

**TRANSPORTATION APPEAL TRIBUNAL OF CANADA**

BETWEEN:

**Raymond Jerry Lee, Appellant**

- and -

**Minister of Transport, Respondent**

**LEGISLATION:**

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

*Canadian Aviation Regulations, SOR/96-433, 700.02(1)*

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**Appeal decision**

**Herbert Lee, Sandra Lloyd, J. Richard W. Hall**

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**Decision: November 17, 2008**

Citation: *Lee v. Canada (Minister of Transport)*, 2008 TATCE 33 (appeal)

Heard at Yellowknife, Northwest Territories, on July 31, 2008

**Held:** The appeal is dismissed. The appeal panel finds that the appellant, Raymond Jerry Lee, contravened section 700.02(1) of the *Canadian Aviation Regulations*. However, the penalty is reduced from \$1000 to \$500 per offence for each of the 12 offences. The total amount of \$6000 is to be made payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within 35 days of service of this decision.

**I. INTRODUCTION**

[1] By letter dated March 7, 2008, the appellant, Raymond Jerry Lee, appealed two review determinations dated February 12, 2008.

[2] In file no. W-3286-33, the member upheld the Minister's decision to assess a monetary penalty against the appellant for three offences, but reduced the total penalty for those offences from \$1200 to \$300.

[3] In file no. W-3287-33, the member confirmed the Minister's decision to assess a monetary penalty of \$1000 for each of 12 breaches of section 700.02(1) of the *Canadian Aviation Regulations* (CARs). That provision prohibits the operation of an air transport service without an appropriate air operator certificate (AOC).

[4] At the outset of the appeal hearing, the appellant voluntarily abandoned his appeal of file no. W-3286-33, and stipulated that he would pay the assessed \$300 monetary penalty to the Minister. Therefore, this appeal decision relates only to file no. W-3287-33.

## **II. BACKGROUND**

[5] Mr. Lee is a licensed airplane pilot who at the relevant times was based in Yellowknife flying for Arctic Air. Mr. Lee voluntarily surrendered Arctic Air's AOC no. 9453 to the Minister in August 2004, apparently out of frustration with his dealings with William Robert Hanson, a civil aviation inspector with Transport Canada. By registered letter dated August 26, 2004, Transport Canada advised Mr. Lee that Arctic Air's AOC was suspended on the grounds that Arctic Air had voluntarily surrendered the AOC.

[6] In the early part of October 2004, Transport Canada initiated an investigation to determine whether 3584674 Canada Inc., carrying on business as Arctic Air, had operated an air transport service during the previous month without having an AOC authorizing it to do so. Transport Canada civil aviation inspector, Kevin John Shott, was assigned to investigate the allegations.

[7] Following that investigation, the Minister of Transport issued, on September 1, 2005, a notice of assessment of monetary penalty to the appellant. The notice alleged 12 breaches of section 700.02(1) of the CARs against Mr. Lee, one for each of 12 flights flown by him for Arctic Air in September 2004.

## **III. REVIEW DETERMINATION W-3287-33**

[8] The member found that the Minister had established on a balance of probabilities that:

- Mr. Lee operated an air transport service between September 9 and 14, 2004, when the AOC of Arctic Air was suspended;
- Mr. Lee flew 12 commercial flights during that period of time. The member also found that in the circumstances, Mr. Lee's conduct did not fulfill the requirements of a due diligence defence; and
- the monetary penalty for each of the offences was reasonable in the circumstances.

## **IV. GROUNDS FOR APPEAL**

[9] The appellant's letter of appeal states the following grounds of appeal:

· Arctic Air is the business name for 3584674 Canada Inc., a limited company. Arctic Air was the person who was the air transport service provider. The member erroneously determined that Arctic Air was a business name for Mr. Lee, when in fact he was only the pilot for the flights in issue.

· There was an AOC and insurance on file with Arctic Air. The principal of Arctic Air, Ted Yaceyko, believed and advised Mr. Lee that charging a fee for the flights would not constitute an offence. No fee was actually paid for the flights. The pilot, Mr. Lee, could not be found to have consented to the offence in the circumstances.

