FLIGHT-WATCH

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FINALLY, THE BOARD CORRECTLY APPLIES THE STALE COMPLAINT RULE IN MOTOR VEHICLE ACTION CASES

1943 North American SNJ-4, modified to resemble a Nakajima B5N2 torpedo bomber (Allied Code Name: "Kate"). The Kate has appeared in such films as *Tora! Tora! Tora!* and *Midway*.

Photo courtesy of Japanese Bomber, LLC
www.JapaneseBomber.com

The author of Flightwatch represented two airmen who had motor vehicle actions, i.e., they were arrested for driving under the influence. In both cases, the airmen failed to timely report these incidents under FAR § 61.15(e)(f). In both cases, the FAA acquired data from the National Driver Register ("NDR"), from which the FAA could readily have determined that these airmen failed to report their motor vehicle actions within sixty days as required by the Federal Aviation Regulations. In both cases, the FAA sat on the data for many months before finally downloading the data and comparing it to a database called "NLETS." The FAA took the position that it did not officially "know" of the violation until correlating the NDR data with the NLETS data. Remarkably, the NTSB accepted this argument. The FAA employed this argument to claim that it had given notice to the airmen within six months of the date it "knew" of a violation. If the FAA fails to satisfy the six-month requirement, the case against the pilot may be dismissed. See 49 C.F.R. § 821.33(a)(1), commonly referred to by aviation lawyers as the "Stale Complaint Rule." The Board's misapplication of the Stale Complaint Rue in situations where pilots have failed to report their motor vehicle actions within sixty days has been

discussed and criticized in previous issues of Flightwatch. See Volume 127, December of 2002; Volume 138, November of 2003; and Volume 141, February of 2004. These earlier issues of Flightwatch appear on the author's website and may be reviewed to develop a full appreciation of the legal issues presented when an airman attempts to have charges against him or her dismissed by employing the Board's Stale Complaint Rule.

As reported in Volume 141 of Flightwatch, Tilak S. Ramaprakash was required to lodge an appeal with the United States Court of Appeals for the District of Columbia in order to have a decision by the NTSB reversed in its erroneous application of the Stale Complaint Rule. Following the opinion and mandate of the D.C. Circuit Court of Appeals, the NTSB finally determined that the FAA was on notice with respect to the airmen's violation of the regulations when it came into possession of the data from which a determination could be made that the airman had violated regulations. See *Administrator v. Ramaprakash,* NTSB Order Number: EA-5076 (January 30, 2004).

The companion case to *Ramaprakash* was *Administrator v. Shrader*, NTSB Order EA-4971 (2002), in which the Board incorrectly reversed a grant of summary judgment to the pilot by Judge Mullins, who reasoned that that the FAA's complaint was stale. After the Board reversed Judge Mullins and directed a hearing on the issue of sanction, Mr. Shrader appealed the thirty-day suspension of his certificate. The FAA also appealed, claiming Mr. Shrader's certificate should have been suspended for sixty days. While appealing the issue of sanction, Mr. Shrader, again, raised the misapplication of the Stale Complaint Rule in his appeal brief. The strategy was to keep the *Shrader* case in play while awaiting what was hoped would be a favorable decision in *Ramaprakash*. The strategy worked. Consequently, on June 18, 2004, the Board reversed its earlier decision in *Shrader* and declared the charges against Mr. Shrader brought by the FAA were stale. See *Administrator v. David A. Shrader*, NTSB Order Number: EA-5100 (June 18, 2004).

EXCULPATORY CLAUSE MAY NOT RELIEVE AIRCRAFT OWNER OF LIABILITY FOR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT

Sky Warriors, Inc. ("SWI") owned and operated several T-34 aircraft based at the Fulton County Airport in Atlanta, Georgia. Pilots (and non-pilots) could rent these aircraft with an appropriately certificated instructor aboard, and the aircraft would dogfight another aircraft in air combat maneuvers ("ACM"). On one such flight, a T-34 aircraft suffered a catastrophic structural failure. After the wing failed, neither pilot was able to abandon the aircraft and deploy his parachute.

