

TRANSPORTATION APPEAL TRIBUNAL OF CANADA

BETWEEN:

Robert Scott Harrity, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Canadian Aviation Regulations, SOR/96-433; ss 605.94(1)

Review Determination
J. Richard W. Hall

Decision: August 24, 2012

Citation: *Harrity v. Canada (Minister of Transport)*, 2012 TATCE 25 (Review)

Heard in Calgary, Alberta, on April 3, 2012

Held: The Minister of Transport has proven, on a balance of probabilities, that the Applicant, Robert Scott Harrity, contravened subsection 605.94(1) of the *Canadian Aviation Regulations*. However, due to mitigating circumstances, the penalty is reduced to \$500.

The total amount of \$500 is payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within thirty-five (35) days of service of this Determination.

I. BACKGROUND

[1] On April 1, 2010, the Minister of Transport ("Minister") issued a Notice of Assessment of Monetary Penalty ("Notice") in the amount of \$750 to the Applicant, Robert Scott Harrity, pursuant to section 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2 ("Act"), for a contravention of subsection 605.94(1) of the *Canadian Aviation Regulations*, SOR/96-433 ("CARs"). Specifically, the Minister found that the Applicant had failed to enter defects into the Journey Log Book as required by the CARs.

[2] Schedule A to the Notice sets out the charge as follows:

#1 – CARs 605.94(1)

On or about 11th day of May 2009, at or near Red Deer, Alberta, the particulars set out in column I of item nine in Schedule I to this Division of the *Canadian Aviation Regulations (CARs)*, were not recorded in the journey log at the time set out in column II of the item and were not recorded by the person responsible for making entries set out in column III of that item, specifically defects; right manifold low at a maximum of 30' on take-off; fuel flow was low on take-off; and the right RPM lever was mechanically sticking and unable to get full RPM on take-off; thereby contravening subsection 605.94(1) of the *CARs*.

MONETARY PENALTY - \$750.00

TOTAL MONETARY PENALTY - \$750.00

[3] The defects noted in the Notice include:

- right manifold low at a maximum of 30' on take-off;
- fuel flow was low on take-off; and
- the right RPM lever was mechanically sticking and unable to get full RPM on take-off.

[4] The Applicant requested a review of this matter by the Transportation Appeal Tribunal of Canada ("Tribunal") on April 15, 2010. A Review Hearing was scheduled for February 21, 2012, and later rescheduled for April 3, 2012, by request of the Applicant.

II. STATUTE AND REGULATIONS

[5] Subsection 7.7(1) of the *Act* provides the following:

7.7(1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

[6] The Regulation allegedly breached by the Applicant is set out in subsection 605.94(1) of the *CARs* as follows:

Journey Log Requirements

605.94 (1) The particulars set out in column I of an item in Schedule I to this Division shall be recorded in the journey log at the time set out in column II of the item and by the person responsible for making entries set out in column III of that item.

[7] Item 9 of Schedule I to the *CARs* states as follows:

SCHEDULE I

(Subsection 605.94(1) and Item 3 of Schedule II)

JOURNEY LOG

Item	Particulars to be entered	Time of entry	Person responsible for entry

9.	Particulars of any defect in any part of the aircraft or its equipment that becomes apparent during flight operations	As soon as practicable after the defect is discovered but, at the latest, before the next flight	The pilot-in-command of the aircraft
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III. EVIDENCE

A. Minister of Transport

(1) Phil Goyer

[8] Phil Goyer is a Civil Aviation Safety Inspector working for the Enforcement branch of Transport Canada who took part in the investigation of this case. Mr. Goyer is an Aircraft Maintenance Engineer ("AME") by trade as well as a private pilot.

[9] Mr. Goyer summarized the problem at hand as being that the aircraft was flown to a maintenance facility where maintenance was performed on the aircraft without the defects having first been entered into the Journey Log Book (Exhibit M-2). He submitted that multiple defects existed, including the propeller not getting full revolutions per minute ("RPM"), the engine not going into overboost, as well as low oil pressure and low fuel flow.

[10] Mr. Goyer testified that the maintenance work done on the aircraft to address these defects was noted in the Journey Log Book by Elaine Friesen in order to comply with sections 571.03 and 571.10 of the *CARs*.

