CAT File No. C-0067-33
MoT File No. 6504-P026136-007577

CIVIL AVIATION TRIBUNAL

BETWEEN:

Minister of Transport, Appellant

- and -

Gerald Fosberg, Respondent

LEGISLATION:
Aeronautics Act, R.S.C. 1985, c. A-2, s. 6.7
Air Regulations, C.R.C. 1978, c. 2, s. 555(1)(b)

Take off below minimum visibility.

Appeal decision
Gordon R. Mitchell, James W. Snow, Robert J. Rushford, Q.C.

Decision: April 12, 1988

Heard: Thunder Bay, Ontario, April 8, 1988

The appeal is allowed and the Tribunal substituted a fine of $100 for the penalty imposed by the Minister to be paid on or before May 25, 1988.

Appeal Hearing on the above application heard by the Civil Aviation Tribunal, at Government of Canada Building, Fort Williams Post Office, 221 North Archibald Street, 2nd Floor, in the city of Thunder Bay, Ontario.

The Respondent, Gerald Fosberg, is a former military pilot who served for 28 years with the Canadian Armed Forces prior to returning to a civilian flying career in 1973. He is currently employed by Inotech Aviation Limited at Thunder Bay, Ontario.

The charge, which is the subject of these proceedings, is that the Respondent took off from runway 07 at the Thunder Bay, Ontario, airport at 12:33 UTC on August 18, 1987, when the take-off visibility for the runway was below the take-off minima specified in the *Canada Air Pilot* as per section 7.9(2) of his company operations manual.

The above wording is that of the Tribunal. The wording of the actual charge is different. Originally, the charge set out in the Notice of Assessment of Monetary Penalty served on the Respondent read as follows:

Pursuant to section 6.7 of the *Aeronautics Act*, the Minister of Transport has decided to assess a monetary penalty on the grounds that you have contravened the following provision(s): *Air Regulation* 555(1)(b), in that at 12:33 UTC on August 18, 1987, at Thunder Bay, Ontario, you, being the pilot-in-command of an aircraft, to wit, an Israeli 1124 bearing Canadian registration marks C-GJLK, permitted the aircraft to take off from a runway, to wit, runway 07 at Thunder Bay Airport, Ontario, when the take-off visibility for the runway was below the minimum visibility for the runway specified in your operations manual, namely RVR 1,400 feet or more.

Subsequently, by letter dated November 30, 1988, the Minister wrote the Respondent advising him that the Minister would be making an application to amend at the initial hearing by deleting from the last line of the charge the words "namely RVR 1,400 feet or more" and substituting the following: "namely landing minimum specified in the *Canada Air Pilot*, as per section 7.9(1) of the said operations manual".

It should be noted that the proposed amendment refers to "landing minimum", whereas the Respondent was "taking off" from runway 07, and the proposed amendment refers to section 7.9(1) of the operations manual whereas reference should have been made to section 7.9(2).

The last sentence of the letter of November 30, 1988, says "therefore, takeoff must be in accordance with standard *Canada Air Pilot* take-off minima".

Having started with the wrong charge, the Minister further compounded the situation by making further errors in the amendment. In drafting both the charge and the amendment, the Minister's officials have imposed on themselves far less stringent standards than they expect from the pilot.

The facts relating to the charge are as follows: On August 18, 1987, the Respondent was the pilot-in-command of an Israeli 1124 aircraft C-GJLK, which took off at 12:33 universal time from runway 07 at Thunder Bay, Ontario. The weather at Thunder Bay at 12:00 UTC was "obscured measured 100 overcast, half mile, fog" and the runway visual range (RVR) reading, taken from a transmissometer located 800 feet from the threshold of runway 07, was 800 feet. Evidence was given by a technician associated with aviation electronics since 1948 that the transmissometer was in working order.

