

CIVIL AVIATION TRIBUNAL

BETWEEN:

Aviation Lanaudière Enr., Applicant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, R.S.C. 1985, c. A-2, as am., s. 7.1(1)(b)

Air Navigation Order, Series VII, No. 3, s. 5(1)(b)

Suspension of Operating Certificate, Qualified Managerial Personnel

Review Determination
Jean-Marc Fortier

Decision: April 10, 1992

The Notice of Suspension of the operating certificate issued by Transport Canada on September 25, 1991, and in force since October 28, 1991, is confirmed until such time as Aviation Lanaudière Enr. has satisfied the conditions of reinstatement set forth in the Notice.

The Review Hearing was held on March 12, 1992, at 09:00 hours at the Ste-Toy Holiday Inn, Hochelaga Room, in the City of Ste-Toy, Province of Quebec.

BACKGROUND

The purpose of the hearing was to examine the request of the Applicant, Aviation Lanaudière, to review and cancel the suspension of its operating certificate by Transport Canada by Notice of September 25, 1991. Under the terms of the Notice, the suspension was to take effect on October 28, 1991, unless the Applicant complied with *Air Navigation Order*, Series VII, No. 3, (the "ANO") and hired qualified personnel.

The Notice of Suspension in effect since October 28, 1991, was issued by Transport Canada pursuant to subsection 7.1(1) of the *Aeronautics Act* because Aviation Lanaudière no longer had the personnel required under the ANO to continue to operate safely.

The Notice of Suspension sets forth the following conditions of reinstatement:

(translation)

The carrier shall propose to Transport Canada an acceptable candidate for the position of Chief Pilot in accordance with Air Navigation Order, Series VII, No. 3, Schedule "A", section 4. The carrier shall propose to Transport Canada an acceptable candidate for the position of Operations Manager in accordance with *Air Navigation Order*, Series VII, No. 3, paragraph 5(1)(b)".

TRANSPORT CANADA'S POSITION

At the request of the Tribunal, Transport Canada's representatives filed copious correspondence covering the period from January 23, 1991 to February 28, 1992. In filing these exhibits, Transport Canada's representative explained extensively to the Tribunal the factors that led to the Notice of Suspension of September 25, 1991, until partial lifting of the Notice on February 12, 1992, allowing the Applicant to operate an air service under VFR flight conditions by day with single-engine aircraft only.

In summary, according to Transport Canada's representatives, Messrs. Trudel and Devost, Aviation Lanaudière did not comply with the requirements of subsection 5(1) of the ANO.

Subsection 5(1) of the ANO reads as follows:

"An applicant for an operating certificate shall show that he has the qualified managerial personnel necessary to operate the proposed air transport operation and that such personnel are employed on a full time basis in the following or equivalent positions:

- (a) Managing Director;
- (b) Director of Flight Operations (or Operations Manager);
- (c) Chief Pilot; and
- (d) Chief Maintenance Engineer."

Further, subsection 6(2) of the Order states that no person shall serve as a Chief Pilot or Chief Maintenance Engineer unless he meets the requirements for that position set out in Schedule A to the ANO.

On September 25, 1991, the Department of Transport informed Aviation Lanaudière that it was suspending the company's operating certificate because Mr. Luc Gaudet, who had been authorized to fill simultaneously the positions of Operations Manager and Chief Pilot, no longer worked for the company. Consequently, the carrier had to propose to Transport Canada an

acceptable candidate for the position of Chief Pilot and an acceptable candidate for the position of Operations Manager in accordance with the ANO.

In the correspondence filed by Transport Canada there followed an exchange of letters in which Aviation Lanaudière tried to have Mr. Luc Lussier accepted as Chief Pilot.

Transport Canada's officials refused Mr. Lussier's candidacy because he did not meet the requirements of the ANO. According to Transport Canada, Mr. Lussier could not be chief pilot because he was already employed on a full time basis as a co-pilot for the Inter-Canadian company. Exhibit M-14, filed by Transport Canada, shows the number of Mr. Lussier's flying hours and duty hours from June to November 1991.

Transport Canada contends that Mr. Lussier would not have the time and the availability necessary to discharge in a normal and safe manner the duties that would fall to him as Chief Pilot at Aviation Lanaudière, and that he would therefore not be able to exercise his employment on a full time basis with this carrier.