[11] Mr. Goyer noted that since actions had been taken to rectify defects, he would have expected to see other entries in the Journey Log Book regarding these defects. As stated by Mr. Goyer: "I would expect to see...something identifying that there was a requirement to have maintenance done." He noted that this is required due to section 605.94(1) of the *CARs*, and that the required Item 9 of Schedule I should have been visible on the journey log pages (Exhibit M-2).

[12] Mr. Goyer noted that a defect is not necessarily an airworthiness issue or something requiring grounding an aircraft, but rather simply an imperfection. He also spoke to the importance of having proper entries in a journey log book to help the AME to identify aircraft systems that may need to be examined to ensure an aircraft's safety. Mr. Goyer further noted that the items listed by Ms. Friesen in the Journey Log Book are all defects because they meant that the aircraft was not operating at peak efficiency, and that the aircraft was "not working the way it's supposed to be working".

[13] The witness also spoke to the possibility of deferring defects, whereby it is determined that the aircraft is still fit for flight, and that the defects noted will be addressed at a later date. However, while these defects might not be addressed until later, Mr. Goyer submitted that these items – as well as the deferral – should be entered into a journey log book so that the operator of an aircraft is aware of that aircraft's condition.

[14] Mr. Goyer stated that he would describe the stops not being met at the propeller as an airworthiness issue, since when a stop is not being met, the aircraft is not meeting its type design. He further described this as a safety issue, stating that "in the event of an emergency, you want that prop to be able to grab the most amount of air and operate as it is supposed to".

[15] Mr. Goyer expressed his opinion that both the Applicant and Pat Gropp provided excellent descriptions of the aircraft's defects and that this information, had it been entered into the Journey Log Book, "would have told us so much of what was going on with the systems". Furthermore, he noted that "everything they told me...should have been listed in the technical record".

[16] On cross-examination by the Applicant, Mr. Goyer acknowledged that some of the issues noted with the aircraft could have been deferred.

[17] On cross-examination, the Applicant also drew the witness's attention to the Transport Canada case report of the incident (Exhibit A-1) which notes that "Mr. Harrity demonstrated... a very strong technical understanding of the Cessna 310 and its systems. That combined with his flying experience of over 10 years, and that he holds a valid class two instructors rating he ought to have known the critical nature of entering defects of this type in the JLB".

[18] The Applicant pointed to the above passage to suggest that this assessment implies that he would have been a good judge of whether the aircraft was serviceable and needed a snag entry. However, Mr. Goyer distinguished the Applicant's knowledge of the flight manual from his understanding of how the maintenance side of the aircraft functions.

[19] On cross-examination, Mr. Goyer admitted that the aircraft was operating within normal parameters, but clarified that the airworthiness of the aircraft is not in dispute in this case.

Furthermore, Mr. Goyer discussed the penalty assigned to the Applicant and noted that the recommended sanction was a first level sanction from the sanction schedule, which is a fine of \$750.

B. Applicant

[20] The Applicant called no witnesses and chose not to provide any sworn evidence.

IV. ARGUMENTS

A. Minister of Transport

[21] The Minister alleges that the Applicant should have made a Journey Log Book entry on May 11, 2009, pursuant to the CARs but failed to do so. While an entry was made on May 11, 2009, by Ms. Friesen regarding work done on the aircraft that day, there was no entry preceding Ms. Friesen's entry concerning any aircraft defects.

[22] There is no question that the Applicant was the pilot-in-command of the aircraft on the day in question. As such, the entries regarding the defects were his responsibility. The Minister

notes that this is a strict liability offence, and that no intention to have committed the offence is required.

[23] While the *CARs* and the *Act* fail to define a defect, the Minister submits that a defect is an imperfection. The Minister further submits that a defect need not be an airworthiness issue but rather simply means that something is not operating as it should be. The Minister submits that the Applicant is incorrect to equate a defect with unairworthiness.

[24] Each of the items listed on the Notice demonstrate that something was wrong with the aircraft. While these defects might not have resulted in grounding the aircraft, it is nevertheless clear that the aircraft in this instance was not working as it should have been.

