

CIVIL AVIATION TRIBUNAL

BETWEEN:

John Brian Magill, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, S.C., c. A-2, s. 6.9, 37(1)

Airworthiness Manual, s. 571, 571.10(2), 566.02

Canadian Aviation Regulations, SOR/96-433, s. 571.10(1), 571.11, 605.85

**Weight and Balance Report, Maintenance Release, Duty of Care, Centre of Gravity
Location**

Appeal decision

David S. Ahmed, Keith Edward Green, Pierre Rivest

Decision: April 6, 1999

The Appeal Panel unanimously agreed to dismiss Mr. Magill's appeal. The suspension for seven days of his Canadian aviation document, aircraft maintenance engineer licence, is confirmed. The said suspension will commence on the fifteenth day following service of this determination.

An Appeal Hearing on the above-entitled matter was held on Thursday, March 4, 1999 at 10:00 hours at the Federal Court of Canada, Winnipeg, Manitoba.

INTRODUCTION

An Embraer EMB 110 P1 aircraft was imported from the USA into Canada by Sowind Air Ltd. Sowind Air Ltd. subsequently contacted Northeastern Aircraft Ltd. to carry out an Inspect, Test, Repair as Necessary (ITRAN) inspection on the said aircraft. The aircraft was subsequently certified and a new Certificate of Registration was issued. The aircraft remained in service for almost one year when it was later destroyed in an accident.

Subsequent to the destruction of the aircraft an investigation was launched by the Minister during which it was established that the aircraft's Weight and Balance Report, which had been filed in support of the application, contained data which was in error.

The investigation established that the Weight and Balance Report calculation had been carried out by a Mr. Dennis Turney. Mr. Turney is an Aircraft Maintenance Engineer (AME) and the Director of Maintenance for Sowind Air Ltd. He holds an M2 licence and was not qualified to release EMB 110 aircraft so the work was carried out under the supervision of a Mr. John Magill who was qualified to work on the aforementioned type of aircraft.

On June 4, 1998, a Notice of Suspension was issued to Mr. John Magill, which stated in part:

Pursuant to section 6.9 of the *Aeronautics Act*, the Minister of Transport has decided to suspend the above indicated Canadian aviation document on the grounds that you have contravened the following provision(s):

Canadian Aviation Regulation 571.10(1) in that, on or about November 22, 1996, at or near St. Andrews, Manitoba, you did sign a maintenance release required pursuant to Section 605.85 of the Canadian Aviation Regulations when the standards of airworthiness applicable to the maintenance performed and stated in Chapter 571 of the Airworthiness Manual had not been complied with, more specifically, you certified as released for return to service an aircraft, to wit, an Embraer EMB 110P1, bearing Canadian registration marks C-GVRO while the empty weight, weight and balance report contained an inaccurate centre of gravity location.

The suspension was for seven days and was disputed by Mr. Magill who petitioned the Civil Aviation Tribunal for, and was granted, a Stay of Suspension on June 9, 1998. He also requested, and was granted, a Review Hearing by the Tribunal.

REVIEW PROCEEDINGS

A Review Hearing was held on August 25, 1998 in Winnipeg, Manitoba. Mr. Magill was represented by Mr. William Tweed, counsel. The Case Presenting Officer for Transport Canada was Mr. Don Hiscock. Mr. Hiscock had two witnesses, Mr. Andrew Dennis Turney and Mr. Eckhard Dittbrenner. Mr. Turney is the AME referred to earlier and Mr. Dittbrenner is an investigator with the Aviation Enforcement Branch of Transport Canada. He is also a rated AME who was part of Transport Canada's investigation team following the destruction of the aircraft in question. The Hearing Officer representing the Civil Aviation Tribunal was Mr. Pierre J. Beauchamp.

At the conclusion of the Review Hearing, Mr. Pierre Beauchamp determined the following:

The Minister did prove on a balance of probabilities that the Applicant, Mr. Magill, certified as released for return to service an aircraft, to wit, Embraer EMB 110 P1, bearing Canadian registration marks C-GVRO while the empty

weight, weight and balance report contained an inaccurate centre of gravity location. The suspension for seven days of the Canadian aviation document, aircraft maintenance engineer licence, held by the Applicant is confirmed. Said suspension will begin on the fifteenth day following service of this determination.

Because Mr. Magill did not agree with the Review Determination, he requested, and was granted, an Appeal Hearing by the Civil Aviation Tribunal. He was also granted a Stay of Suspension pending the result of the Appeal Hearing.

GROUND FOR APPEAL

On December 22, 1998, the Civil Aviation Tribunal received an Application for Appeal from Mr. Magill. Mr. Magill's grounds for appeal were as follows:

1. The Tribunal member erred in determining that the center of gravity location was in error and that on the balance of probabilities and the evidence submitted that the weight and balance was, in fact, accurately located.
2. That in the alternative pursuant to the CAR's the owner of the aircraft is responsible for the aircraft maintenance and the owner of the aircraft repaired the Weight and Balance Report that was the subject of the Hearing not the applicant.
3. That based on the Weight and Balance Report prepared by the aircraft owner, the Minister issued a Certificate of Airworthiness for the subject aircraft.
4. The applicant is entitled to rely on the documents prepared by the owner and the Certificate of Airworthiness issued by the Minister and in so doing exercised due diligence.

