



# FLIGHT-WATCH



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By: Alan Armstrong, Esq.

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## NINTH CIRCUIT COURT OF APPEALS REVERSES THE NTSB FOR ITS REVERSAL OF A CREDIBILITY ASSESSMENT MADE BY JUDGE MULLINS

As anyone knows who operates an aircraft that has been re-equipped with the new GPS navigation technology, the installation of this equipment and the certification of the equipment to operate it in IFR conditions is ordinarily a multi-step process. For example, the first step is to have the new GPS equipment installed in your airplane. Then, you will be given a temporary authorization to operate the aircraft for purposes of conducting flight tests to ensure that the navigational accuracy of the GPS system at least equals and perhaps exceeds the navigational signals you receive during the course of a VOR or NDB approach.

In my personal experience, I had to conduct flight tests in my aircraft after installing a new GPS system to verify that

**North American F-86 Sabre at the Camden, S.C. Air Show, November 5-7, 2004.**

the GPS signals were consistent with the navigational signals of other ground-based navigational aids. After conducting the test flight, I had to fill out paperwork verifying my findings. Then, the facility doing the radio work had to interface with the FAA and secure for me a written authorization for me to use my new GPS navigational system in IFR conditions and for instrument approaches.

The case at hand is not unlike my personal experience in having a new GPS system installed in my airplane. The difference between my personal experience and the case at hand is that the individual installing the GPS system was charged with falsifying FAA documents in the course of his work. The airman performing the work interfaced with an FAA inspector, Mr. Lutz. While Mr. Lutz recalled the airman faxing an FAA Form 337 (Major Alteration or Repair) to him for approval, Mr. Lutz then faxed the document back to the airman, suggesting changes. Prior to the trial, Mr. Lutz admitted that he “may”

the GPS signals were consistent with the navigational signals of other ground-based navigational aids. After conducting the test flight, I



**Colonel Bob Murphy (USAF, Ret.) at the Albany, Georgia, Airshow**

have approved other installations with this airman at about that point in time. However, when the case was tried, Mr. Lutz took the position that he had not authorized this particular installation in the aircraft in question which was a Beech V-35B.

One would think that when an FAA inspector and an airman have a credibility dispute, that the case would end there due to the FAA's inability to carry its burden of proof. Unhappily, this was not the case. The FAA obtained the testimony of an expert witness in document examination. The expert witness opined that the signature on the Form 337 was a forgery. The expert witness explained how this "could" have been done by cut-



ting and pasting the inspector's signature from another document. The FAA's theory of the case was that only the airman would have been motivated to have committed this heinous act. The Agency completely ignored the earlier testimony of Inspector Lutz indicating he may have authorized other installations with this airman at or about the time in question.

Based upon this ambiguous record, Judge William R. Mullins correctly determined that he had before him a "credibility assessment." Was Judge Mullins going to revoke the certificate of an airman based upon this ambiguous record, bearing in mind that the FAA has the burden of proof? Thankfully, Judge Mullins exercised appropriate discretion and employed proper logic. He found (and the author submits, correctly) that the FAA had failed to carry its burden of proof in demonstrating that the airman had (1) made a false representation, (2) with reference to material fact, and (3) with knowledge of its falsity. See *Hart v. McLucas*, 535 F. 2d 516, 519 (9<sup>th</sup> Cir. 1976).

Displeased with Judge Mullins' cold logic, the FAA filed an appeal to the five mem-

bers of the NTSB. In a somewhat condescending opinion and order, the NTSB reversed Judge Mullins and relied heavily upon the testimony of the expert witness (document examiner). Judge Mullins was criticized by the five members of the NTSB for his conclusion that this case revolved around a “credibility assessment.” In fact, the Board said of Judge Mullins that he “ignored all the forensic evidence in the record.”

Thankfully, in the interest of justice and common sense, this airman had the resources to appeal from the NTSB to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit saw the case the same way Judge Mullins did, i.e., it was a credibility assessment. The Ninth Circuit trumped the Board’s opinion and order, reciting as follows:

The Board did not apply its deferential standard of review to the ALJ’s adverse credibility determination regarding Inspector Lutz. To reverse the ALJ’s determination, the Board would have to find that the “great weight of the evidence” established that Wedding, not Lutz, falsified the Form 337. It is not possible from this record to say that the great weight of the evidence points to either man, as it is at best inconclusive. Because the Board abused its discretion in overturning the ALJ’s credibility finding, we grant the Petition for Review, reverse the Board’s decision, and remand the case for further proceedings consistent with this opinion.

As a legal practitioner of some 28 years, it is generally my impression that the political climate in which pilots function today is far more conservative than it

was ten or fifteen years ago. It is also my impression that the NTSB members seem to believe that it is their function to act as a second arm of the prosecution. It is my belief that lawyers representing airmen have a tougher ladder to climb today in litigation before the Board than they did a decade or two ago. The fact that the five members of the Board would reverse Judge Mullins on a credibility assessment when he was at the trial and heard the testimony of the witnesses himself, underscores my belief that the Board has an unfortunate propensity to second-guess judges who make credibility assessments in favor of pilots.

*Gary Michael Wedding v. National Transportation Safety Board, et al.*, United States Court of Appeals for the 9<sup>th</sup> Circuit, Case Number 02-73839 (May 3, 2004). [The author of Flightwatch appreciates the submission of information on this case from Mark McDermott, Esq. in Washington, D.C.].



**A Cessna 0-2, as Seen at the Albany, Georgia, Airshow**

## A Pilot's Poem

By: Captain E. Hamilton Lee

I hope there's a place  
Way up in the sky  
Where pilots can go  
When they have to die

A place where a guy  
Can buy a cold beer  
For a friend and a comrade  
Whose memory is dear

A place where no doctor  
Or lawyer can tread  
Nor a management type  
Would ere be caught dead

Just a quaint little place  
Kind of dark  
Full of smoke  
Where they like to sing loud  
And love a good joke

The kind of a place where a lady could go  
And feel safe and protected  
By the men she would know

There must be a place  
Where old pilots go  
When their paining is finished  
And their airspeed gets low

Where the whiskey is old  
And the women are young  
And songs about flying and dying are  
sung

Where you'd see all the fellows  
Who'd flown west before  
And they'd call out your name  
As you came through the door  
Who would buy you a drink  
If your thirst should be bad  
And relate to the others, "He was quite a  
good lad!"

And then through the mist  
You'd spot an old guy  
You had not seen in years  
Though he taught you to fly  
He'd nod his old head  
And grin ear-to-ear  
And say, "Welcome, my son,  
I'm pleased that you're here,

"For this is the place  
Where true flyers come  
When their journey is over  
And the war has been won.

"They've come here at last  
To be safe and alone  
From the government clerks and manage-  
ment clones,  
Politicians and lawyers, the Feds and the  
noise,

"Where all hours are happy  
And these good ole boys  
Can relax with a cool one  
And a well-deserved rest  
This is Heaven, my son – you've passed  
your last test!"



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