[25] The Minister stresses the importance of entering defects into a journey log book. This is done not only to inform an aircraft owner that there is something wrong with an aircraft, but also so that an AME working on the aircraft knows the issues and relevant details surrounding the aircraft's defects.

[26] The Minister submits that each of the four defects the Applicant failed to enter in the Journey Log Book could have resulted in separate charges against the Applicant; furthermore, the Minister submits that each defect alone would succeed in proving the charge before the Tribunal. While the defects in this case did not require grounding the aircraft, they are nonetheless defects that should have been entered into the Journey Log Book pursuant to the *CARs*.

B. Applicant

[27] The Applicant submits that the Minister has not proven that he intended to breach the *CARs*.

[28] Furthermore, the Applicant notes that the Minister's definition of defect is overly broad, and that if a defect is "anything that renders an aircraft imperfect... we're stuck with immediately grounding every aircraft in Canada because...there's not a perfect aircraft out there".

[29] The Applicant considers a defect to be anything that renders an aircraft unsafe or unairworthy. By this definition, the Applicant notes that no entry was required in this case as the aircraft was airworthy.

[30] The Applicant submits that he was simply trying to act prudently by landing the aircraft in Red Deer, Alberta, and that he is being punished for being prudent. Indeed, he notes that he could have continued to fly the aircraft legally until the situation had either resolved itself or deteriorated into a safety issue.

[31] Furthermore, the Applicant notes his history of compliance regarding writing up snags that are obvious to him, but in this case, the fact that these issues were defects was not obvious to him.

[32] The Applicant submits that there are not four separate defects in this case, but that all four issues were symptoms of the same problem. He contends that the penalty levied against him was high considering the circumstances of the case.

V. ANALYSIS

A. Elements of the Offence

[33] Schedule I to the *CARs* states that the pilot-in-command of an aircraft is responsible for recording the particulars of any defect in any part of the aircraft, or its equipment, that becomes apparent during flight operations in the aircraft log book as soon as practicable after the defect has been discovered; but at the latest, before the next flight.

[34] As such, the elements to be proven in this case include:

- whether the Applicant was responsible for recording the particulars of the defect;
- whether the issues noted by the pilot-in-command were defects;
- whether the defects took place during flight operations.

B. Responsibility for entering the defect into the Journey Log Book

[35] Neither party argued that the Applicant was the pilot-in-command of the aircraft at the relevant time. In fact, the Applicant agrees that he was the pilot-in-command on the date in question. As such, I am satisfied that if an entry was required in the Journey Log Book under these circumstances, it was the responsibility of the Applicant.

C. Were the noted issues defects that required journey log book entries?

[36] The crux of this case requires the determination of what constitutes a defect. Unfortunately, the *CARs* and the *Act* do not define this term. As such, the Tribunal must examine the word in the context of the statute in order to ascertain the intention of Parliament and ensure the term is interpreted in a way that is harmonious with the *Act*.

[37] While the term 'defect' itself is undefined in the *CARs*, the word finds its place as part of a larger definition. In the *CARs* interpretation section, 101.01, the term "service difficulty" is defined as "a failure or malfunction of, or defect in, an aeronautical product". I interpret this definition to indicate that the *CARs* equates a failure or malfunction of an aeronautical product with a defect in an aeronautical product. This leads me to believe that the term 'defect' could include less serious issues with an aeronautical product (in other words, a mild malfunction of an aeronautical product), as well as more serious issues, up to and including the failure of an aeronautical product. I believe this view is supported by the definition of defect in *Black's Law Dictionary*, 6th Ed., which includes "the absence of something necessary for completeness or perfection; a deficiency in something essential to the proper use for the purpose for which a thing is to be used".

[38] One of the most commonly applied principles of legislative interpretation is that the words of an Act should be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[39] In examining the context of the *CARs* and the *Act*, the Minister noted in his representations that it is important to enter defects or snags into a log book in order to let the aircraft owner know that there is something wrong with the aircraft, as well as for the benefit of the AME working on the aircraft so that they have, in writing, all the details relating to the issues. Clearly, ensuring aviation safety is the paramount purpose of this part of the *CARs* and the *Act* itself.