Under cross-examination by Mr. Jenner, Mr. Trudel reasserted that the reasons for Transport Canada's refusal were as follows:

- (i) Mr. Lussier is already employed by another airline;
- (ii) Mr. Lussier could not perform all the duties assigned to a Chief Pilot because the requirements of and the time devoted to his work at Inter-Canadian did not leave him sufficient time to fill his position as Chief Pilot on a full time basis.

According to Transport Canada's representative, Mr. Lussier has to work many hours each month as a co-pilot for Inter-Canadian and is thus obliged to be absent regularly, at least five days a week. His absence will coincide with Aviation Lanaudière's operating hours, mainly during the day.

The Tribunal notes that Exhibit M-14 shows that, for the period of five months from June to November 1991, Mr. Lussier was on duty on monthly basis during approximately 156 hours, which included approximately 80 hours of flying time on average. During some months, in particular July, August, September and October 1991, Mr. Lussier was on duty for more than 160 hours a month.

While Mr. Trudel was unable to determine with accuracy the minimum number of hours normally required to perform the duties of a Chief pilot, this witness reiterated the position that the carrier could not safely make use of the services of a Chief Pilot who for all practical purposes would be absent during normal working hours during the week.

Transport Canada admitted that it had on occasion authorized a Chief Pilot to work for other employers as a pilot or in other capacities while holding the position of Chief Pilot with a carrier. However, Transport Canada hastened to add that, in all such cases, circumstances were different from those being submitted to the Tribunal in the present instance. Further, Transport Canada

had ensured in each case that all the safety measures adopted by the carrier were complied with, and that the Chief Pilot in question had the availability and the time required to perform his duties as Chief Pilot fully and safely, regardless of any other employment he might hold.

Transport Canada reiterated its position that the regular presence of the Chief Pilot at the carrier's offices was vital, because he was responsible for all of a carrier's air operations and had to be available to monitor them. To that end, according to Transport Canada's position, the regular, physical presence of the Chief Pilot was required at the carrier's offices.

AVIATION LANAUDIÈRE'S POSITION

Aviation Lanaudière called as its sole witness Mr. Guy Prud'homme, its President and Chief Operating Officer. According to Mr. Prud'homme, Aviation Lanaudière is unable to offer a Chief Pilot a full time position because the pay would be much too costly in his opinion. Such a situation could be justified by the smallness of Aviation Lanaudière's operations.

Mr. Prud'homme nevertheless reiterated that Mr. Lussier was qualified to act in that capacity, and he made a commitment to Transport Canada that Aviation Lanaudière would not perform any flight unless the flight had received Mr. Lussier's prior approval. According to Mr. Prud'homme, if Mr. Lussier was not able to approve a flight because he was not available or was working in his other duties, Aviation Lanaudière would not make the flight in question. These were voluntary restrictions that Mr. Prud'homme agreed to impose on Aviation Lanaudière in the present circumstances. Further according to Mr. Prud'homme, Aviation Lanaudière planned most of its flights some days in advance, so that it was possible for him to tell Mr. Lussier in advance and thus ensure his availability and obtain his authorization before making the required flights.

CONCLUSION AND DECISION

During the pleadings each party summarized the grounds of its arguments quite fully.

The Tribunal was able to identify two fundamental questions that were debated in several forms during the hearings. They are as follows:

- (a) What interpretation is to be put on the expression "employed on a full time basis" within the meaning of the ANO?; and
- (b) will the candidate for the position of Chief Pilot proposed by Aviation Lanaudière be able to satisfy the requirements of the ANO?

The first question is one of law while the second has to be examined in the light of the facts presented by the parties at the Hearing.

The expression "full time" deserves to be examined in its entirety in order to give it the interpretation which is most plausible and most likely to apply to the conditions required by the ANO.

In "The Dictionary of Canadian Law" (991-Carswell Publication) the expression "full-time basis" is defined as follows:

"In relation to an employee of a particular class, means engaged to work, throughout the year, all or substantially all of the normally scheduled hours of work established for persons in that class of employees".

The dictionary also defines the expression "full-time employee" as "An employee whose regular work week exceeds 30 hours".

Further, the expression "full-time employment" is defined in the dictionary as "Employment requiring continuous service in an office or position, where the employee is normally required to work the minimum number of hours prescribed by the person having authority to establish the hours of such employment".

These definitions help us to see that the expression "employed on a full-time basis" must be distinguished from the criteria of casual employment. Full-time employment must be characterized by continuity and regularity and must be related to the activities and services performed by the employee.

Therefore, the employment of a Chief Pilot within the meaning of subsection 5(1) of the ANO cannot be casual, that is to say, without the characteristic of continuity, regularity and periodic return by the employee to the carrier's offices or place of business.

