



# FLIGHT-WATCH



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## **NTSB ISSUES AN ORDER DECLARING THAT THE FAA CAN IGNORE POLICIES IN ITS OWN ENFORCEMENT HANDBOOK**

### **I.**

#### **INTRODUCTION**

In a recent case, the National Transportation Safety Board (NTSB) has declared that the FAA can ignore the unambiguous provisions of its Compliance and Enforcement Program, FAA Order 2150.3A (the "Enforcement Handbook") and take certificate action against pilots even though the Handbook mandates issuing a warning letter. This unfortunate decision issued by the NTSB confirms that the members of the NTSB do not appreciate or fully comprehend their function in dealing with enforcement litigation. The NTSB no longer possesses the resolve to stand up to the FAA when the FAA fails to enforce or follow its own internal policies and procedures. The decision of the NTSB which is the topic of this article is evidence that the aviation enforcement system in the United States of America is a dysfunctional system.



### **II.**

#### **THE FACTS OF THE CASE**

On April 17, 2005, a Lear 35 aircraft received a clearance to climb to 26,000 feet. The Learjet leveled off at 26,000 feet, but the co-pilot failed to engage the altitude hold function on the autopilot. The captain noticed the aircraft was drifting upward after it climbed about 120 feet. By all accounts (including radar data), the aircraft never climbed more than 300 feet above its assigned altitude of 26,000 feet. There was an airliner 3.4 nautical miles away laterally and 700 feet vertically. There was no evidence in the record that the pilots in either aircraft even saw the other aircraft. The only indication that there had been an altitude deviation was when the controller noticed the data blocks of the two aircraft began flashing on his radar scope. This, in turn, resulted in an alarm going off at his supervisor's desk. The excursion by the Learjet to 26,300 feet lasted only a few seconds, when the aircraft promptly returned to



its assigned altitude. When the captain of the Learjet was queried by ATC, he apologized and admitted that the aircraft had “drifted up there a little bit” and the controller turned the aircraft over to the next sector. At no time was there any alarm or tension in the voice of the air traffic controller. From listening to the tape recording and reading the transcript of communications between ATC and the Learjet, the momentary excursion was a non-event.

Because an alarm went off at the controller’s desk, the controller’s supervisor became involved. A preliminary pilot deviation report was completed accusing the pilots of the Learjet of deviating from their assigned altitude. Two different National Traffic Analysis Programs (NTAP) studies were made, one for the preliminary pilot deviation report and one for the final pilot deviation report. The lateral position of the Learjet was materially different in the two NTAP studies. An air traffic control sector later down the line told the pilots of the Learjet to contact Atlanta Center when they landed. Both pilots in the Learjet filed Aviation Safety Reports with the National Aeronautics and Space Administration (NASA) within ten days of the incident.

### III.

#### THE FAA INVESTIGATION BEGINS

The FAA inspector who conducted the investigation made an appearance at the facility of the air taxi company which operated the Learjet. He interviewed the captain, but he never interviewed the co-pilot. The inspector obtained copies of the preliminary and final pilot deviation reports, the NTAP data, and the history of the airmen revealing that they had no previous violations of any kind. The inspector de-

ecided to go forward with an enforcement action even though his own handbook required that the matter be resolved administratively by the issuance of a warning letter.

At the time of the inspector’s investigation, the FAA Enforcement Handbook contained an Appendix entitled “Compliance/Enforcement Bulletin 86-1 which read as follows:

... [A] computer detected altitude deviation of 500 feet or less, where no near mid-air collision resulted, should normally be addressed by means of administrative action, unless a prior altitude deviation occurred within two years of the date of the subject altitude deviation or other aggravating circumstances require initiation of legal enforcement action. In determining whether a violation is “aggravated,” all circumstances surrounding the incident (e.g., whether the deviation was deliberate or inadvertent, the hazard to safety, etc.) shall be considered.

Despite the fact that the altitude deviation was less than 500 feet, despite the fact that there was no near mid-air collision (the pilots of the aircraft did not even see each other), despite the fact that neither pilot had a history of an altitude deviation, and despite the fact that there were no aggravating circumstances, the FAA inspector proceeded with enforcement action against the pilots and sought to have their certificates suspended.

