



FLIGHT-WATCH



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LIFETIME
REVOCA-
TION
OF AN AIR-
MAN'S CER-
TIFICATE

I.

INTRODUC-
TION

Many years ago when I began practicing law, if a pilot flew illegal drugs into the United States, his airman's certificate was revoked just like any other person guilty of a violation of the Federal Aviation Regulations. Ordinarily, if an airman's certificate is revoked, the pilot may requalify. Under ordinary circumstances, the period of denial is one year. Typically, the revocation of an airman's certificate is not for the lifetime of the pilot, but only for one year. In some compelling circumstances, the FAA may revoke the certificate and shorten the period of denial.

As I recall, a number of years ago, Congress changed the statute on drug smuggling to provide for a five-year denial period for pilots engaging in those activities. However, at the time this article is written, pilots who engage in drug smuggling will have their licenses revoked on a lifetime basis. There are extremely rare circumstances where a pilot who has had his license revoked for drug smuggling may obtain a certificate if he works on behalf of law enforcement. In all my years of practicing law, I only saw one pilot who claimed he was working for the state authorities undercover to obtain information on drug smuggling activities.



**Don Brooks' B-17
Liberty Bell**

II.

THE DONNELLY CASE

The airman involved in the *Donnelly* case flew for Federal Express. He flew to Japan on Northwest Airlines by virtue of his Federal Express employment. He carried six tablets in a canister, which the Japanese authorities claimed were MDMA, methylenedioxymethamphetamine. After the Japanese authorities tested the six tablets, the airman was convicted of violating the Japanese Narcotics and Psychotropics Control Law. His sentence was suspended, and he was deported to the United States. The Administrator brought an action to revoke the airman's

certificate on a lifetime basis, relying on 49 U.S.C. § 44703. That statute provides that the Administrator may not issue an airman's certificate to an individual whose certificate has been revoked pursuant to § 44710 unless the Administrator decides that issuing the certificate will facilitate law enforcement efforts and the individual "otherwise satisfies the requirements for a certificate and subsequently is acquitted of all charges relating to a controlled substance..."

The case was tried before Judge Fowler of the National Transportation Safety Board ("NTSB"). Judge Fowler found that the airman was guilty of violating 49 U.S.C. § 44710(b)(2), but he reduced the period of revocation from a lifetime revocation to eighteen months. Both the airman and the FAA were displeased with Judge Fowler's decision. Both parties filed appeals with the full Board of the NTSB. An amicus brief was filed by the Airline Pilots' Association ("ALPA"). On June 24, 2004, the NTSB issued an Order on Petition for Reconsideration from an earlier decision of January 2, 2003 (NTSB Order No. EA-5011); and the effect of that previous order was to dismiss the appeals of both parties in the case. In petitioning for reconsideration, both parties were trying to have the NTSB revisit the logic and legal basis for the

initial decision rendered by Judge Fowler. Both parties were unsuccessful. It should be pointed out that at the time of the issuance of the earlier order (the Order of January 2, 2003), the appeals were dismissed because there was no majority to grant or deny the appeal. At that time, there were four members sitting on the NTSB, when by law, five members are authorized.



Chris Rounds' T-33

While the FAA was not successful in securing reconsideration of the earlier Order issued by the NTSB which, at that time, lacked a majority to render a decision, the net affect of not reconsidering the earlier Order was to revoke the airman's certificate on a lifetime basis. The reason for this legal conclusion was because the airman had been found guilty of a violation of 49 U.S.C. § 44710(b)(2). For that reason, the Administrator would not and will not issue the airman a certificate in the future. Judge Fowler's pronouncement at the hearing that the revocation would last for eighteen months was of no legal effect.

III.

LEGAL ISSUES RAISED ON THE PETITIONS FOR RECONSIDERATION

The arguments and counter-arguments raised by the FAA and the airman in seeking reconsideration of the Board's earlier order of January 2, 2003, give insight into the meaning of the present statute dealing with drug smuggling by aircraft. The arguments and legal issues raised in the respective briefs of the parties will be discussed below.

- A. The Drugs Do Not Have to be Tested in the United States: While the Japanese authorities concluded that the material



P-38 Glacier Girl, Flown by Steve Hinton

contained in the six tablets was MDMA, the airman challenged the admissibility of the evidence because there was no corresponding test of the materials in the United States. The Board rejected this argument, concluding that the documentation produced by the Japanese authorities was sufficient.

B. The Offense Did Not Have to Involve Imprisonment of at Least

One Year: The second argument advanced by the airman was that in order to be convicted of the statute in question, he had to be subject to a felony conviction involving a minimum sentence of one year or more imprisonment. The Administrator referenced 13 U.S.C. § 953, which prohibits the exportation of controlled substances, including MDMA. The Administrator argued that the activity in question could have resulted in a twenty-year prison term, but more likely would have ranged between ten to sixteen months in prison. The Board rejected the airman's argument, noting that a minimum of one year imprisonment is not a condition to being in violation of the statute.

- C. An Aircraft May Be Involved in the Offense, Even if the Airman is Not a Crew-member: The next argument advanced by

the airman was that he had merely been a passenger aboard the Northwest Airlines aircraft. He did not serve as a crew-member on that aircraft, even though he was an airman. The Board read the statute literally and concluded that an aircraft was used in the commission of the offense. The Board rejected the argument that the airman had to be involved as a crew-member on the aircraft

for the statute to apply.

D. The FAA Could Rely Upon the Japanese Conviction: The fourth argument advanced by the airman was that the rules of procedure and due process in Japan are not consistent with those in the United States. Because Japanese laws do not afford the same level of protection as those in America, it was argued that the Japanese con-



Steve Hinton Shows Ed and Connie Bowlin the Cockpit of his P-38 Glacier Girl

lifetime revocation) could not have been what Congress intended in the promulgation of the statute. The NTSB did not agree with this argument and noted that Judge

Don Brooks' B-17 Liberty Bell

viction should not be a basis for a lifetime revocation or a violation of 49 U.S.C. § 4410(b)(2). Again, the NTSB did not agree with the position taken by the airman. The conviction by the Japanese courts was deemed sufficient.

E. The FAA was Over-reaching: The next argument advanced by the airman was that the FAA was over-reaching in this case, because the result (a lifetime revocation) could not have been what Congress intended in the promulgation of the statute. The NTSB did not agree with this argument and noted that Judge Fowler had no authority to reduce the revocation period to



eighteen months.

In a statement by Member Carmody that was part of the Board's Order Denying Reconsideration, Member Carmody argued that Congress did not intend the use of the aircraft to include an airman sitting as a passenger in a commercial airliner. For that reason, Member Carmody would have granted the Respondent's request for reconsideration.

Members Healing and Goglia both joined in a statement finding that the FAA had effectively won the fight even without the grant of the Petition for Reconsideration. The logic was that by virtue of a conviction under 49 U.S.C. § 44710(b)(2), the FAA could never again issue the airman a certificate because of language found in 49 U.S.C. § 44703.

The airman was represented by Mark McDermott, Esq. of Washington, D.C. Mr. Donnelly has appealed the decision of the NTSB to the United States Court of Appeals for the District of Columbia. Oral argument is scheduled for March 17, 2005.

Marion C. Blakey v. David Joseph Donnelly, NTSB Order Number EA-5101 (June 24, 2004).



P-38 Glacier Girl

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