· The pilot did not consent to the offence; therefore, under section 8.4(3) of the *Aeronautics Act* (Act), that is a sufficient defence. The pilot does not need to prove due diligence; that defence would only apply to Arctic Air.

- The penalty is excessive in that:

1. it treats each take-off and landing as a separate flight, which is incorrect; and

2. its form is inappropriate given the circumstances of the offence and the circumstances of the appellant.

## V. LAW

[10] Sections 7.31, 8.1(3) and (4), 8.4(3) and 8.5 of the Act read as follows:

**7.31** Where an offence under this Part is committed or continued on more than one flight or segment of a flight, it shall be deemed to be a separate offence for each flight or segment of a flight on which the offence is committed or continued.

**8.1(3)** The appeal panel of the Tribunal assigned to hear the appeal may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, the panel may substitute its decision for the determination appealed against.

(4) Where the appeal panel finds on an appeal that a person has contravened the designated provision, the panel shall without delay inform the person of the finding and, subject to any regulations made under paragraph 7.6(1)(b), of the amount determined by the panel to be payable by the person in respect of the contravention and, where the amount is not paid to the Tribunal by or on behalf of the person within the time allowed by the Tribunal, the Tribunal shall issue to the Minister a certificate in a form prescribed by regulation of the Governor in Council, setting out the amount required to be paid by the person

**8.4 (3)** The pilot-in-command of an aircraft may be proceeded against in respect of and found to have committed an offence under this Part in relation to the aircraft for which another person is subject to be proceeded against unless the offence was committed without the consent of the pilot-in-command and, where

found to have committed the offence, the pilot-in-command is liable to the penalty provided as punishment therefor.

**8.5** No person shall be found to have contravened a provision of this Part or any regulation, notice, order, security measure or emergency direction made under this Part if the person exercised all due diligence to prevent the contravention.

[11] Section 14 of the *Transportation Appeal Tribunal of Canada Act*, S.C. 2001, c. 29 reads as follows:

**14.** An appeal shall be on the merits based on the record of the proceedings before the member from whose determination the appeal is taken, but the appeal panel shall allow oral argument and, if it considers it necessary for the purposes of the appeal, shall hear evidence not previously available.

[12] Section 101.01(1) of the CARs provides the following definitions of "air transport service" and "flight time", and section 700.02(1) reads as follows:

**101.01(1)**

"air transport service" - means a commercial air service that is operated for the purpose of transporting persons, personal belongings, baggage, goods or cargo in an aircraft between two points;

"flight time" - means the time from the moment an aircraft first moves under its own power for the purpose of taking off until the moment it comes to rest at the end of the flight.

**700.02 (1)** No person shall operate an air transport service unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service.

## **VI. DISCUSSION**

[13] Section 8.1(3) of the Act provides that the appeal panel of the Transportation Appeal Tribunal of Canada (Tribunal) may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, may substitute its decision for the determination appealed against.

[14] As pointed out by the Minister's representative, the Federal Court of Canada recently discussed, in *Billings Family Enterprises v. Canada (Minister of Transport)* [2008] F.C.J. no. 17, the appropriate standard of review for an appeal panel of the Tribunal to undertake. Harrington J. held that an appeal panel of the Tribunal must give considerable deference to findings of fact or credibility made by a member in a review determination. However, he also said that an appeal panel is entitled to its own view of the law. Further, in his view, an appeal panel of the Tribunal is explicitly authorized by section 8.1(3) of the Act to advance its own opinion as to the amount of a penalty.

## **A. Issues on Appeal**

*(1) Did the member err in finding that Arctic Air was a business name for Mr. Lee or that Mr. Lee, rather than Arctic Air, operated a commercial air service?*

[15] Nowhere in the review determination does the member say that Arctic Air was a business name for Mr. Lee. The member states in paragraph [48] that Mr. Lee operated an air transport service when the AOC of Arctic Air was suspended. At paragraph [54], he concludes that Mr. Lee provided air transport services without an AOC and that he had contravened the requirements of section 700.02.(1) of the CARs.