The aircraft in question was owned by Inotech Aviation Limited. The aircraft owner had made an application to Transport Canada to amend the operations specifications in its operations manual and had received authorization "to commence flights when the visibility is 1/4 mile (RVR 1,400) or more using Westwind 1124 (C-GDUC) and Hawker Siddeley 125 (C-GVQR) type aeroplane(s). The aircraft in question, Israeli (Westwind) C-GJLK, is the same type of aircraft and has the same avionics as Westwind C-GDUC.

The Respondent had operated Westwind C-GDUC with an RVR of 1,400 feet and assumed that amended operations specifications also applied to C-GJLK. Inotech had not, however, applied

for amended operations specifications for that aircraft. The result is that C-GJLK was subject to the take-off minima specified in the *Canada Air Pilot*, which is RVR 2,600 feet. On the date in question, the Respondent testified that, from his position in the cockpit, he could see to the Delta cut-off on runway 07, which is 2,000 feet. Runway 25 does not have a transmissometer. Had the Respondent departed runway 25, he would have been subject to take-off minima of 2,600 feet. The special weather observation at 12:00 UTC was "100 overcast, half mile in fog". Runway 07, therefore, with a transmissometer, had a take-off minima of 800 feet, while the other end of the runway (25) with no transmissometer had a take-off minima of 2,600 feet.

The Respondent believed he was subject to the take-off limits set out in the amendment to Inotech's operations manual of 1,400 feet and because the reported weather was 100 overcast half mile fog, that he was within limits. This was in error because even if the amendment (RVR 1,400) applied to the aircraft in question, the RVR as measured by the transmissometer was only 800 feet and that is the RVR to which the Respondent was subject. The section of the *Air Regulations* under which the charge was laid is section 555(1)(b) reads as follows:

> 555. (1) No pilot-in-command of an aircraft shall permit the aircraft to take off from a runway if the take-off visibility for the runway, as determined in accordance with subsection (2), is below the minimum visibility for the runway specified in
>
> (a) the operations specifications for the operator of the aircraft where the operator is an air carrier;
>
> (b) the operations manual of the operator of the aircraft where the manual is required under the *Private Aeroplanes Passenger Transportation Order*;
>
> (c) the operations manual, or equivalent document, issued by the state of the operator of the aircraft and accepted by the Minister; or
>
> (d) the *Canada Air Pilot*, in any case other than a case described in paragraph (a), (b) or (c).
>
> (2) For the purposes of subsection (1), the take-off visibility for a runway is
>
> (a) the RVR of the runway, unless the RVR is
>
> (i) fluctuating rapidly above and below the minimum visibility for the runway as specified in a manual or other document under paragraphs (1)(a) to (d),
> (ii) less than the minimum visibility referred to in subparagraph (i) because of a localized phenomenon, or
> (iii) not reported by an air traffic control unit or a flight service station;
>
> (b) the ground visibility of the aerodrome for the runway, if

(i) the RVR is as described in subparagraph (a)(i), (ii) or (iii), and
(ii) the ground visibility of the aerodrome is reported as set out in the definition "ground visibility"; or

(c) the visibility for the runway as observed by the pilot-in-command, if

(i) the RVR is as described in subparagraph (a)(i), (ii) or (iii), and
(ii) the ground visibility of the aerodrome is not reported as described in subparagraph (b)(ii).

The meaning and application of section 555 of the *Air Regulations* was dealt with extensively by the Tribunal in *Minister of Transport v. Joseph P. René Savard*, CAT File no. A-0012-33, DoT File no. 4758(MARB), the Tribunal held that

1. The take-off visibility for a runway is the reported RVR (as measured by the transmissometer).

2. If the RVR is fluctuating above and below minimum or less than minimum because of a localized phenomenon, take-off visibility is the ground visibility as reported by the appropriate ATS unit. The pilot-in-command cannot, on his own, make the assessment that the RVR is fluctuating above and below minimum or less than minimum because of a localized phenomenon. He must be notified.

3. Since the reported RVR of the runway applies (as measured by the transmissometer), it is not appropriate to fall back on the secondary means of determining take-off visibility, i.e., ground visibility of the aerodrome (as reported by the appropriate ATS Unit) and, lastly, the visibility for the runway as observed by the pilot-in-command.