THE APPEAL HEARING

Mr. Magill, who was physically present but did not participate in the hearing, was represented by Mr. Joseph D. Barnsley, counsel. Transport Canada was represented by Ms. Beverlie E. Caminsky. Because this was an Appeal Hearing, Mr. Barnsley was requested to present his case first.

Even though it was mentioned in the grounds for appeal, Mr. Barnsley did not dispute the evidence suggesting that the Weight and Balance Report submitted by Mr. Turney and subsequently "signed off" by Mr. Magill was inaccurate. The issues that his argument focused on can be summarized as follows:

- Mr. Barnsley informed the Appeal Panel that Mr. Magill was totally ignorant of the fact that Mr. Turney was not qualified to work unsupervised on EMB 110 P1 aircraft. The inference was that, had he been aware of this fact, it was conceivable that he may have

paid more attention to the figures pertaining to the centre of gravity location submitted by Mr. Turney before signing them off.

- Mr. Barnsley reminded the Appeal Panel that when the ITRAN was carried out on the aircraft in question there were over 90 items that had been included in the work report. One of these items, of course, referred to the fact that a new weight and balance had been carried out. The lengthy work report list included, for example, that both propellers had been overhauled as had the left and the right engines by companies authorized to do this sort of work and who had subsequently certified that the work had been done according to accepted standards. His point was that if these types of reports were accepted at "face value" he could not understand why Transport Canada was singling out the flawed Weight and Balance Report as submitted by Mr. Turney.
- Mr. Barnsley pointed out to the Appeal Panel that, following completion of the ITRAN, it was Transport Canada who issued the Certificate of Airworthiness in spite of the fact that it was later determined that the Weight and Balance Report was flawed. His point was that, this being the case, the Minister's representatives who were responsible for issuing the Certificate of Airworthiness should take, certainly in part, some of the blame.

Ms. Beverlie Caminsky's Submission

Ms. Caminsky is employed by Transport Canada, Regulatory Services. She is currently Acting Chief, Safety and Security, Appeals. Prior to presenting her oral argument, she presented all parties present at the hearing with a document that was entitled Respondent's (Minister's) Written Submissions in Preparation for Oral Argument. This was a carefully prepared, 31-page document, which summarized, in a clear and concise fashion the facts pertaining to this case.

Ms. Caminsky reminded the hearing that Mr. Pierre Beauchamp who chaired the original Review Hearing on behalf of the Civil Aviation Tribunal had confirmed the Minister's decision to suspend Mr. Magill's AME licence for seven days. She submitted that the Member's determination should not be substituted by the Appeal Panel because the Member's findings of fact and credibility were not unreasonable. She went on to indicate that the Minister's representative proved all the elements of the offence, and the defence of due diligence was not proven on a balance of probabilities.

She further submitted that in relation to the specific grounds for appeal, the finding of fact by the Member clearly held that the centre of gravity stated on the Weight and Balance Report was an error.

She also stated that it was further found that Mr. Magill had signed the maintenance release for the aircraft and was responsible for the work of Mr. Turney. Mr. Magill, she stated, was obliged to ensure that in certifying the aircraft the standards of airworthiness had been abided by. The owner had hired Mr. Magill's company to perform the ITRAN inspection when the aircraft was imported from the USA and was entitled to rely on the certification. In approving the Certificate of Airworthiness, the Minister ensured that the proper forms were completed and the acceptable process and professionals had done the relevant work. She stated that the Minister is not obliged to check each calculation and each specific item performed by the AME in the course of his work. She concluded by submitting that the defence of due diligence was not proven and that the

AME did not act as a reasonable and competent AME and that Mr. Magill was not entitled to rely on the owner and the Minister to perform his work in a professional and competent manner.

Following Ms. Caminsky's presentation, both parties were given the opportunity to summarize their argument. The fundamental basis of Mr. Barnsley's argument was that, in his opinion, the Minister had not proven, on a balance of probabilities, that Mr. Magill deserved a suspension of his AME licence for a period of seven days. Ms. Caminsky, on the other hand, argued that the Minister had acted responsibly and, consequently, the Minister's decision should be confirmed.

During his arguments, Mr. Barnsley insisted in saying that should the Tribunal reject the Appeal, this will create a case of jurisprudence where, in the future, AMEs will be subjected to prosecution risking to be penalized for mistakes made by other persons or organizations such as an engine or propeller overhaul shop. The fact of signing an aircraft as airworthy after a recently overhauled engine has been installed, as an example, could render an AME responsible for any defect of the same engine even if it has been released and signed by an approved overhaul shop.

Members of the Appeal Panel are of the opinion that such a statement is erroneous, each approved organization being responsible for the work it has been recognized for by Transport Canada. The AME who afterwards installs an engine will be responsible only for airworthiness of the installation itself. This is not the case here since Mr. Turney was not approved to sign the weight and balance report of the aircraft involved. It was then to Mr. Magill to verify Mr. Turney's work before the aircraft was signed out as airworthy.

APPEAL DETERMINATION

After careful consideration, the Appeal Panel unanimously agreed to dismiss Mr. Magill's appeal. The suspension for seven days of his Canadian aviation document, AME Licence, is confirmed.

Reasons for Appeal Determination by:

Dr. D.S. Ahmed, Member

Concurred:

Pierre Rivest, Member

Keith Edward Green, Member