

CIVIL AVIATION TRIBUNAL

BETWEEN:

Lindbergh's Air Service, Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, c. A-3, s. 5.9

Aeronautics Act, c. A-3, s. 6.3(1)(c)

Air Navigation Order, Series VII, No. 3, s. 13(b)

Air Regulations, C.R.C. 1978, c. 2, s. 804

Operating a single-engine aircraft at night when carrying passengers, Vicarious liability

Review Determination
S.M. Deluce

Decision: May 25, 1987

Heard: Timmins, Ontario, May 21, 1987

My determination is that there be no suspension of operating certificate.

The appeals of Brian Randall Simms and Lindbergh's Hunting & Fishing Air Service Ltd. were heard on May 21, 1987, at 10:15 hours at Timmins, Ontario.

At the request of the representatives of the Minister, the appeals were heard jointly. Mr. Lorenzo Girones representing both parties agreed to this procedure.

Mr. Brian R. Simms

Mr. Simms was appealing from the decision of the Minister as follows:

"Pursuant to section 5.9 of the *Aeronautics Act*, the Minister of Transport has decided to suspend your Senior Commercial Pilot Licence YZS-167658 on the ground that you have contravened

Air Navigation Orders, Series VII, No. 3, paragraph 13(b),(paragraph 6.3(1)(c) of the *Aeronautics Act*) and section 804 of the *Air Regulations* in that on or about the 23rd of August 1986, between 21:00 and 21:45 (EDT), you did conduct a flight at night while carrying passengers, in a De Havilland DHC-3 aircraft bearing registration C-FFVZ, from Rainy Lake to Lillabelle Lake (Cochrane), Ontario.

Further, you did make a false entry in the aircraft journey log for De Havilland DHC-3 aircraft bearing registration C-FFVZ from Rainy Lake to Lillabelle Lake (Cochrane), Ontario, in that for the 23rd day of August 1986, the entry showed TIME UP Rainy Lake as 20:30 and TIME DOWN Lillabelle Lake as 21:00 (EDT), and did land at Lillabelle Lake (Cochrane) at or about 21:50 (EDT).

Further, on or about the 23rd day of August 1986, between 21:45 and 22:00 (EDT), you did land a De Havilland DHC-3 aircraft bearing registration C-FFVZ at an aerodrome at Lillabelle Lake (Cochrane), Ontario, which was not lighted. Official night occurred at 21:00 (EDT) on the 23rd day of August 1986 on the said route and at Lillabelle Lake (Cochrane) Ontario."

The representatives of the Minister of Transport submitted appropriate evidence indicating on the day in question that sunset occurred at 20:25 hours local time and therefore night, pursuant to the *Air Carrier Regulations*, occurred at 20:55 hours local time.

Mr. Jack Britton, a witness produced by the Minister of Transport, stated that he was a passenger on the aircraft C-FFVZ flown by Simms on August 23 between Rainy Lake and Lillabelle Lake. He indicated the aircraft took off at approximately 21:00 hours and landed at Lillabelle Lake at approximately 21:40 hours. Due to the fact that it was several months subsequent to the incident before Mr. Britton had been questioned in regard to it, it was difficult to accept his times as being completely accurate. He said that on the trip from Rainy Lake to Lillabelle Lake blue sky could be observed and that would not seem to confirm the times that he stated.

Nellie Pettman, another witness produced by the Ministry and involved with a competitor, Cochrane Air Services Ltd., stated that she had come to the dock of Lindbergh's Air Service at Lillabelle Lake to pick up the passengers flown in by Simms due to the fact that the trip had been performed by Lindbergh's for her air service due to their lack of availability of equipment. She indicated that her recollection was that she made the pick up of passengers at approximately 21:40 hours. I am aware of the competitive nature of commercial air service activity in small communities such as Cochrane and, while not doubting the testimony of the witness, I have taken that factor into consideration in my determination.

Peter Basha was another commercial pilot flying for Lindbergh's Air in C-FPMQ, another De Havilland Otter, who had been dispatched on a flight from Cochrane to Cook's Pond to drop off two passengers and pick up four. He stated that he departed Lillabelle Lake at approximately 19:30 hours with sufficient time to complete the trip with a normal turnaround of 10 minutes and would have returned to Cochrane at approximately 21:00 hours. However, he gave evidence of having been delayed at Cook's Pond and admitted that he left that point at 21:00 hours.

Basha stated that he had a conversation with Simms sometime after he departed from Cook's Pond and at the time of the conversation Simms was airborne.

Norman Zaverucha, a witness produced by the defence, testified that he worked on the dock of Lindbergh's Air at Lillabelle Lake and that the aircraft flown by Simms arrived at the dock at Cochrane prior to 21:00 hours. He stated that he was aware of the landing taking place prior to that due to the fact that the aircraft had arrived in before the arrival of the Polar Bear Express. An exhibit was produced by the defence being a letter from Mr. Duguay, the Ontario Northland agent at Cochrane, which stated that the Polar Bear Express arrived on time at Cochrane at 21:15 hours that day. The station at Cochrane is beyond the dock area utilized by Lindbergh's Air. Being involved in the rail services in this area for an extensive period of time, I am aware that a train register is kept at all depots, but it is sometimes difficult to rely upon its accuracy unless there is a significant diversion from the scheduled arrival time.

Simms, in his own testimony, indicated that he had departed Rainy Lake at approximately 20:30 hours and had arrived at Lillabelle Lake at exactly 21:00 hours. He stated that he had informed his customers on arrival at Rainy Lake that they would have to spend the night at Rainy Lake if they were not ready to leave in five minutes and that this had caused them to get ready quickly and they departed immediately.