The record in this case indicated that three years before this catastrophic failure, a sister ship was found to have a fractured wing spar. When the suspected fractured wing spar was of interest, the sister ship was flown from Georgia to Illinois. Upon arriving in Illinois, it was confirmed that the sister ship had a fractured wing spar.

Concerned about the findings on the sister ship flown to Illinois, the entire fleet of SWI aircraft were x-rayed. The accident airplane had two x-rays. One x-ray suggested the aircraft had a fractured spar. The other x-ray indicated that the aircraft did not have a fractured spar.

Because of these ambiguous results, it was decided to employ an eddy current test. While more precise in some respects, an eddy current test does have limitations. It cannot give an operator an accurate reading about the integrity of the metal below 3/16th of an inch. The x-ray report on the accident aircraft said "Reject – crack." However, the management of Sky Warriors took the position that since the eddy current test showed the wing was not cracked, the aircraft was safe for flight.

Following the crash of the aircraft, the widows of both pilots brought wrongful death actions. SWI moved for summary judgment and referred the trial court to the fact that both pilots had signed exculpatory clauses relieving SWI from liability in the operation of the aircraft. The agreement between SWI and the instructor pilot had the following limiting language:

> Provided, however, that Sky Warriors shall satisfy any legal liability for injuries or damage to the instructor or his property if such liability arises solely from the negligence or willful misconduct of Sky Warriors and provided further that the amount paid in satisfaction of such liability shall not exceed the insurance coverage provided under the existing insurance policy of Sky Warriors, reduced by any retained risk under such policy.

The agreement between the pilot of the aircraft (the patron of SWI) included the following language:

> In consideration of being permitted to participate in an aerial flight involving simulated aerial combat, aboard an aircraft owned by Sky Warriors, Inc., Participant hereby releases, waives, and forever discharges Sky Warriors, Inc.… from all liability to participant, his or her spouse, legal representatives, heirs, assigns, children, or anyone claiming by or through participant, for any loss, damage, liability, claim, demand, action, cause of action, cost, or damages resulting therefrom on account of injury to Participant's person or property that occurs while Participant is on the premises of Sky Warriors, Inc., or while participating in the aforementioned flight…

This flight was an electrifying experience

When SWI moved for summary judgment in reliance upon the language appearing in the exculpatory clauses, the widows maintained that the exculpatory clauses could not be applied, since they were against public policy. The trial court disagreed and granted summary judgment to SWI.

The widows appealed the trial court's decision. The Georgia Court of Appeals re-

versed, and declared that while exculpatory clauses are not necessarily void as against public policy, they do not relieve a party from liability for acts of gross negligence or willful or wanton misconduct. Because there was evidence in the record that SWI had allowed a sister ship to be flown from Georgia to Illinois with a suspected cracked wing spar, and because there was evidence that the spar on the accident aircraft was cracked (albeit, conflicting evidence), the Georgia Court of Appeals reversed the trial court and reasoned that there was a question of fact for the jury on the claims of the widows as to whether or not SWI was guilty of gross negligence or willful or wanton conduct that caused the crash.

It is a common practice in the Warbird community to have passengers and occupants of aircraft sign waivers and exculpatory clauses. However, this case suggests that if the plaintiff can develop evidence indicating the operator is guilty of willful misconduct or gross negligence, the exculpatory clauses may be worthless.

McFann v. Sky Warriors, Inc., __ Ga. App. __, Case Numbers: A04A0092; A04A0093 (June 24, 2004).

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Alan Armstrong is engaged in the general practice of law with an emphasis in the following areas:

Aviation Matters, Personal Injury, Professional Negligence (Malpractice), Products Liability

Phone: (770) 451-0313 Fax: (770) 451-0317
Email: alan@alanarmstronglaw.com

Website Addresses: www.alanarmstronglaw.com
www.flyingtigersfilm.com

Please contact us at flightwatch@alanarmstronglaw.com with any questions, comments, or if you no longer wish to receive Flightwatch via email.