In the present case, the reported RVR for runway 07 was 800 feet. The evidence establishes that the RVR was not fluctuating above and below minimum, nor was it less than minimum because of a localized phenomenon. The runway visual range at the time of takeoff, to which the Respondent must adhere, was 800 feet. Even if the operations specifications for this aircraft had been amended to 1/4 mile (RVR 1,400) or more, an infraction would have occurred, because in the circumstances the Respondent was not entitled to substitute the special weather observations of 1/2 mile for the reported RVR of 800 feet.

The disposition of this case before the hearing officer turned on the errors made by the Minister in the original charge and again on the amendment. The hearing officer in dismissing the charge said:

Mr. Fosberg's statement re: Amendment to the Notice of Assessment of Monetary Penalty was reviewed. I support Mr. Fosberg's position; the amendment does not compliment the original charge. I have determined disqualification and thereby dismiss the charges made by the Ministry.

Counsel for the Minister argues that all of the evidence given at the hearing refers to "taking off" not "landing" and that, at worst, the errors were technical and did not prejudice the Respondent.

Alternatively, the Minister's counsel argues that the proper course of action for the hearing officer would have been to allow the Minister to make the appropriate amendment and, if necessary, grant the Respondent an adjournment to enable him to prepare a proper defence. Counsel cites the decision of this Tribunal in *Minister of Transport v.Calm Air International Ltd.*, CAT File no. C-0049-10, DoT File no. 6504-C340-006682, page 4, where the Tribunal stated by way of obiter:

At the initial hearing, the Minister sought to use an alleged breach of Calm Air's operations manual as another particular of a breach of section 703 of the *Air Regulations*. Calm Air is not charged with a breach of any provision in their operations manual, they are charged with a breach of a section of the *Air Navigation Orders* and that is the only charge they have to meet. The Minister must decide when the Notice of Suspension is given, what the charge is. If changes are to be made, it can only be done by way of an application to the hearing officer for an amendment. If an amendment is granted, the Respondent must not be taken by surprise and must be given every opportunity to prepare a full and complete defence to the amended charge including an adjournment of the hearing, if necessary.

We are also referred to *Regina v. Cote*, 33 Canadian Criminal Cases at page 357. A decision of the Supreme Court of Canada where Mr. Justice de Grandpre held:

... the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.

Our attention was also directed to two other cases. *R. v. Kostiuk*, Saskatchewan Reports, page 91, a decision of the Saskatchewan Court of Appeal where Mr. Justice Tallis held as follows:

[1] Tallis, J. A. [orally]: The Crown appeals the Respondent's acquittal on a charge of escaping lawful custody. At the conclusion of the trial, the learned trial judge acquitted the Respondent because the information incorrectly referred to section 133(a) rather than section 133(1)(a) of the Code.

[2] We are satisfied that the impugned information met the requirements of section 510 of the *Criminal Code* and left the Respondent accused in no doubt about the charge he faced. The learned trial judge erred in declaring it to be invalid and should not have acquitted the accused on that basis.

The other case is *Regina v. Cropp*, 42 Manitoba Vehicle Reports at page 276, where the Court held:

The Court pointed out, however, that the modern Code goes far "to nullify the old procedure with the purpose of ameliorating its extreme technicality and facilitating the administration of justice in accordance with the very right of the case" (Ont. C. A. per Masten J. A. in *R. v. Adduono* [1940] O. R. 184, 73 C.C.C. 152 at 155, [1940] 1 D.L.R. 597 (Ont. C.A.)); that so long

as a charge meets the requirement of section 510(1) that it contain "in substance a statement that the accused committed an [...] offence therein specified" it is not a complete nullity incapable of amendment; and that other sections, such as sections 730, 732 and 512 further protect the prosecution in summary conviction proceedings from "quibbling objections so long as the accused is not misled.