[40] In considering the term 'defect' in the larger context of the *CARs* and the *Act*, one must consider that the statute and regulations allow for some defects to be deferred. This in and of itself points to a definition of defect that is far more broad than the definition suggested by the Applicant. Indeed, it is highly unlikely that the legislative scheme would allow for the deferral of defects if a defect were only equated with issues of airworthiness. If this were the case, it would mean that the *CARs* and the *Act* would condone flying an aircraft that is unairworthy. Clearly, this would not be harmonious with the scheme and object of the *CARs* and the *Act*, nor the intention of Parliament.

[41] While some defects may be more serious and affect the airworthiness of an aircraft, I do not find this to be an inherent part of the definition of the term 'defect'. Indeed, not all defects are created equal: a defect may be a smaller issue that can be deferred and addressed at a later date, or it may be a bigger problem that requires immediate attention.

[42] This interpretation of the term 'defect' is supported in the Australian case of *Topfelt Pty Ltd. v. State Bank of New South Wales Ltd.*, (1993) 47 FCR 226 at 237-238, in which Lockhart J. held that:

According to its ordinary usage a 'defect' means a lack or absence of something necessary or essential for completeness; a shortcoming or deficiency; an imperfection. **A defect** according to ordinary understanding is not necessarily something which is of a minor nature, it **may be either major or minor** [emphasis added].

[43] In the case at hand, the defects noted by the Applicant were of a minor nature. However, simply because they were not airworthiness issues does not mean that they did not require an entry into the Journey Log Book. Indeed, the regulatory scheme in the *Act* has as its foundation a concern for aviation safety, and the requirement of entering both major and minor defects serves to further this purpose.

[44] The Applicant has pointed out that he acted prudently by landing at Red Deer to have the aircraft checked. However, as noted by the Minister, the offence in this case is not one that requires intention. Rather, the simple omission of a journey log book entry with regard to the defects noted by the pilot-in-command is enough to attract a penalty pursuant to the *CARs*.

D. Did the defects occur during flight operations?

[45] The Applicant argues that the issues he noticed occurred prior to take-off and that he experienced no issues when the aircraft was in the air. Accordingly, he argues that the defects did not occur during flight operations.

[46] I am unconvinced by this argument, and agree with the Minister that any defect noted after the aircraft has started up—whether the aircraft was weight on or weight off wheels—constitutes a defect in the aircraft systems during flight operations. Indeed, as noted by Mr. Goyer in this instance, this term appropriately encompasses the entire operating procedure of the aircraft.

E. Sanction

[47] I disagree with the Minister, however, that this is a case where aggravating circumstances exist. Rather, I believe that there are mitigating circumstances that speak to the intention of the Applicant to ensure the safety of the aircraft.

[48] While the Applicant may have omitted to create a Journey Log Book entry on the matter, the Applicant landed in Red Deer to have the plane serviced, and provided a good amount of detail with regard to what the issues were with the aircraft; that is to say, he took immediate action at the first sign of problems with the aircraft.

[49] Furthermore, the Minister agrees in this instance that the defects noted at the time were not airworthiness issues, but defects of a minor nature. While this does not excuse the Applicant's failure to create the required Journey Log Book entries, it certainly makes the Applicant's omission more understandable.

[50] The Minister pointed out that he could have charged the Applicant with numerous counts of a *CARs* violation rather than one count, due to the facts of this case. I believe this, in itself, suggests that the Minister recognizes the existence of some mitigating circumstances in this case.

[51] Finally, it is important to note that the Applicant was not unreasonable regarding his lack of knowledge as to what exactly constitutes a 'defect' requiring a log book entry. As noted, the *Act* and the *CARs* contain no definition of this term, and without this definition it is not unreasonable for the Applicant to have believed that the issues he noted did not rise to the level of a defect. Indeed, without a definition in the statute, we are left with a term that is open to interpretation and subjective by nature.

[52] For the reasons noted above, I find that the penalty against the Applicant should be upheld, but that the amount of the penalty should be decreased from \$750 to \$500.

VI. DETERMINATION

[53] The Minister of Transport has proven, on a balance of probabilities, that the Applicant, Robert Scott Harrity, contravened subsection 605.94(1) of the *Canadian Aviation Regulations*. However, due to mitigating circumstances, the penalty is reduced to \$500.

August 24, 2012

(Original signed)

J. Richard W. Hall

Chairperson