CAT File No. W-1733-41
MoT File No. SAP-6504-C2273-31177

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Applicant

- and -

Kenn Borek Air Ltd., Respondent

LEGISLATION:
Canadian Aviation Regulations, SOR/96-433, s. 605.31(1)

Notice, Oxygen, Incomplete Notice

Review Determination
Pierre Rivest

Decision: July 27, 1999

In response to the Notice of Application filed by the Respondent, I dismiss the Minister's allegation based on the fact that, in this case, the allegation is incomplete and written incorrectly and does not sufficiently agree with the text or the spirit of subsection 605.31(1) of the Canadian Aviation Regulations. I consequently cancel the penalty of $1,000 assessed against the Respondent.

A Review Hearing on the above matter was held July 27, 1999 at 10:00 hours at the Federal Court of Canada, in Calgary, Alberta.

BACKGROUND

Kenn Borek Air Ltd., the Respondent, was alleged to have contravened subsection 605.31(1) of the *Canadian Aviation Regulations* (CARs), in that on December 6, 1997, near the South Pole, one of its unpressurized aircraft was operated at an altitude above 13,000 feet above sea level (ASL) without sufficient oxygen dispensing units for all persons on board.

A monetary penalty of $1,000.00 was assessed. Since it was not paid by the due date of December 15, 1998, the case was brought before the Tribunal for review.

THE LAW

Subsection 605.31(1) of the CARs:

> 605.31 (1) No person shall operate an unpressurized aircraft unless it is equipped with sufficient oxygen dispensing units and oxygen supply to comply with the requirements set out in the table to this subsection.

TABLE

OXYGEN REQUIREMENTS FOR UNPRESSURIZED AIRCRAFT

1.	**All crew members and 10 per cent of passengers and, in any case, no less than one passenger**	**Entire period of flight exceeding 30 minutes at cabin-pressure-altitudes above 10,000 feet ASL but not exceeding 13,000 feet ASL**
2.	All persons on board the aircraft	(*a*) Entire period of flight at cabin-pressure-altitudes above 13,000 feet ASL (*b*) For aircraft operated in an air transport service under the conditions referred to in paragraph (*a*), a period of flight of not less than one hour

Since this case involves a commercial air transport service, item 2 of column I and paragraph (*b*) of column II in the table are applicable.

NOTICE OF APPLICATION

After the usual presentations, but before hearing evidence from either of the parties, a response to a Notice of Application filed with the Tribunal on the previous day by the Respondent (Exhibit D-1) was required. The document in question contains a duly signed and sworn statement to which several appendices are attached, marked as A to F.

This Notice of Application seeks an outright dismissal of the allegation or at least a postponement to a later date (see paragraphs 14 and 15 of D-1).

The representative of Transport Canada, Mr. McFarlane, having only received the documentation the morning of the hearing, requested a 20-minute recess to become familiar with it. The recess was granted.

After the recess, I asked the Respondent's representative, Mr. Davis, to further explain the basis for his Notice of Application to the Tribunal.

Essentially, everything is based on the following arguments:

The manner in which the allegation was formulated by Transport Canada in the Notice of Assessment of Monetary Penalty indicates that the alleged error results from the fact that aircraft C-GXXB did not have sufficient oxygen dispensing units on board during the flight of December 6, 1997. The Respondent's representative therefore prepared its defence accordingly.

However, subsequently during various conversations between the representatives of the Respondent and those of Transport Canada, it became apparent that it was not so much that there was a shortage of oxygen dispensing units that mattered rather than their **availability** to passengers (6 parachutists).

According to the Respondent, this aspect of the issue does not appear in the original allegation and this application of subsection 606.31(1) changes the whole approach of the defence. Verbal and written communications on the subject between Transport Canada and the Respondent are proof of this (appendices C, D, E and F of D-1).

Consequently, Mr. Davis asked the Tribunal to dismiss the allegation against his client, or at least, to postpone the hearing until such time as the defence has had the time to prepare itself in view of the new approach of Transport Canada. This could include the possibility of having witnesses appear who, in the current context, would not be required.

