



FLIGHT-WATCH



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MOUNTING A SUCCESSFUL DEFENSE TO A TFR PENETRATION CHARGE

I.

INTRODUCTION

Temporary flight restrictions (“TFRs”) have become more prevalent and problematic for pilots operating under visual flight rules (“VFR”) since September 11, 2001. Pilots are required to acquaint themselves with all available information affecting their flight. However, what happens if the pilot is not provided pertinent TFR data in the weather briefing? This article will address that question.



expanded radius of the P-40 area.

The flight in question was an instructional flight in which the instructor had his student obtain a weather briefing from the flight service station (“FSS”). Although

the student had only 26 flying hours, the instructor had previously relied upon weather briefings obtained from the student, including the dissemination of notices to airmen (“NOTAM”) information. According to the student, the flight service station briefer did not mention the NOTAM pertaining to the expansion of P-40 during the briefing. The audio tape of the briefing was not preserved. Predictably, the aircraft in question penetrated the expanded area of P-40.

II.

THE PERTINENT FACTS

A. THE WEATHER BRIEFING

The case involved a VFR flight from the Northeast Philadelphia Airport to Hagerstown, Maryland. On the date of the flight, November 20, 2001, the restricted area surrounding Camp David, Maryland, known as P-40, was depicted on the aeronautical sectional chart as having a radius of three miles. However, after September 11, 2001, the radius of P-40 had been expanded to eight miles. Presumably, if the system worked properly, a pilot receiving a weather briefing would have become acquainted with this

B. THE TRIAL

The case was tried before Chief Administrative Law Judge William E. Fowler, Jr., who issued an initial decision on June 4, 2003, finding that the instructor had violated FAR § 91.103 [becoming acquainted with all available information relating to the flight] and § 91.141 [prohibiting the operation of an aircraft within the vicinity of any area visited by the President, Vice President, or other public figures]. However, Judge Fowler did not find the flight instructor guilty of violating FAR § 91.13 (a) [careless or reckless operation of an aircraft]. Judge Fowler found that the flight



service station briefer did not provide the student with information concerning the expanded dimensions of P-40.

C. THE APPEAL

Both the FAA and the pilot appealed the initial decision of Judge Fowler. The FAA sought to have a finding made of a violation of FAR § 91.13(a). The flight instructor sought to have the violation findings relative to FAR § 91.103 and FAR § 91.141 overturned. The five members of the NTSB granted the flight instructor's appeal and dismissed the Administrator's complaint. In doing so, the Board noted: "...[T]he law judge appears to have implicitly concluded that the FSS briefer did not provide the NOTAM information."

D. THE BOARD'S ORDER

The Board's opinion and order granting the flight instructor's appeal and dismissing the FAA's complaint is an interesting document. In footnote 5 of the opinion and order, the NTSB Board members noted that there had been an increase in NOTAM data disseminated by flight service station personnel between 200% to 300% after September 11, 2001. This additional influx of data would require flight service station briefers to assimilate

up to 55 pages of NOTAMs for a standard pre-flight briefing and make a judgment as to which NOTAMs were relevant to a particular flight. Further, the FAA's flight service division manager indicated that over six years, there were six operational errors involving a briefer's failure to disseminate relevant NOTAM information to pilots. The Board noted that while this was a small number of errors, the reported number of errors may be under-representative of the actual error rate during that time, since the record in the case did not indicate how many briefings were monitored as part of the FAA's quality assurance reviews.

In its appeal to the NTSB, the FAA argued that official acts are entitled to a presumption of regularity. In other words, there should be a legal presumption that the flight service station briefer gave the student pilot the NOTAM information. However, the Board said that even if a presumption does arise as to the regularity of governmental acts, nonetheless, the evidence in the case supported a conclusion that the student pilot was not given the NOTAM information. More specifically, the NTSB declared:

In light of these factors, and given the absence of any official record documenting the contents of the briefing, a conclusion that the information was not given in this instance is not unreasonable.

The Board noted that there was legal authority for the proposition that if a flight service station briefer did not provide a pilot with NOTAM information, then it would be inappropriate to hold the pilot responsible for violating the NOTAM's prohibition. See *Administrator v. Graves and Davis*, 3 NTSB 3900, 3903 (1981) [no

violation when the respondent's inadvertent entry into a restricted area resulted from reliance on erroneous information]. The Board also noted the pilots are not held to a standard of strict liability in aviation enforcement proceedings, citing *Administrator v. Rolund*, Order Denying Reconsideration, NTSB Order Number EA-4123 at 5 (1994), citing *Administrator v. Frohmuth and Dworak*, NTSB Order Number EA-3816 (1993).

III.

CONCLUSION

A pilot charged with violating the prohibitions of a temporary flight restriction may prevail if he can demonstrate that the flight service station briefer did not provide him with pertinent NOTAM information. While there is a presumption as to the regularity of governmental acts, that presumption may be overcome by the pilot. If the judge is going to exonerate the pilot from responsibility for penetrating the area embraced by the temporary flight restriction, then the judge should make a specific finding on the record that the pilot was not provided the NOTAM information by the flight service station briefer.

In the vast majority of TFR cases, the audio tape of the weather briefing between the pilot and flight service station personnel will no longer be in existence. A pilot who is confronted with a claim that he has violated a temporary flight restriction and who is certain the flight service station briefer did not provide him relevant data about that TFR, should promptly dispatch a written notice to the flight service station facility from which the briefing was obtained to secure and preserve the audio tape. If the audio tape confirms that

the flight service station briefer did not provide the pilot with pertinent NOTAM information, then any claim of a presumption of regularity with respect to government action will be overcome.

While pilots will argue that the non-existence of the audio tape results in an adverse presumption against the FAA and defeats the presumption of regularity of governmental action, the Board did not agree with this argument in the case in question. Rather, the Board relied upon the implicit finding made by Judge Fowler in his initial decision. The significance of the implicit decision of Judge Fowler cannot be understated. That implicit finding was the lynchpin of the pilot's argument on appeal to the NTSB. The pilot's position would have been stronger had a timely request been made to preserve the audio tape recording of the briefing by the flight service station personnel with the student pilot demonstrating that no NOTAM information was communicated during the briefing.

Administrator v. Dress, NTSB Order Number EA-5115 (October 13, 2004).



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