SC CIV 73 009

opposition opposed

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

PACIFIC WESTERN AIRLINES LTD.,

Plaintiff

- and -

KOOMIUT ESKIMO CO-OPERATIVE ASSOCIATION, LIMITED

Defendant

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE W. G. MORROW

The plaintiff airline is a corporation with head office in Vancouver, British Columbia, and registered office at Yellowknife, in the Northwest Territories. The defendant corporation has its registered office at Pelly Bay, in the Northwest Territories. The action has been brought to collect two amounts of money, the first, $400.00 for a one hour detention of the aircraft while proper unloading equipment could be obtained, the second, $7,650.00 represented six hours wasted flying time alleged to have resulted from failure by the defendant to provide proper lighting facilities to permit landing at night.

It was agreed at the trial that if there was liability in respect to each claim, the sum sought was correct.

Captain Seymour Page, Captain of the Lockheed Hercules Aircraft involved in the present proceedings, and an experienced pilot, who has been flying in the north since 1956, was the main witness called the plaintiff. He described how on the morning of the 23rd of

of March 1971 he was advised of two flights to take place from Yellowknife to Pelly Bay, each flight to carry some 5000 gallons of oil fuel on the order of the defendant Co-Operative.

The delivery was to be made to what is agreed as being the Pelly Mission strip, located about one-quarter of a mile from the Settlement of Pelly Bay and some seven miles from the DEW-line station. The witness had never landed there before and knew the lack of facilities at the airstrip would mean the landing would be made under visual flight rules. The strip is located in what might be called a wide gully with hills up to 450 feet to the south and hills to the north going up to 900 feet. Located close to the sea, the elevation is about ~~50~~ fifty feet. There is a non-directional beacon just north of the settlement.

Captain Page admitted that when the first flight got off at just before 2.00 p.m. on March 23rd the flight was late getting off, the scheduled take-off having been planned for noon. From take-off to landing the first flight took about ~~2~~ two hours and ~~40~~ forty minutes. Except for time taken in circling on the second flight, it would appear that each flight took about the same time; the return flights the same.

On landing the first time, Captain Page stated the plane would be back in five hours and that, since it would then be dark, they would require flarepots to mark the strip. While awaiting unloading of the first load he thinks he saw some oil cans. He requested flarepots but didn't ask how many flares they had. He told the person he made the

uest of to do their best to get flares out. He was told that they had flares but he himself did not check out the flares or markers. The person he gave the instructions to and received the assurance from was the school teacher. The Captain in cross-examination agreed that he, "just hoped flares would be there," that he presumed the school teacher had authority, and that he didn't think he asked the teacher if he could bind the Co-operative. At this time, he observed oil drums used as markers of the strip. He saw no lighting system except for a few flare-pots on the occasion of the first trip.

Under further cross-examination this witness stated that he took it as his duty to fly into airports (agreed to be the same as air-strips in this case) when they were approved by his Company, as was the se here. He made no check with the Territorial Government in respect to the management of the airport but assumed it was operated by the Co-operative. He agreed that it was his duty as Captain to make sure there were proper facilities for landing.

On the occasion of the first landing there was a delay while the local people in attendance found proper fittings which permitted the fuel to be pumped out of the aircraft. Apparently a 4" fitting was required. He was not responsible for the loading or unloading, this being the responsibility of the loadmaster, a member of the crew.

The Captain then described how in some ~~5 1/2 hours~~ five and a half the plane was back at Pelly Bay. It circled the settlement for some ~~15 - 20~~ fifteen to twenty minutes. Captain Page observed some equipment coming to the strip. observed two flare pots on one side of the strip and a skidoo parked at the end of the runway.

Captain Page described how he made from ~~5~~ five to ~~6~~ six circles over the strip at varying altitudes from 1500 feet, 1200 feet and finally at 500 feet. In the last run, he lined up with the flarepots and came in with the plane's lights on. He could observe no change in the lighting and since his own fuel was running short he returned to Yellowknife.

The last 5000 gallons of oil fuel were then delivered the next day in daylight without event.

According to Captain Page, the Pelly Bay temperature that night was 20° below zero, there was very little wind, and the sea was near at hand.

Captain Page was examined for discovery as the plaintiff Company's officer. He agreed on discovery that he, "didn't take any real notice as to whether there were flares all the way down the runway (during his first trip.). He agreed also that with below zero temperature as was experienced on the night in question his aircraft produces condensation, that flarepots produce instant condensation, and that he had in his northern flying experience observed ice fog from around flarepots and around the exhaust of snowmobiles.

On discovery this witness also stated that the defendant made no request to make the delivery at night time. He did not know what size pipe line Pelly Bay airstrip was equipped with when he left on the first flight, this not being within his department.

In returning to Yellowknife Captain Page stated it was not safe to land with the conditions he had observed on the occasion of the second trip. He explained how the Hercules type of aircraft for a safe night landing required flarepots every 200 feet and the thresh-hold clearly marked to avoid overrunning the strip.

