

**CIVIL AVIATION TRIBUNAL**

BETWEEN:

**Minister of Transport**, Appellant

- and -

**Avionair Inc.**, Respondent

**LEGISLATION:**

*Air Navigation Orders*, Series VII, No. 3, s. 40(b)

*Air Navigation Orders*, Series VII, No. 3, s. 9

**Operating specifications**

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**Appeal decision**  
**G. Richard, J. Rouleau, Michel Larose**

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**Decision: February 15, 1990**

TRANSLATION

**Heard:** Montréal, Quebec, December 15, 1989

(CAT File nos. Q-0161-41 and Q-0163-41)

*The appeal is allowed and the fine is reduced to \$5,250. The fine is to be paid to the Receiver General for Canada and forwarded to the Civil Aviation Tribunal office, 344 Slater Street, Room 405, Ottawa, Ontario, K1A 0N5, on or before March 30, 1990.*

(CAT File no. Q-0165-41)

*The appeal is allowed and the fine is reduced to \$250. The fine is to be paid to the Receiver General for Canada and forwarded to the Civil Aviation Tribunal office, 344 Slater Street, Room 405, Ottawa, Ontario, K1A 0N5, on or before March 30, 1990.*

Avionair Inc. filed an appeal from the determination made by Zita Brunet, dated September 14, 1989. This determination was a follow-up to a Review Hearing during which six proceedings,

including this one, were examined. Each of the proceedings dealt with a Notice of Assessment of a penalty issued against the Applicant by the Respondent on May 1, 1989. The Applicant did not contest the alleged facts, but asked that the amount of the assessed fines be reduced. Ms. Brunet dismissed the Applicant's request on the ground that she could not justify a reduction in the penalty.

The Applicant asked that the review determination be reversed and the amount of the fines, reduced. In support of his request, he cited, firstly, the fact that the offence alleged in the notice had been penalized by the assessment of a fine for each segment of what he considered to have been a single flight.

The Applicant then submitted that the severity of the penalty did not achieve the intended objective of rehabilitation and deterrence because, since the time when the offences had been committed, the company had been restructured, and it was operating in compliance with the standards under new management. He added that the stiff penalties were a very heavy burden on the new management. Furthermore, the Applicant stated that the penalties at issue were the first to have been assessed against it by the Respondent.

The Respondent asked, however, that the amount of the fines be upheld and the review determination, confirmed. He argued that each flight segment, from takeoff to landing, was a separate "flight" and that the offence alleged in the notice was a separate offence for each "flight" liable to a separate fine.

In support of this position, counsel for the Respondent submitted two definitions from British sources, namely:

1. In this Act, unless the context otherwise requires, the following expressions have the following meanings respectively, that is to say, "flight" means a journey by air beginning when the aircraft takes off and ending when the aircraft next alights thereafter;

(Section 10, *Civil Aviation (Licensing) Act*, 1960, c. 38, 8 & 9 Eliz 2)

2. Meaning of "flight". For the purposes of the *Air Navigation Order*, 1972, an aircraft is deemed to be in flight either, in the case of a piloted flying machine, from the moment when, after the crew embarks for the purpose of taking off, it first moves under its own power until the moment when it next comes to rest after landing; or, in the case of a pilotless flying machine or a glider, from the moment when it first moves for the purpose of taking off until the moment when it next comes to rest after landing; or, in the case of an airship or free balloon, from the moment when it first becomes detached from the surface until the moment when it next becomes attached thereto or comes to rest thereon. The expression "flight" and "to fly" must be construed accordingly.

Counsel for the Respondent acknowledged that she had not found any Canadian definition for the word "flight" and affirmed that the question was currently under study.

Furthermore, she filed a memorandum dated May 17, 1989, signed by Bruce Stockfish, counsel for the Department of Justice of Canada. The memorandum stipulates, among other things:

My opinion, from a strict legal point of view, is that each flight constitutes a separate offence. However, I would question whether the attention that such a fine draws to a continuing offence situation would reflect poorly on the Department in its ongoing surveillance responsibilities.

The Respondent's second argument in support of the confirmation of the review determination was based on the principles of determining an appropriate penalty as they were analysed in the Tribunal's determination in *Wylor* (CAT File no. O-0075-33).

## CONSIDERATION

The facts alleged by Transport Canada were admitted. The Appellant acknowledged that there had been an offence. The first question is whether a trip that comprises one or more segments is a single flight or is made up of as many flights as there are segments.

Regarding the definition of "flight", we note the Respondent's representations concerning the absence of a Canadian definition. We further note that the application of the proposed definitions is limited as follows in the first case, "In this Act, unless the context otherwise requires, ..." and in the second, "For the purposes of the *Air Navigation Order, 1972* ...". These definitions, like those in certain international conventions, hold true in a particular context but do not claim to be universal in scope.

Thus, Article 3 of the *Convention for the Suppression of Unlawful Seizure of Aircraft* signed at The Hague on December 16, 1970, stipulates:

1. For the purposes of this convention, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation, until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

Chapter 1, Article 1 of the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* signed at Tokyo on September 14, 1963, provides:

3. For the purposes of the present convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of takeoff until the moment when the landing run ends.