In the area of criminal law, the *Criminal Code* has specific provisions relating to the sufficiency of charges under that statute. Section 510(1), (2) and (3) reads as follows:

> 510. (1) Each count in an indictment shall, in general, apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified. 1985, c. 19, section 118.
>
> (2) The statement referred to in subsection (1) may be
>
> (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
>
> (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
>
> (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.
>
> (3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

Section 529(1) and (4) reads as follows:

> 529. (1) An objection to an indictment or to a count of an indictment for a defect apparent on the face thereof shall be taken by motion to quash the indictment or count before the accused has pleaded, and thereafter only by leave of the court before which the proceedings take place, and the court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.
>
> (4) The court shall, in considering whether or not an amendment should be made, consider
>
> (a) the matters disclosed by the evidence taken on the preliminary inquiry;
>
> (b) the evidence taken on the trial, if any;
>
> (c) the circumstances of the case;

(d) whether the accused has been misled or prejudiced in his defence by a variance, error or omission mentioned in subsection (2) or (3); and

(e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

In dealing with the errors in both the original charge and the proposed amendment, the Tribunal should base its decision on the following test:

Has the Respondent been reasonably informed of the charge against him so that he has an opportunity to present a full defence and obtain a fair trial? If the Respondent has not been misled, the Tribunal ought to allow an application to amend and proceed with the hearing. If, on the other hand, there is any possibility that the Respondent has not been reasonably informed of the charge and may not be able to present a full defence and obtain a fair trial, the Tribunal ought to allow an amendment only if a sufficient adjournment is granted to enable the Respondent to prepare a full and complete defence and obtain a fair trial.

In the present case, in spite of the ineptitude of the Minister's officials in preparing both the original charge and the amendment, the Tribunal are satisfied that the Respondent understood the charge against him and that he had an opportunity to prepare and present a full and complete defence.

The Respondent argued that he had no intent to break the law, that he acted honestly and in good faith, and that, had he known that he was not within limits, he would not have taken off. The Tribunal believes the Respondent. He is an experienced pilot with an impeccable record. His representations in this regard really amount to the defence of due diligence as set out in section 7.4 of the *Aeronautics Act*:

7.4 No person shall be found to have contravened a provision of this Part or of any regulation or order made under this Part if the person exercised all due diligence to prevent the contravention.

Without section 7.4, this offence would be an "absolute liability" offence. Section 555(1) of the *Air Regulations* uses the words:

"no pilot-in-command shall permit the aircraft to take off, etc."

Section 7.4, however, allows a defence of "due diligence" and the offence is, therefore, one of "strict liability" as defined in the classic case of *Regina v. City of Sault Ste. Marie*, 1987, 2 Supreme Court Reports. The Respondent is presumed to know the law. Has the Respondent, therefore, displaced the onus on him of proving to the Tribunal's satisfaction that, in the circumstances, all of his actions are such that he took reasonable care to avoid the commission of the offence? *Air Navigation Order*, Series I, No. 2, headed "ORDER PRESCRIBING STANDARDS AND PROCEDURES FOR TRANSPORTING PASSENGERS IN PRIVATE AEROPLANES" provides that every operator shall provide a complete copy of his operations manual to all crew members and that every person provided with an operations manual shall

keep the manual up-to-date. The Respondent's belief that he was within limits, however sincere, does not satisfy the onus on him in this regard. The appeal is, therefore, allowed and a monetary penalty of $100 substituted for the $200 penalty imposed by the Minister. Payment of the penalty shall be made on or before the date set out in formal appeal determination, Form CAT 6.

The Respondent does not require a large fine as a deterrent. The Tribunal are satisfied that a similar infraction will not occur again. The Minister has made available to pilots *Guidelines Used in Assessing Monetary Penalties*. The Respondent falls within all of the guidelines which would, in this case, have allowed a "letter of counselling" with no charges at all. If the Tribunal had the power to do so, a letter of counselling would have been substituted for the monetary penalty. That avenue is, however, not within our power and, consequently, a $100 monetary penalty has been imposed.

We would comment with gratitude upon the well-prepared and articulate arguments of the counsel for the Appellant and Mr. Fosberg, and thank them for their assistance.