It was explained by this witness that before airstrips such as the Pelly Bay one are approved by his Company a competent pilot makes an inspection which is reported to the Company's Chief Pilot and in turn reported to the Director of Flight Operations. Apparently he did not check with the Company director because he had been informed the strip was suitable.

In answer to the Court's question of why he didn't wait until the next day for the second trip Captain Page gave as his reason the heavy commitments of the plane.

The first officer on the same first two flights, Captain Robert Crosby was called by the plaintiff's counsel as a rebuttal witness. He was on both flights. He explained how a 4" fitting was standard procedure. On a previous occasion in December, 1969 he had made a night landing at Pelly Bay with a Hercules. The lighting by flarepots appeared to be adequate. On the present occasion he observed two motor toboggans going toward the strip and a "couple perhaps" of flare pots put out. The motor toboggans appeared to be positioned to light the end.

Defence counsel called two witnesses and read in certain discovery as mentioned above.

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The first of these, Father Andrew Goussaert, who speaks the Eskimo language, is spiritual and business adviser to the members of the Co-operative. He was absent from the settlement on March 23rd and 24th, 1971.

According to Father Goussaert there had been a previous occasion when a Hercules aircraft could not land and on this occasion the plane overflew and landed at the DEW-line site at Shepherd's Bay some one hundred miles distant. According to him PWA had made some fifty Hercules flights to the Pelly Bay settlement. On one instance prior to March 23rd 1971, PWA had been advised by radio that the hose line was the same as before, namely "3". He also explained that on the previous occasions the planes had always carried the necessary adaptors. According to him there had been no trouble unloading the oil fuel deliveries before as all the loadmaster had to do was make connection to the pipe at the airstrip. All previous flights had been unloaded with no one in charge from the Co-operative. He described the strip as 5000 feet in length and equipped to provide flarepots every 250 to 300 feet along each side. The airstrip was owned by the Territorial Government and had been built by the same Government.

Guido Tigvareak, who had lived all his life at Pelly Bay, stayed up all the night of March 23rd to 24th, 1971, as he had heard the plane was coming back about 2.00 a.m. When he heard the plane he went to the strip on his skidoo. He noticed the flarepots were not on so poured fuel in them and started lighting them. He began lighting them at the point on the strip farther from the settlement. He was so busy

that he didn't see the plane until it went over for the last time. About sixteen of the total of twenty flarepots had been lit by him by the time the plane went over the last time. This man's testimony was not challenged by cross-examination. He agreedthere was no boss to oversee the unloading or lighting of flarepots.

Finally, in respect to the evidence, questions and answers read in from the discovery of Father Goussaert by counsel for the plaintiff included a reference to PWA unloading fuel before and that adaptions to the line had to be made and, "They didn't charge us that time." Also, that the Co-operative knew from the remarks made to the school teacher that flarepots would be expected to be lighted for the return flight.

I accept the evidence of all witnesses as credible. On my assessment of the facts the Co-operative ordered oil fuel to be delivered by two trips in a Hercules airplane. There was nothing in the negotiating of the contract for fuel to indicate any change in the manner of delivery or in the manner of unloading from the previous orders and deliveries of fuel. The airline was not asked to make a delivery at night but if it suited the Company to so do, then the co-op was satisfied and assumed the responsibility of providing flarepots as lighting, in the same manner as they had done on other occasions, for the same Company, and under similar conditions.

I am satisfied that by the time the plane made its last circle over the airstrip the flarepots as described by Guido Tigvareak had been lit in position. It may be that condensation prevented Captain

. ge and his first officer from observing the full number of flarepots, or it may have been his anxiety over not having enough reserve plane fuel to continue circling, or it may have been a combination of both, that prompted the Captain to return to the base at Yellowknife. Such a decision was his prerogative as Captain, and no one can fault him there. I do think that for a Captain expecting to make his first night flight on an airstrip such as the one at Pelly Bay, it would have been better had he made full inquiries of his Director of Flight Operations, and if he had made fuller and more careful inquiries while on the ground at Pelly Bay. Had he done so perhaps he would not have attempted a night trip under the existing conditions, or perhaps he would have contemplated putting down at Shepherd's Bay until daylight rather than flying l the way back to Yellowknife.

Unless, therefore, there is anything in the Tariff and Regulations that have been cited to me, to affix liability on the defendant, I cannot on the above facts find any basis for the plaintiff's claims. Any seasoned pilot in the Northwest Territories must be taken to understand the effect of extreme cold weather on equipment such as flarepots, the shortage of daylight hours during the winter months, the frequency of ice-fog near the sea even though for the most part the sea may be frozen over. And any experienced northern pilot must have some understanding of how the local inhabitants respond to the type of request as was made here, by making the best use of what they have and under the most trying of weather conditions. Further, if PWA was to introduce w terms or a new way of delivery than used in the past, the Co-operative should have been told so.