#### IV.

#### THE TRIAL

The trial was conducted before Judge William A. Pope of the NTSB. Before the trial, the FAA attorney had ignored a number of requests for admission which essentially admitted the FAA out of a *prima facie* case. Judge Pope refused to bind the FAA to its admissions and allowed it to withdraw the admissions provided the FAA attorney explained his position to the numerous requests for admission in open court. This process took over one hour. The trial of the case then began with opening statements.



The FAA never could find anyone who could authenticate the NTAP data in terms of actually preparing it. At one point during the trial, Judge Pope directed the FAA attorney to get someone from the local air traffic control facility to authenticate the data, but the second witness who was forthcoming could not authenticate it either. The NTAP data was admitted into evidence simply because the attorney defending the pilots allowed it in to expedite the trial and on the basis that there were no aggravating circumstances by reason of which the case should be resolved administratively anyway.

The FAA attorney tried to argue that this was not a “computer detected” altitude deviation, but a box on the preliminary pilot deviation report said that it was “computer detected.” While the FAA attorney talked about in his opening statement the hazards of a near mid-air collision, there was no near mid-air collision report under Paragraph 7-6-3 of the Aeronautical Information Manual; nor was there any evidence the aircraft were operated within 500 feet of one another as required by Paragraph 7-6-3(b) of that Manual defining the parameters of a near mid-air collision.

The airmen had several witnesses testify in their defense. Jack Overman, a retired air traffic controller and a lawyer testified that there was no near mid-air collision, that there were no aggravating circumstances, that the FAA's own file revealed that neither pilot had a history of altitude deviations, and there was no near mid-air collision. Taking these factors into consideration together with FAA Compliance/Enforcement Bulletin 86-1, he told the Judge the case should be resolved administratively by issuing a warning letter. He also said that the Mode C readout on the Learjet was not reliable by reason of which the court could find that no technical altitude deviation ever took place. Fran DeJoseph, a retired FAA operations inspector and supervisor concurred in Mr. Overman's assessment that the case should be resolved administratively by issuing a warning letter.

## V.

### THE DECISION OF JUDGE POPE

Judge Pope found that there were no aggravating circumstances, even though the FAA inspector who testified maintained that the mere fact that an altitude deviation took place, is, without more, an aggravating circumstance. This position by the FAA was rejected by Judge Pope. Judge Pope cited *Administrator v. Randall*, 3 NTSB 3624 (1981), where the FAA was allowed to put into evidence flight data recorder (FDR) tapes in violation of its Enforcement Handbook. The order revoking the airman's certificate was reversed by the NTSB because the FAA had violated its own rules.



## VI.

### THE NTSB DECISION

The FAA appealed the ruling of Judge Pope to the NTSB claiming that the case did not involve a computer detected altitude deviation, that the case did involve aggravating circumstances, and that the FAA should not be interfered with in its exercise of prosecutorial discretion. Ignoring *Administrator v. Randall, supra*, the NTSB has declared that it cannot question the FAA's decisions on prosecutorial discretion even though the clear mandate of its Enforcement Handbook requires that the case be closed by issuing a warning letter. This unfortunate decision rendered by the NTSB confirms what a number of aviation lawyers have known for sometime, that the NTSB does not appreciate its function in the aviation enforcement system. The NTSB no longer adjudicates controversies between the FAA and pilots. Rather, the NTSB has become a "rubber stamp" approving FAA violations of its own rules and NTSB policies and procedures.

As Lord Acton wrote: “Power corrupts, and absolute power corrupts, absolutely.” The vacuum left by the NTSB’s retreat from its responsibility to enforce rules and regulations in the aviation enforcement arena, have left pilots with an FAA staffed by some individuals corrupted by “absolute power.”

*Administrator v. John Doe I & John Doe II*, NTSB Order EA-5355 (January 18, 2008). [Note: Alan Armstrong, the author of this article represents the pilots who do not want to be identified.]





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