[16] In retrospect, it may have been inaccurate for the member to state that Mr. Lee operated or provided an air transport service. Arctic Air's operations manual states that Mr. Yaceyko is the owner of Arctic Air, while Mr. Lee is the manager. Arctic Air submitted the invoice to the customer for the flights in question and owned the aircraft involved.

[17] However, Mr. Lee was proceeded against pursuant to section 8.4(3) of the Act. That section provides that the Minister may proceed against the pilot-in-command in relation to the aircraft for which another may be proceeded against, unless the offence was committed without the consent of the pilot-in-command. The notice of assessment of monetary penalty states that the procedure was by way of that provision. There is no doubt that Mr. Lee was the pilot-in-command of the flights in question. Since section 8.4(3) of the Act allows the Minister the option of charging the pilot-in-command instead of the operating company, the appeal panel finds that the conclusions of the member that Mr. Lee himself operated or provided an air transport service are not material to the outcome of this appeal.

*(2) Did Mr. Lee consent to the offence?*

[18] Mr. Lee does not deny that the flights were made or that he was the pilot-in-command. The appeal panel agrees with the member that the invoice submitted by Arctic Air is sufficient to establish that the air service was of a commercial nature.

[19] Mr. Lee's position is that because he believed that an AOC was in place when he undertook the flights, he did not consent to the commission of the offence as contemplated by section 8.4(3) of the Act. He submitted that consent to an offence requires that he had knowledge of the offence being committed, and that he could not be found to consent to an offence when he did not have accurate knowledge of the facts. He submitted that when section 8.4(3) of the Act requires consent of the pilot, the matter is no longer a strict liability or due diligence type of offence but requires *mens rea*.

[20] The Minister's representative submitted that the fact that the appellant was, in addition to being the pilot-in-command, the operations manager, chief pilot and maintenance coordinator for Arctic Air, the individual who undertook the voluntary surrender of the AOC completely undermines any claim to the effect that there was no consent to commit the offence. Mr. Lee clearly consented to undertake commercial flights when he knew or ought to have known that no valid AOC was in existence. Further, the Minister's representative submitted that it need not be

shown that the pilot-in-command knew that the impugned act would result in the commission of the offence; it suffices that the act was undertaken voluntarily.

[21] In his review determination, the member did not discuss the issue of whether or not Mr. Lee had consented to the offence. Once he found that the Minister had established that the offence of operating an air service without an AOC had taken place, he discussed only whether Mr. Lee had exercised due diligence in accordance with section 8.5 of the Act.

[22] In *Charron v. Canada (Minister of Transport)*, [1997] appeal determination, CAT file no. Q-1277-02, [1997] C.A.T.D. no. 18 (QL), an appeal panel of the Civil Aviation Tribunal (predecessor to the Tribunal), considered section 8.4(3) of the Act and said the following:

**15** . . . . It is clear that the Minister of Transport has exercised its option to proceed vicariously by proceeding against the pilot-in-command of the aircraft and to hold the pilot-in-command responsible for the offence.

**16** It is equally clear, . . . that once the Minister has established the facts of the case, the onus then shifts to the pilot to exculpate himself by proving that the offence was committed without his consent. The defence of due diligence is also available to the pilot in circumstances warranting its application as contemplated by section 8.5 of the *Aeronautics Act*.

[23] Our view is that this approach to section 8.4(3) is correct. A pilot proceeded against pursuant to section 8.4(3) may avoid liability for the offence by proving that he did not consent to the commission of the offence. If he is unsuccessful in that regard, he may nevertheless escape liability if he proves that he exercised all due diligence to prevent the contravention, pursuant to section 8.5 of the Act.