Upon weighing all the evidence presented, I have concluded that Simms was still in the air at sometime after the 20:55 hours daylight deadline. Had he not been in the air at that time, he would not have been able to have a conversation with Basha due to the fact that he would have been unable to receive any transmission from Basha if he had been on the lake at Lillabelle Lake, even considering that the terrain around Lillabelle Lake is fairly flat.

It is apparent that after taking off from Rainy Lake, Simms had to make a determination whether to attempt a landing on an unfamiliar lake before 21:00 hours and considering the safety of his passengers elected to continue on to Cochrane as he was familiar with the landing area at Lillabelle Lake. I therefore determined that Simms' licence suspension should be reduced from the suggested 30-day period to a period of 10 days. In making this determination, I am aware that the suspension accepted by Basha was for a 2-week period and I do not consider that the penalty to be issued to Simms should be any more severe.

Lindbergh's Hunting & Fishing Air Service Ltd.

Lindbergh's Hunting & Fishing Air Service Ltd. was appealing from the decision of the Minister as follows:

"Pursuant to section 5.9 of the *Aeronautics Act* and in accordance with subsection 7.3(2) of the *Aeronautics Act*, the Minister of Transport has decided to suspend your Air Carrier Operating Certificate No. 3263, on the ground that you have contravened *Air Navigation Order*, Series VII, No. 3, paragraph 13(b) and section 804 of the *Air Regulations* in that on or about 23rd day of August 1986, between 21:00 and 21:45 (EDT), Lindbergh's Hunting & Fishing Air Service Ltd. did operate a De Havilland DHC-3 bearing registration C-FFVZ while carrying passengers between Rainy Lake and Lillabelle Lake (Cochrane), Ontario, and on the same date, between

21:00 and 22:00 (EDT), operate a De Havilland aircraft DHC-3 bearing registration C-FPMQ while carrying passengers from Cook's Pond to Lillabelle Lake (Cochrane), Ontario.

Further, on the 23rd day of August 1986, between 21:45 and 22:00 (EDT), Lindbergh's Hunting & Fishing Air Service Ltd. did land a De Havilland DHC-3 aircraft bearing registration C-FPMQ at night at Lillabelle Lake (Cochrane), Ontario, an unlighted aerodrome, and on the same date did land a De Havilland DHC-3 aircraft bearing registration C-FPMQ at night between 21:00 and 22:00 (EDT) on Sangster Lake, Ontario, on an unlighted aerodrome. Official night occurred at 21:00 (EDT) on the 23rd day of August 1986, on the said routes and at Sangster Lake."

By his own admission, Basha stated that he had taken off at or after official nighttime from Cook's Pond. Approximately 40 minutes later, he became disoriented and crashed at Sangster Lake, which was 9 miles off his intended course and 26 miles from Cochrane. While attempting a landing in the dark at Sangster Lake, the aircraft crashed and sank. Basha and his four passengers were in the water for a considerable period of time after the aircraft sank and were rescued by boat by campers on the lake. Basha had accepted a 66-mile trip from Cochrane to Cook's Pond and departed at 19:30 hours with sufficient time to do the trip and return to Cochrane before official nighttime. The decisions that were made were made by Basha as captain of the aircraft, and there are no indications before me that any pressures were brought to bear on Basha by the company to operate in contravention of the *Air Regulations*. He made an improper decision at Cook's Pond to depart when it was officially nighttime. The Ministry issued a suspension of his personal authority for a period of 14 days, which was accepted by Basha.

The evidence in regard to the violation by Simms of *Air Regulation* 804 have been recited previously in regard to his departure from Rainy Lake expecting to arrive at Lillabelle Lake before official nighttime. Simms made an error in judgment when he departed from Rainy Lake with insufficient time to complete the trip before dark.

There were two other witnesses produced by the Ministry in regard to the facts, being Dr. Timothy Johnson and Lloyd De Cairrie, who merely confirmed the times given for the operation of the aircraft by Basha.

There was no evidence given in front of me of any previous violations on the records of either of the pilots involved. Also there was no evidence given in front of me of any previous violations by the company. The suspension of a company's operating certificate is a matter which should receive serious consideration and in making that determination I am cognizant of the fact that there were no previous records of violations by the company. While I am aware that the *Air Regulations* provide for liability of the company for violations of its employees, I am also taking into consideration the lack of pressure being put on the individuals who operate these flights in contravention of the *Air Regulations*.

A suspension of 30 days to the company is an extremely onerous sanction considering the offences committed by the accused. A 30-day suspension of the operating certificate of this company would have a devastating effect on the size of the operation, which has a heavy debt load at the present time. In making this decision, I would point out that under the *Aeronautics Act* and the *Air Regulations*, the maximum financial penalty that could be imposed would be a

fine of \$5,000. It is my estimate, being experienced in the type of operation that this company has, that revenue at this crucial time of the year for such a company would be approximately \$100,000 a month, which would be lost to the company if a 30-day suspension were invoked.

I am also aware in making my determination of the effect that any suspension would have upon such a company and its customers at this time of the year due to the fact that this is the commencement of the tourist business on which such a company relies. Most of the flying done in this type of service is done over a weekend and there would not be sufficient capacity for the competitors in the area to handle the additional workload that would be required should the operation be shut down even for one week.

On weighing all of these circumstances, I have determined that no suspension of the operating certificate of the Appellant is warranted in this situation.