the alleged contravention, specifically cited against Section 7.4 of Western Express Air Lines Inc. MCM, was not being complied with, and therefore, violated subsection 706.08(3) of the CARs as charged.

Fact: The Minister proved on a balance of probabilities: Western Express Air Lines Inc. was the holder of a current and authorized MCM, containing policy and procedure, relating to an authorized quality program.

Fact: The Minister proved on a balance of probabilities: records were not available for inspection and subsequent verification of Western Express Air Lines Inc. quality program, as per the requirements of the MCM. Sections 7.1, 7.2, 7.3 and 7.4 and/or had not been filed as in accordance to Western Express Air Lines Inc. MCM Section 7.4. Demonstrated by Exhibits M-1, M-3 and the combined testimony rendered by the Minister's first and third witnesses, during separate interviews with the current QA Manager/DOM and the former (deceased) quality manager. Additionally, qualifying testimony provided during the cross-examination by Mr. Oliver to Inspector Williams.

Fact: The Minister proved on a balance of probabilities: sufficient time was provided for the requested records to be produced. This was accomplished via Exhibit M-3 and testimony from three of the Minister's witnesses. Although initially contested by Mr. Oliver, with respect to a particular time noted on a 'copy' of Exhibit M-3, Mr. Oliver rapidly realized that his copy was in error.

Due diligence

Exhibit D-1 , Section 6.4 Location of Records deals with the "long term storage of technical records", etc. The argument fostered over the requested records classification "technical" or "non-technical", is purely academic. Section 7.4 of the MCM, fifth paragraph, requires that "The Quality Manager shall retain all completed audit forms and non-conformance sheets on file in the maintenance office for a period of five (5) years." Section 6.4 of the MCM, requires that, "All long term storage of technical records will be at the company head office. Records of less than one year will be maintained at the maintenance office in a dry and safe area." Therefore, according to Western Express's own MCM, there would have been at least twelve months (one complete audit cycle) of audit records available for inspection at the maintenance office, regardless as to the definition of "technical documents". Additionally, Mr. Oliver was aware of the request for the missing records, as he was a participant at the "Exit Meeting", when the findings were reviewed. In fact, Mr. Oliver publicly stated, "We (Western Express) accept the fact that there were post audit meetings..." Accordingly, giving Mr. Oliver sufficient opportunity to retrieve any documents that might have been located at head office or providing authority to the quality manager to access the area — neither being accomplished.

The authority warranted to Transport Canada is sufficiently documented under various sections of the CARs and the *Aeronautics Act* to empower the Minister of Transport with the appropriate authority to "request and review" the files of those companies engaged in the practice of air operation. Once requested, it becomes the air operator's responsibility to produce those files and documents for the Minister. With due respect to Mr. Oliver, his argument suggesting the "Minister" must prove the existence of the missing files and documents, is illogical. The files and records as requested by the Minister are in accordance to Western Express Air Lines Inc. MCM, a condition of the "contract" between the Minister and the air operator, Western Express. Therefore, any omission in maintaining and ultimately failing to produce the required files and

records, as required under the company's quality program (Section 7.4 of the MCM), renders Western Express Air Lines Inc. in "breach of contract" to the Minister of Transport.

With respect to evidence: failure to produce the requested records and files is tantamount to admitting non-compliance to the above mentioned section of Western Express's MCM. The records of audit and non-conformance are the only practical means for Transport Canada to validate the effectiveness of the quality system employed at Western Express. The onus to fulfil the Minister's request is on the document holder. Mr. Oliver, as President and representative for Western Express Air Lines Inc., had abundant opportunity to accomplish the assignment, both before and during the Hearing, when he could have assumed the stand and presented evidence to the Tribunal in the shape of the absent records. This Mr. Oliver chose not to do. Was due diligence exercised in the prevention of the contravention? In the eyes of the Tribunal, Western Express Air Lines Inc. failed to prove due diligence as demonstrated in the deficiency of testimony and evidence.

CONCLUSION

I have scrutinized the admissible evidence and testimonies, lending each the appropriate weight and consideration they deserved. I heard the Minister's case and that of the Respondent, fairly and without bias. Equally as important, I listened to what both parties had to convey.

In the final analysis, I have determined my conclusion upon the facts, evidence and testimony as presented before me. In the minutiae of this case, the Minister has demonstrated on a "balance of probabilities" the document holder, Western Express Air Lines Inc., did not exercise "due diligence" in the execution of specific duties as defined and agreed upon within the company's MCM. As a consequence, Western Express Air Lines Inc. did not fulfil the required responsibilities expected of a responsible air operator. I quote again Mr. Oliver's own words, "It is a very serious responsibility to have an air operating certificate, specifically the maintenance control manual and all the checks and balances that go with it. It is written for a very specific reason and that is the safety of the travelling public in Canada".

DETERMINATION

By virtue of the evidence submitted and the testimonies rendered, the Tribunal has decided to uphold the Minister's decision and confirm the monetary penalty of \$1,250.00.

Keith Edward Green
Member
Civil Aviation Tribunal