[24] Mr. Lee's evidence at the review hearing was that he had sent the AOC back to Transport Canada on August 20, 2004, about a month after his commercial insurance expired. He obtained private insurance covering his operation of aircraft on July 20, 2004, and received a fax to that effect from the insurance company. The address shown for him on the insurance policy was the same as Arctic Air's address in the company operations manual. Subsequently, Mr. Yaceyko and Mr. Lee " . . . had discussed revitalizing or reestablishing because (Mr. Yaceyko) knew how (Mr. Lee) wanted to go with the certificate, obtaining it back from Transport Canada."

[25] Transport Canada advised Mr. Lee by registered letter dated August 26, 2004, addressed to him as operations manager of Arctic Air, that AOC no. 9453 was suspended as of August 26, 2004.

[26] Later, after a customer approached Mr. Lee about doing some flying in September 2004, Mr. Yaceyko advised Mr. Lee that he had the insurance and air operator certificate in his files. Mr. Yaceyko was mistaken. The insurance company had mailed Mr. Lee's private insurance folder to Mr. Yaceyko's mailbox, since that was the address Mr. Lee had given. The cover of the

folder was the same as the one used for the commercial insurance. Mr. Yaceyko did not check the insurance folder to confirm the insurance coverage. He assumed that Arctic Air had valid commercial insurance, when it did not.

[27] To compound matters, prior to sending the AOC back to Transport Canada, there had been two copies of Arctic Air's AOC in existence, the one which Mr. Lee sent back, and one in Mr. Yaceyko's files. Both had the same number, 9453. Transport Canada had at some point in the past issued a new copy of the AOC, apparently to change the designation given to Arctic Air's base, and had advised Arctic Air that the new AOC superseded the original. Arctic Air had not destroyed or returned the original AOC.

[28] This appeal panel adopts the following comments of the member in his determination:

[51] Mr. Lee testified that he relied upon that assurance and had no reason to doubt Mr. Yaceyko who was the owner of Arctic Air and funded its operations. Mr. Lee, however, had voluntarily surrendered the AOC just a few weeks earlier. He was also aware that the insurance policy authorizing commercial operations had lapsed. While it may have been convenient for Mr. Lee to rely upon Mr. Yaceyko's assurances, I find that it was not prudent to do so in the circumstances. It was incumbent upon Mr. Lee to inquire how the AOC was reinstated and how the commercial operations insurance was renewed. Prudence also required an examination of those documents by Mr. Lee to satisfy himself that Mr. Yaceyko had properly reinstated them. A reasonable and prudent person would ensure that all requirements relating to the AOC and insurance had been met.

[29] As noted by the Minister's representative, Mr. Lee was in a position of considerable authority with Arctic Air. He was the company's only pilot. He was shown in Arctic Air's operations manual as being not only the manager of Arctic Air, but also the operations manager, chief pilot and maintenance coordinator. Mr. Lee was fully aware of the importance of an AOC, referring to it in his evidence as being like the "holy grail". That he had taken full responsibility for Arctic Air's AOC is indicated in his letter of August 20, 2004 to Transport Canada, where he refers to the AOC as if it were his own.

[30] While most employee pilots would not be expected to investigate the validity of their employer's AOC, in our view the pilot in this case ought to have done so. In the circumstances of this case, the appeal panel cannot find that the appellant did not consent to the commission of the offence on the basis that he did not have knowledge of all the circumstances. Clearly, Mr. Lee consented to the flights, and he ought to have known that the AOC was suspended. He ought not to have relied on Mr. Yaceyko's assurances without questioning both him and Transport Canada further, to ascertain the validity of the AOC that Mr. Yaceyko had on file.

*(3) Did Mr. Lee exercise all due diligence to prevent the contravention?*

[31] This appeal panel agrees with the member's finding, and the reasons given, that the evidence does not support a due diligence defence.

## **B. Sanction**

[32] The appellant's position is that the amount of the sanction assessed by the Minister is excessive and that either Arctic Air should be held responsible or the penalties against Mr. Lee should be reduced. Mr. Lee submits that:

- his conduct with respect to this offence demonstrated respect for the Regulations;
- the contravention was made in error, not knowingly or with illegal intent;
- he ought not be assessed a monetary penalty for each of the 12 flights.

