

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Appellant

- and -

Alpen Helicopters Ltd, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, ss 7.7, 8.4(1)

Air Regulations, C.R.C. 1978, c.2., ss 506a), 521g), 534(1) (2)a), 534(4)(b)

Special purpose operation, Low Flying, Built-up area

Appeal decision

Faye H. Smith, Linda P. Thayer, Robert L. Mortimer

Decision: November 18, 1996

The Appeal Panel dismisses the appeal and upholds the member's confirmation of the assessment of monetary penalty. The Civil Aviation Tribunal must receive the payment of \$250.00, made to the order of the Receiver General for Canada, within 15 days after service of this determination.

An Appeal Hearing on the above matter was held before three designated Tribunal Members, Friday, September 27, 1996 at 10:00 hours at the Sinclair Centre, in the city of Vancouver, British Columbia.

BACKGROUND

Alpen Helicopters Ltd. ("Alpen") is appealing the Tribunal's Review Determination of February 12, 1996. In that Determination, the Tribunal Member confirmed the Minister's decision and assessment of a \$250 monetary penalty.

The events giving rise to the appeal occurred on March 23, 1995. On that date, Alpen was inspecting a portion of B.C. Gas pipeline running through several municipalities to the U.S. border. It was alleged that Alpen Helicopters contravened paragraph 534(2)(a) of the *Air*

Regulations when, at approximately 11:30 hours, it flew over a built-up area at an altitude of less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft. The waiver for the special purpose operation of pipeline patrol had expired.

GROUND FOR APPEAL

The grounds for appeal can be summarized as follows:

1. The Tribunal Member erred in concluding that Transport Canada had proven its case on a balance of probabilities because Transport Canada failed to prove that it was Alpen's aircraft that was low flying at 11:30 hours on the day in question.
2. The Tribunal Member erred by ignoring critical evidence including that from the Complainant and the Air Traffic Controller which established that Alpen's helicopter had not yet transited the Langley control space at 11:30 hours.
3. The Tribunal Member erred in preferring his own assumptions and calculations as to the aircraft's position, over the uncontradicted evidence of three witnesses.
4. The Tribunal Member erred in concluding that air traffic clearance did not override the requirements for a low flying waiver.
5. The Tribunal Member erred in concluding that the Alpen flight was not undertaken for the purpose of saving human lives.
6. The Tribunal Member erred in concluding that Alpen did not exercise due diligence in the circumstances.

REPRESENTATIONS BY THE PARTIES

Appellant's Position

The Appellant's position is essentially as set out in the first three grounds for appeal above. Although the Appellant does not abandon its other three grounds for appeal, its focus throughout is on the first three grounds. The Appellant's position is that the Minister of Transport failed to identify Alpen's helicopter as the helicopter that was low flying in the vicinity on the date and time set out in the Notice of Assessment of Monetary Penalty ("the Notice of Assessment"). The Appellant's position is that the evidence before the Member did not place Alpen's helicopter in the vicinity at the time of the allegation. Alpen says that the Tribunal Member failed to give weight to evidence that Alpen's helicopter could not have been in the vicinity at 11:30 a.m. and that the Member preferred his own calculations which were never tested by cross-examination. Alpen says that natural justice was denied as a result of the change in the time alleged from approximately 11:30 to another time because Alpen came to the hearing prepared to meet the case against it: a contravention allegedly committed at 11:30 hours.

Alpen says that the Member erred when he confirmed the Notice of Assessment based only on a finding that Alpen's helicopter "could have been in the vicinity by 11:44 a.m." on March 23, 1995. Alpen says that finding was insufficient to confirm the Notice of Assessment.

Alpen does agree, however, that its helicopter (C-FRBO) was flying on March 23, 1995 at or near 68th Avenue and 198th in Langley at sometime between 11:17 and 13:03 hours, and that its

helicopter C-FRBO, at some point during that time period, was cleared and did descend to below 1,000 feet without a valid low flying waiver.

Without abandoning grounds 4, 5 or 6 of the Appeal, Alpen does not rely on those grounds. Alpen's position on ground 4 is that Air Traffic Control clearance would not override the need to have a valid low flying waiver. However, Alpen pointed out that the pilot did obtain clearance to transit the zone at 500 feet for pipeline inspection.