This interpretation also prevents the position of Chief Pilot with a carrier from being filled by two employees or by a part-time or casual employee.

The expression "employed on a part-time basis" or "employé à temps partiel" is normally understood of any person who is employed for irregular or intermittent periods of time, that is, for a day, or over the course of a week, a month or a year, and whose services are not necessarily required during normal business hours.

From the criteria developed by Canadian jurisprudence and doctrine, and as it is defined in certain Canadian legislation, mainly legislation relating to labour standards, the Public Service and unemployment insurance, the interpretation given to the expression "on a full-time basis" would appear to be more restrictive than that put forward by the parties in the Hearing. It would appear from this interpretation that the expression "on a full-time basis" is much more favourable to the position that a full-time employee must spend all his time during normal business hours performing his duties for his employer.

However, the Tribunal is not of the opinion that such a restrictive interpretation should prevail. Unless required by conditions such as those relating to aviation safety, there does not appear to be any particular condition or requirement arising from the current regulations under the ANO to the effect that a Chief Pilot cannot hold any other function or employment than that which he might hold such with an air carrier.

Moreover, the expression "employed on a full-time basis" within the meaning of the ANO necessarily requires that the employee be able to perform the duties devolved on him as Chief Pilot, that he possess the experience to do so, and that he be able to assume all the responsibilities that arise from his employment in accordance with existing air regulations. All of these criteria seem to be more important than the mere number of hours spent performing the duties of Chief Pilot.

In these circumstances, the Tribunal is of the opinion that the requirement of subsection 5(1) of the ANO to the effect that the Chief Pilot must be employed on a full-time basis would not preclude his holding other employment or performing other duties than as Chief Pilot insofar as:

- (i) he is the only person empowered to make decisions that arise from his duties as Chief Pilot for the carrier;
- (ii) he has the time and the availability necessary to perform, in compliance with air regulations, all the duties that fall to a Chief Pilot of an air carrier; and
- (iii) he is in fact able to perform such duties and is physically on the spot to assume responsibility for the air operations of a carrier in a regular, adequate and continuous manner.

The performance of these duties does not necessarily require that the Chief Pilot be present at his employment during the minimum number of hours a day and a minimum number of days a week, unless, of course, there is an agreement to the contrary with the employer.

Having determined the criteria of interpretation applicable to the expression "on a full-time basis", we must now answer the second question, in order to determine whether the candidate proposed for Chief Pilot by Aviation Lanaudière will be able to meet the requirements that fall upon such a position in this company.

In this regard, the Tribunal doubts that Mr. Lussier, the candidate proposed by Aviation Lanaudière, is able to perform all the duties arising from a Chief Pilot's position mainly because of his other activities and responsibilities arising from his employment with Inter-Canadian. The evidence showed that Mr. Lussier has to spend a significant number of hours as a pilot on duty with his main employer, and that this would leave him very little time to assume the Chief Pilot's responsibilities at Aviation Lanaudière.

While the Tribunal is sympathetic to Aviation Lanaudière's position that, because of the size of its operations, it does not have the financial resources to hire a Chief Pilot whose sole job would be to be responsible for the company's air operation, it must nevertheless conclude that the criteria developed earlier as applying to the responsibilities of a Chief Pilot must prevail.

The Tribunal also carefully examined the excerpt from Aviation Lanaudière's operations manual describing the responsibilities attributable to a Chief Pilot.

The Tribunal concluded that, even though Aviation Lanaudière's operations are not at present very large, the Chief Pilot's duties adopted by the company are impressive. According to

Aviation Lanaudière's operations manual, a Chief Pilot is responsible to the Operations Manager for the complete supervision of all the company's air activities, for setting up a control system to ensure that Transport Canada and company regulations are applied at all times, and for taking disciplinary measures as necessary for any violations occurring within the company.

The Tribunal is of the opinion that, for the reasons given above, the candidate proposed by Aviation Lanaudière will not be able to perform safely all the duties that will be delegated to him and which form part of his responsibilities under the company's operations manual.

IN CONCLUSION, THE TRIBUNAL CONFIRMS THE NOTICE OF SUSPENSION OF THE OPERATING CERTIFICATE ISSUED BY TRANSPORT CANADA UNTIL SUCH TIME AS AVIATION LANAUDIÈRE HAS SATISFIED THE CONDITIONS OF REINSTATEMENT SET OUT IN THE NOTICE OF SUSPENSION OF SEPTEMBER 25, 1991.