As for the Minister's representative, he indicated that he was prepared to argue subsection 605.31(1) on the basis of the **availability** as well as of the **quantity** of oxygen dispensing units on board aircraft C-GXXB on December 6, 1997, while at the same time giving the impression that the quantity might have been sufficient.

Finally, there was also some question as to whether another subsection of the CARs, subsection 605.32(2), could be used. This subsection states:

> (2) Where an aircraft is operated at cabin-pressure-altitudes above 13,000 feet ASL, each person on board the aircraft shall wear an oxygen mask and use supplemental oxygen for the duration of the flight at those altitudes.

This suggestion was rejected immediately by the Tribunal since any new allegation would not be part of the current hearing and would have to be made in accordance with the appropriate sections and provisions of the *Aeronautics Act*, which would not be the case under the circumstances.

Following these arguments, while still considering the Notice of Application, the Tribunal had to make one of the following decisions:

1. Dismiss the Respondent's application and proceed with the hearing in accordance with the allegation as written and submitted by the Minister.
2. Adjourn the hearing to allow the Respondent to better prepare its defence based on the new approach of Transport Canada regarding the issue of availability of oxygen rather than the quantity.
3. Grant the Respondent's application and dismiss the Minister's allegation.

Given that this was a response to a Notice of Application, the decision had to be made at the hearing.

ANALYSIS

Considering the discussions that took place regarding the issues of **quantity** and **availability** of oxygen dispensing units on board the aircraft, considering that the **availability** aspect is not part of the allegation and considering that the grounds of defence are not the same depending on whether the issue is **quantity** or **availability**, option 1 must be rejected.

Before selecting option 2 or 3, the following factors must be considered:

- In the allegation, there is no mention of the availability of oxygen dispensing units. The reference to the availability of oxygen is made by Transport Canada, signed by Mr. McFarlane, on June 28, 1999 (appendix D – 2nd paragraph of D-1).
- Furthermore, the registration of the aircraft involved in the incident is not indicated. The only mention of the registration is in the letter dated July 14, 1999, signed by Mr. Davis and addressed to Transport Canada (appendix E of D-1).
- Finally, in his letter of July 15, 1999 (appendix F of D-1), Mr. McFarlane returns to the issue of **quantity** of oxygen, but this time, not for **all persons on board**, as stipulated in the allegation and in the table included in subsection 605.31(1), but only for the **passengers**, thereby excluding crew members, which is contrary to the regulation.

However, the Respondent submits that there was sufficient oxygen on board the aircraft, and Transport Canada was informed of this (paragraph 4 of the affidavit, D-1).

- At this stage, it is important to note that the issues of **quantity** and **availability** in consideration of subsection 605.31(1), including the table that accompanies it, are two necessary elements for correctly interpreting and using this section. We could, for example, state that the availability was sufficient, but that the quantity was not. It must therefore be known if we want to argue quantity only, availability only or both.
- Adjourning the hearing in order to give the Respondent time to prepare its defence based on the new approach of Transport Canada would have meant that the allegation, as written, was satisfactory in all respects, which contradicts what we have just seen.
- The third option remains. I then asked Mr. McFarlane if Transport Canada had changed its approach in consideration of the issue of **availability** before or after written and verbal communications with the Respondent took place. He answered before.

CONCLUSION

I therefore concluded that Transport Canada did not have all the elements at hand, despite its investigation, to make an allegation and to write it accurately. In light of the arguments heard today, it seems to me that it was essential to mention all elements in the allegation, namely the quantity and availability of oxygen dispensing units for all persons on board aircraft C-GXXB. It

therefore seems unfair to me that a case can be argued when certain significant items are added or changed in the process, to the detriment of the Respondent.

DETERMINATION

In response to the Notice of Application filed by the Respondent, I dismiss the Minister's allegation based on the fact that, in this case, the allegation is incomplete and written incorrectly and does not sufficiently agree with the text or the spirit of subsection 605.31(1) of the CARs. I consequently cancel the penalty of $1,000 assessed against the Respondent.

Pierre Rivest
Member
Civil Aviation Tribunal