Alpen's position on ground 5 is that the purpose of pipeline inspection is to investigate the integrity of the B.C. Gas pipeline: ultimately Alpen's purpose, in descending to inspect the pipeline, was for saving human life.

Alpen's position on ground 6 is that due diligence was exercised because the pilot, Mr. Owens, believed he had a valid waiver. Mr. Owens ceased pipeline inspection as soon as he learned that the waiver had expired. Alpen says that because Mr. Owens honestly believed that he had a waiver and because he did in fact obtain clearance from the Langley control zone to descend to 500 feet, due diligence is established.

REPRESENTATIONS BY THE MINISTER OF TRANSPORT

The Minister's position is that Alpen's helicopter was identified as the helicopter flying low over Mr. Houlton's home. The evidence established that Mr. Houlton telephoned Air Traffic Controller Baxter within five minutes of observing the helicopter near his home. The evidence also established that the only helicopter in the vicinity at that time on that date was Alpen's helicopter. The Minister says, therefore, that identification was established before the Tribunal Member.

The Minister says that, because the Notice of Assessment of Monetary Penalty alleges that the infraction occurred at approximately 11:30 a.m., exact time is not crucial to identification. The Minister says he proved the allegation that at approximately 11:30 a.m. on the day in question, Alpen's helicopter was low flying in the vicinity of 68th Avenue and 198th Street in Langley, near Mr. Houlton's residence.

The Minister says that he was not required to amend the Notice prior to hearing because the Minister's evidence proved the allegations as set out in the Notice of Assessment, namely that at approximately 11:30 a.m. on the date in question, the aircraft owned by Alpen was low flying. The contravener, therefore, received adequate notice of the allegations against it. The Minister says there is no violation of the principles of natural justice because the Notice was sufficient to allow Alpen to know the case it was required to meet.

In response to ground 4 of the Appeal, the Minister says that the Member was correct in concluding that Air Traffic Control clearance did not override the need for a valid waiver. The Minister's submission is that it is up to the pilot to accept a clearance issued only if it is legal in accordance with the *Air Regulations*. Air Traffic Control is not bound to ensure that a "special purpose" waiver is in force. An Air Traffic Control clearance does not exonerate the pilot if he does not have the necessary waiver.

In response to ground 5 of the Appeal, the Minister says that paragraph 534(7)(c) only applies where there is a landing or takeoff. As there was no landing or takeoff in this case, this is not an appropriate case for application of paragraph 534(7)(c).

In response to ground 6 of the Appeal, the Minister says that the Respondent did not establish on a balance of probabilities that he exercised due diligence. The test of due diligence is the test of what a prudent, professional pilot would do in the circumstances. Because Mr. Owens merely put the waiver in his log book and did not inform himself as to its expiration date, the Minister says that the Member was correct in finding that due diligence was not established.

In short, the Minister claims that none of the errors put forward by Alpen either independently or taken together, are sufficient to merit reversal of the Member's determination.

CONCLUSION AND REASONS FOR DETERMINATION

The Appeal Panel dismisses the Appeal and upholds the Member's confirmation of the Assessment of Monetary Penalty.

The jurisdiction of the Appeal Panel is set out at subsection 8.1(4) of the *Aeronautics Act* which states:

(4) The Tribunal may dispose of the appeal by dismissing it or allowing it and in allowing the appeal, the Tribunal may substitute its decision for the determination appealed against.

The Appeal Panel finds that the Member did not err in concluding that Alpen Helicopters contravened paragraph 534(2)(a) of the *Air Regulations*. The record shows that the evidence before the Member was sufficient to establish the factual elements of the infraction as set out in the Notice of Assessment on a balance of probabilities.

The Notice of Assessment reads in part as follows:

Alpen Helicopters Ltd., being the owner of an aircraft bearing Registration Marks C-FRBO, by virtue of section 8.4(1) of the *Aeronautics Act*, R.S.C. 1985, c. A-2 as amended, committed a violation of section 534(2)(a) of the Air Regulations, in that the aircraft was flown at approximately 11:30 hours on or about March 23, 1995 at or near 68 Avenue and 198 Street in Langley, British Columbia over the built-up area of the city of Langley at an altitude of less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft.