[33] The appellant's representative referred to a number of court cases from the 1970s and 1980s in support of his contention that a lower penalty would be appropriate, although neither copies of the cases nor citations were provided. She also noted that Mr. Lee is unemployed and of no fixed address. The evidence indicates that when in Yellowknife, he lived in a trailer at the float base, sleeping on Mr. Yaceyko's sofa when it was too cold.

[34] The Minister submitted that:

- the member's finding that there were 12 flights was not unreasonable;
- the member's finding that the penalties imposed by the Minister were appropriate was an entirely reasonable finding;
- the sanctions were determined in conformity with the established procedures and are in no way capricious;
- the quantum of \$1000 per flight is fully justifiable, based on the relevant factors set out in the evidentiary record; and
- there is nothing in the evidentiary record that would justify a modification to the sanctions imposed by the member.

[35] Section 7.31 of the Act provides that where an offence is committed on more than one flight or segment of a flight, it shall be deemed to be a separate offence for each flight or segment of a flight. The appeal panel agrees with the member that the appellant flew 12 commercial flights without an AOC.

[36] At paragraph [55] of his determination, the member stated that he agreed with the submissions of the Minister's representative that the monetary penalties assessed were reasonable in the circumstances. He did not give reasons for coming to that conclusion.

[37] Inspector Shott thought that \$1000 per offence was appropriate for the following reasons:

- he thought Mr. Lee had disregard for the Regulations;



- the need for general deterrence;
- the concern for aviation safety;
- precedent setting;
- in his view, the offence was premeditated; and
- the gravity of the offence.

[38] Inspector Shott identified an excerpt from the Aviation Enforcement database showing Transport Canada's policy that the recommended penalty for a first-time individual offender of section 700.02(1) is \$1000, and \$5000 for a corporate offender. The Minister's representative pointed out that the maximum penalty permitted for an individual in this instance is \$5000, and \$25 000 for a corporate offender.

[39] The Minister's representative noted that the *Billings* case confirmed that an appeal panel of the Tribunal has the authority to make a reduction in a monetary penalty, as long as it does not rely on considerations that are irrelevant or extraneous.

[40] Applying the sentencing principles outlined in *Canada (Minister of Transport) v. Wyer*, [1988] appeal determination, CAT File no. O-0075-33, [1988] C.A.T.D. no. 123 (QL), the appeal panel has come to the view that the penalty is excessive in the special circumstances of this case and that it ought to be reduced to \$500 per offence, for a total of \$6000. The factors the appeal panel has taken into account in reaching this conclusion are:

- from the evidence of the appellant's living situation and his submissions, it appears that his financial circumstances are such that this amount will constitute a significant specific deterrence to him;
- while the offences occurred as a result of an unacceptable careless mistake by Mr. Lee, the appeal panel finds they were not premeditated or committed with unlawful intent;
- Arctic Air had held a valid AOC, was qualified to hold an AOC, and would have continued to hold it, had Mr. Lee not sent it back;
- the appeal panel believes there is little likelihood of a repeat occurrence of this offence by Mr. Lee; and
- the total penalty of \$6000 is sufficiently large in the circumstances of this case to send an appropriate message of general deterrence.

[41] The appeal panel notes that prior to the review hearing, the Minister was unaware that Mr. Yaceyko had an AOC document in his possession and that he had informed Mr. Lee that he had it.

[42] The appeal panel wishes to emphasize, however, that the reduction of the monetary penalty is based solely on the special circumstances that apply to this case. It is not intended to diminish our strongly held view that adherence to the CARs and the requirement for commercial operators to hold a valid AOC is a matter of the utmost importance. The public's faith in the integrity of the air transport service industry is vital.

## **VII. DECISION**

[43] The appeal panel finds that the appellant contravened section 700.02(1) of the CARs. However, the penalty is reduced from \$1000 to \$500 per offence for each of the 12 offences.

November 17, 2008

Reasons for appeal decision: Sandra K. Lloyd, Member

Concurred by: Herbert Lee, Member

J. Richard W. Hall, Member