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It now remains to examine the Tariff and Regulations that may govern here.

Counsel for the plaintiff Company relies on the General Rules attached to the Charter Tariff filed by Pacific Western Airlines Ltd. with the Air Transport Board pursuant to General Order 35/63 dated January 29, 1963. Para. 10(1) refers to the facilities and services to be provided by the charter and sub-para. (d) includes "airstrips with ... markers and/or lights....". It is agreed that the above requirement is applicable to the airstrip in question.

Para. 10(2) is to the effect:

> "When the facilities and services named in paragraph (1) above are required but not available ... they shall be provided by the charterer at no cost to the carrier."

Para. 11 is also relied on here:

> "11(1) Carrier shall have exclusive operational control over chartered aircraft, contents and crews thereof. All persons provided transportation on aircraft shall comply with all rules and regulations of carrier, and all persons or property aboard chartered aircraft shall be subject to the authority of the pilot in charge.
>
> (2) Carrier has the right to cancel or terminate the charter or any flight of a charter at any time or to return to base or to the last point of landing or to divert or to land at an intermediate point when such action is deemed by carrier to be necessary due to unserviceability, weather, or to conditions beyond the control of carrier."

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From the above Regulations he reasons that the Captain was entitled to decide the facilities were unsafe for landing, that the plaintiff Company has the operational control, and that it was the duty of the defendant Co-operative to provide a useable airstrip, that even if the flares were provided as testified to by the witness they were not sufficient in number and accordingly the return to Yellowknife was justifiable.

Defence counsel on the other hand refers to Para. 4(5) of the same General Rules wherein it is provided:

> "No charges will be assessed against charterer in respect of any flying in an unsuccessful attempt to complete a flight required under the charter, unless the charterer, his servant or agent, so agrees."

From this he reasons that there is no evidence that the Co-operative agreed to pay for an unsuccessful charter, that there was no specific request by the charterer to make a night flight, that if such a flight was to be undertaken the Captain or his company should have inquired from someone in authority as to the nature of the facilities and as to his requirements, that the night flight was to accommodate not the defendant but rather the plaintiff because of the heavy commitment of its plane, and that the type of difficulties such as ice fog and delays in lighting flares in below zero weather being well known to the Captain required him to make responsible arrangements while at Pelly Bay on the first trip and not rely on a superficial inspection and a mere request for flares from a person not in authority.

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The defendant does not dispute the Captain's decision not to land, but agrees that was his prerogative. It is however suggested that if he was to make this decision there was no need to return all the way to Yellowknife when, as is provided for in Para. 11(2) he could have landed at Shepherd's Point, or at Cambridge Bay, and waited until day-break, thus saving unnecessary mileage.

I can find nothing in the Regulations referred to above that changes my initial assessment of the situation. On the contrary Para. 11(2) and Para. 4(5) when read together, if anything, only reinforce the defendant's position. The defendants were busy providing the lighting they had always been in the habit of providing, and which they assumed would satisfy the pilot. The defendant did nothing in my view of the facts which would take them out of the effect of Para. 4(5). There is no evidence the defendant agreed to pay for the incomplete flight. I cannot see anything in the evidence which might be construed as an act or acts by the defendant that might be considered as misleading the plaintiff so as to render the above Para. ineffective. Accordingly I dismiss the plaintiff's claim under this heading.

I should observe that even if I had reached a contrary conclusion here I would have held, in any event, that the Captain should not have returned to Yellowknife, but should have followed the more sensible course, as indeed one of his predecessors had done, namely, have put down at Shepherd's Bay, or Cambridge Bay.

With respect to the holding time, counsel for the plaintiff again relied on Para. 10 as set forth above. He also referred to Para. 50(1) which is quoted below, arguing that it is implicit that time taken

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to obtain the proper fitting was a detention at the request of the charterer.

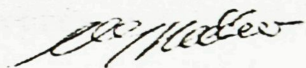
> "50(1) The detention charges published in the Tables of Rates and Charges will be assessed only when the aircraft is detained at the request of the charterer beyond the free time provided in the said Tables."

Reliance was also placed on Para. 42 which states:

> "42(1) Carrier will be responsible for loading and unloading aircraft at its bases except that when charterer requests or the nature of the shipment requires special equipment or personnel, the costs of such special equipment and personnel will be charged to charterer.
>
> (2) At all other points, except when caused by unserviceability of the aircraft or other causes attributable to carrier, the cost of loading and unloading of aircraft will be borne by charterer."

I have already set forth my finding of fact under this heading. It seems to me that if the plaintiff was to now place the responsibility on the defendant to provide the appropriate coupling, to change the practice followed in past deliveries, then before any delays could be assessed against the defendant the defendant was entitled to be placed on full and clear notice of that fact. The plaintiff's claim for detention charges is accordingly dismissed.

In the result the plaintiff's action is dismissed with costs to be taxed in Column 5, to include discoveries.



W. G. Morrow

Yellowknife, N.W.T.
22 August 1973

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