Paragraph 534(2)(a) of the *Air Regulations* states:

(2) Except as provided in subsections (4), (5) and (6), or except in accordance with an authorization issued by the Minister, unless he is taking off, landing or attempting to land, no person shall fly an aircraft

(a) over the built-up area of any city, town or other settlement or over any open air assembly of persons except at an altitude that will permit, in the event of an emergency, the landing of the aircraft without creating a hazard to persons or property on the surface of the earth, and such altitude shall not in any case be less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft;

In deciding whether or not Alpen Helicopters had committed the infraction as alleged in the Notice of Assessment, the Member required proof on a balance of probabilities of the factual elements of the alleged contravention, namely that:

(a) Alpen Helicopters Ltd. was the owner of an aircraft bearing registration marks C-FRBO;

(b) the aircraft C-FRBO was flown at approximately 11:30 hours on March 23, 1995, at or near 68 Avenue and 198 Street in Langley, British Columbia;

(c) at that date and time, the aircraft C-FRBO was flown at an altitude of less than 1,000 feet above the highest obstacle within a radius of 2,000 feet from the aircraft.

The evidence on the record before the Member establishes that Alpen Helicopters was the owner of C-FRBO, and that C-FRBO did fly below 1,000 feet at some time between 11:17 and 13:03 on March 23, 1995, at the location set out in the Assessment Notice. The evidence on the record also establishes that no other traffic was reported in the vicinity by any witness. The facts necessary to establish the allegation were therefore proven on a balance of probabilities before the Member. The Appeal Panel finds that the evidence and circumstances before the Member are consistent with a finding that it was Alpen's Helicopter that was low flying on March 23, 1995, at approximately 11:30 a.m.

The Member did not err in concluding that Transport Canada had established on a balance of probabilities that Alpen's helicopter was low flying at approximately 11:30 hours. The evidence on the record placed Alpen's helicopter at the location between 11:17 and 13:03 on March 23, 1995. It was not incumbent on the Minister to establish that Alpen's helicopter was at the location at exactly 11:30 hours, but rather that it was in the vicinity at approximately 11:30 hours, as set out in the Notice.

The Appeal Panel is not satisfied that the Member ignored critical evidence, nor does the Appeal Panel find that the Member committed a reviewable error.

We are satisfied that the record supports a conclusion that the Minister has met the burden of proof on a balance of probabilities. While the Member ought not to have relied on his own assumptions and calculations without putting those to Alpen's witnesses, the Appeal Panel is satisfied that this is not fatal to the decision, because the record reflects a sufficient factual basis upon which the Member could find that the Minister proved the infraction on a balance of probabilities.

The Appeal Panel finds the Member did not err in concluding that Air Traffic clearance did not override the need for a valid waiver. An Air Traffic Control clearance cannot override the regulatory requirement of a valid waiver for a special purpose operation. While pipeline patrol is included in the definition of a "special purpose operation" under subsection 534(1) of the *Air Regulations*, a valid waiver must be in effect to permit low flying for inspection. The record shows that the "waiver" valid only until January 4, 1995, had expired, and had been placed in the back of the logbook where it was forgotten.

The Appeal Panel finds that the actions were not undertaken for the purpose of saving human lives pursuant to paragraph 534(7)(c) of the *Air Regulations*. That paragraph states as follows:

(7) Except in accordance with an authorization issued by the Minister, no person shall cause any aircraft to take off or attempt to take off from, land or attempt to land on, any surface within the built-up area of any city or town unless

(...)

(c) the take-off or landing is necessary for the purpose of saving human life.

The evidence before the Member does not indicate that the pilot was landing or attempting to land, taking off or attempting to take off. Neither does the evidence indicate that if there was such landing or take off or attempt to do so that such action was necessary for saving human life. The Appeal Panel therefore finds that the Member did not err in concluding that the Alpen flight was not undertaken for the purpose of saving human life.

The Appeal Panel upholds the Member in his finding that due diligence was not exercised in the circumstances. The record shows that a waiver had been granted, but had expired at the time of the infraction. The pilot, Mr. Owens, had placed it into the back of the log book, and had not realized that it expired. Such conduct does not meet the test of due diligence. The test of due diligence was set out by this Tribunal in the determination of *Richard Noël and Minister of Transport* (CAT File No. Q-0435-33). The test in that case is what a prudent, professional pilot would have done in the circumstances. The Appeal Panel finds that the Member did not err in finding that Mr. Owens' conduct did not meet the test of due diligence.

Reasons for Appeal Determination by:

Linda P. Thayer, Member

Concurred:

Faye Smith, Chairperson

Robert L. Mortimer, Member