Article 2 of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* signed at Montréal on September 23, 1971, stipulates:

For the purposes of this convention:

(a) an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

The *ICAO Lexicon* does not contain any definition of "flight". However, there is a definition of the expression "flight time" which reads as follows:

Flight time: the total 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.

Note: Flight time as here defined is synonymous with the term "block-to-block" time, or "chock-to-chock" time in general usage, which is measured from the time the aircraft moves from the loading point until it stops at the unloading point.

Although they do not make up for the absence of a definition in the *Aeronautics Act* and despite their divergencies, these definitions lead us to believe that each segment of a trip is a flight. This consideration does not, however, seem to be a determining factor in the settling of the matter at issue. Consideration must still be given to whether, for the purposes of assessing the penalty, the commission of the same offence repeatedly over a series of consecutive flights must be considered as a single offence or as many offences as there were flights. In this regard, we refer to the principles set out in *Sanchez* (CAT File no. O-0103-33) and adopt the position expressed by Mr. Stockfish in the memorandum cited by the Respondent.

The second argument put forward by the Applicant was contested by the Respondent on the basis of the principles set out in *Wylor*. It seems to us advisable to quote certain passages from that decision:

The principles of determining an appropriate monetary penalty include at least the following:

(a) Denunciation

Denunciation is another word for punishment or retribution. This is not seen as vengeance [*sic*] sanctioned by the Tribunal, but its focus is retrospective public repudiation of the wrongful conduct.

(b) Deterrence

This principle is prospective in its focus in that it will act as a future deterrent for a particular offender (specific personal deterrence) and others in the aviation community (general deterrence). The gravity of the offence, the incidence of the occurrence [*sic*] in the aviation community, the harm caused by it either to the individual or to others and the public attitude toward it are some of the matters to

be considered in using this principle of sentence. If the purpose is to deter the offender from repeating the offence, then greater consideration must be given to the individual, his past record of performance and attitude, his motivation and his reformation and rehabilitation. If both purposes are to be achieved, then there must be a weighing of all the factors and a penalty determined that gives a proper balance to each of them.

General deterrence conveys, to other members of the aviation community, fear of the consequences should one offend and, as well, demonstrates the merits of not offending. It would be hoped that a person with an attitude thus conditioned to regard conduct as reprehensible will not deliberately commit such an act.

#### (c) Rehabilitation

It can be argued that reformation of an individual is, in the long term, in the "best interests" of the aviation community in that it hopefully eliminates the risk of a perpetuation of the wrongful conduct. If a problem is identified as the cause of the misconduct (i.e. impaired flying) then assisting the offender with this problem can not only benefit society, but the aviation community as well.

#### (d) Enforcement Recommendations

A tariff or range approach to penalties meets the Dubin criteria of an enforcement policy which recognizes that the laws will be fairly and equally enforced and that all persons and corporations are equal in the eyes of the law. The manual has attempted to do this in a general sense but is viewed by the Tribunal as guidance only in the attempt at uniformity of approach. This *Enforcement Manual* will modify [*sic*] from time to time, and the uniformity will become enhanced as communication, consultation with Transport Canada and the dissemination [*sic*] of determinations from the Civil Aviation Tribunal bring all those concerns to a closer consensus as to the appropriateness of a particular penalty. The paramount question, of course, always must be, "What should this offender receive for this offence committed in the circumstances under which it was committed?" (see pages 7 and 8).

Certainly, there are a number of factors which exist in finding the proper balance within the principles of sentencing the assessment of a penalty or other sanction [*sic*]. These factors will be considered, some in aggravation [*sic*] and others in mitigation.

Without attempting to limit what such factors may include, the following may be considered:

##### 1. Aggravating factors:

- infractions involving dishonesty

- planned breaches
- premeditated breaches
- extent of harm to victims of the offence
- past record of similar offence
- prevalence of the offence

## 2. Mitigating factors:

- no previous offences
- time since last offence
- degree of remorse
- whether or not an admission of the offence
- degree of cooperation with authorities
- delay between the commission of the offence and the time of the sentence
- conduct (involvement) of any "victims"
- restitution
- type of operation (commercial or private flight)
- impact on aviation community
- special factual circumstances
- relevance [*sic*] of *Enforcement Manual* recommendations
- effect of a monetary v. suspension penalty on individual
- occurrence's [*sic*] impact on aviation safety
- manner of proceeding by authorities

Ultimately, the principles announced and the factors effecting [*sic*] the level of penalty must be considered on an individual basis in the context of the circumstances of the specific occurrence. The list above is not intended to be in any particular prioritized order, nor is the list necessarily complete (see pages 9 and 10).

An examination of the criteria proposed by the Respondent in light of the Applicant's representations convinced us that if, for the purposes of denunciation, since the facts are admitted, a fine were assessed, the intended objective of deterrence and rehabilitation would be poorly served with the assessment of as heavy a fine as that prescribed in the determination from which the appeal is taken. The company is operating under new management which has demonstrated that it has all the relevant characteristics as set out under the heading of mitigating factors. To these factors are added the absence of previous offences and cooperation with the authorities recognized by the Respondent.

Having considered all of the representations of the parties and the record of the review proceeding, we have determined that the Appellant's request is well founded and that a reduction in the penalty is justified.

For the purposes of determining the amount of the fine, we refer to Mr. Stockfish's opinion, whereby an offence perpetrated during consecutive flights forming part of the same operation or trip is considered to be a single offence.