

SUGGESTIONS TO PILOTS AND AIRCRAFT OPERATORS ON AVOIDING INFRACTIONS OF THE FEDERAL AVIATION REGULATIONS

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I.

INTRODUCTION

This paper is written for the purpose of alerting pilots and aircraft owners to some common regulatory pitfalls that have been encountered by the author in 27 years of practicing law. Generally, it has been my impression that pilots are well-trained and disciplined people. They are motivated to achieve and take pride in their ability to operate aircraft in a safe and efficient manner. Most of the problems I have seen are the consequence of lapses in judgment, a lack of situational awareness, or a breakdown in communication between the pilot and air traffic control. There will always be those exceptions to the rule. On rare occasions, I have seen pilots who were lacking in skill or judgment or who exhibited a cavalier attitude towards safe flying. Again, in my experience as an aviation lawyer, those kinds of pilots are in the very small minority.

Recognizing that aviation is heavily regulated and the Federal Aviation Administration is increasingly under pressure from various branches of government, not the least of which is Homeland Security, in relation to temporary flight restrictions (TFR's) now, more than ever, it is important to be a competent, proficient and disciplined pilot.

In the remainder of this paper, we will discuss some of the regulatory and legal issues which emerge in the operation and ownership of an airplane.

II.

THE TENSION BETWEEN THE PILOT AND AIR TRAFFIC CONTROL

A. AUTHORITY OF THE PILOT-IN-COMMAND

The pilot-in-command is the final authority as to the operation of his aircraft. Also, even though the pilot has a number of regulations to contend with in navigating his aircraft through the national air space system, he is authorized to deviate from those regulations in the event of "an in-flight emergency." It is true that the pilot may be requested to submit a written report in the event he deviates from the regulations to meet an emergency. However, if the pilot is required to deviate from the regulations to meet an emergency that is not of his own making, rarely are reports of this nature required.

When a pilot receives a clearance or an instruction from ATC, he generally is not authorized to deviate from that clearance or instruction unless he is acting in response to an emergency. If a pilot is uncertain about an ATC clearance or instruction, it is his responsibility to request clarification from ATC.

Before embarking on a flight, the pilot is expected to engage in appropriate pre-

flight planning to ensure the flight can be safely conducted. If weather or traffic delays are known, the pilot may be expected to carry sufficient reserve fuel to deal with these contingencies. While using reserve fuel is not, in and of itself, a violation of the regulations, if a pilot is given priority by ATC to meet an emergency, such as a low fuel condition, the pilot may be requested to submit a report to the FAA.

One of the most common operational violations seen by aviation lawyers concern altitude deviations. If the pilot deviates from his assigned altitude, the FAA may contend that he deviated from the ATC clearance or instruction. For aircraft operating under instrument flight rules (IFR), there is typically a separation “bubble” around each airplane in the *en route* setting of 1,000 feet vertical separation and five miles lateral separation. If this bubble is compromised by a loss of separation of 20% or more or if an aircraft deviates from its assigned altitude of 300 feet or more, an alarm called “conflict alert” may sound at the ATC facility. In that event, the altitude deviation may be classified as a pilot deviation or an ATC operational error or a combination of both. Historically, the air traffic controller working the airplane that is suspected of an altitude deviation is supposed to give the pilot a notice of his alleged deviation. The “warning” ATC is to give a pilot if he is suspected of deviating from his altitude is imposed on the controller with the condition “workload permitting.” In other words, if the controller is too busy with other activities, the FAA will take the position that he had no obligation to notify the pilot of the altitude deviation.

What is the legal effect of ATC failing to give the pilot notice of an alleged altitude deviation? In *Administrator v. Brasher*, 5 NTSB 2116 (1987), ATC did not give the pilot a warning that he had busted his altitude and the sanction was waived. In other words, if the evidence shows the pilot was assigned a specific altitude and he deviated from the altitude and the evidence further shows that ATC did not give him a warning of his deviation, the FAA will still be allowed to make a finding of violating, among others, FAR § 91.123(a), deviating from an ATC clearance or instruction. However, the actual suspension of the airman’s certificate will be waived. The concept of making a finding of a violation while waiving the suspension has the same legal effect of filing an Aviation Safety Report with the National Aeronautics and Space Administration (NASA).

It is important to note that there may be a discrepancy between the Mode-C readout on the aircraft’s transponder or encoding altimeter and the pilot-reported altitude of up to 300 feet. Nevertheless, the automatic altitude readout is considered valid.

Within two hours of an alleged altitude deviation, a Preliminary Operational Error/ Deviation Report, FAA Form 7210-2 is supposed to be completed and telephonic notification is to be given by the facility to the FAA Operations Center in Washington, D.C.

If a pilot suspects he or she may have committed an altitude deviation, it is generally advisable to file an Aviation Safety Report with NASA. Generally, if the pilot has filed an Aviation Safety Report, the FAA will take this into consideration and make a finding of the violation without suspending the pilot’s license. Also, historically, if the altitude deviation was 500 feet or less, and if there were no aggravating circumstances, and if the pilot does not have a similar infraction within 5 years, the FAA has historically issued the pilot a letter of non-compliance (warning letter) in lieu of suspending his or her certificate. Finally, in the event the pilot knows he or she deviated from an ATC instruction, in response to a letter from the Agency Inspector, he or she may request remedial training in

lieu of a suspension of his or her certificate. Remedial training will require that the pilot accomplish training with a flight instructor within a prescribed time. If the training is completed, the FAA will not pursue certificate action.

B. POSSIBLE DEFENSES TO CLAIMS THAT A PILOT DEVIATED FROM AN AIR TRAFFIC CONTROL CLEARANCE OR INSTRUCTION.

Both pilots and controllers are expected to use appropriate phraseology in their communications. In fact, there is a pilot-controller glossary of terms in the Aeronautical Information Manual (“AIM”). Non-standard phraseology or ambiguous language can play a roll in an aircraft incident. In *Administrator v. Smith*, 3 NTSB 85 (1977), the controller instructed the aircraft to join Victor Airway 244 (“V-244”), which had two components. The controller did not tell the flight crew of the aircraft specifically which of the components of the airway the aircraft was to fly toward. The flight crew by-passed the first component of the airway and flew to and navigated along the second component of the airway. Because the controller did not specify which portion of the airway the aircraft was cleared to, the FAA could not prove a violation of the regulations.

Not only may improper phraseology be a problem, but sometimes ATC can lead the pilot into a false expectation about the operations expected of his aircraft. The body of cases in this area is called “ATC complicity.” In *Administrator v. O’Brien*, NTSB Order EA-4000 (October 28, 1993), the NTSB reversed an administrative law judge who found violations of the Federal Aviation Regulations where the pilots were repeatedly told to expect one runway and then given a landing clearance at the very last moment to a different runway. The NTSB found that the pilots should not be violated because of the ATC complicity which was a causal factor in the incident.

C. CARELESS OR RECKLESS OPERATIONS

If a pilot is alleged to have committed an operational violation such as deviating from his assigned altitude, you will also see the FAA claiming the pilot was careless or reckless in the operation of the aircraft contrary to FAR § 91.13(a). In most cases, the FAA does not contend that there has been a violation of FAR § 91.13 as a substantive violation. Typically, it is a derivative violation that follows another act on the part of the pilot giving concern to the FAA. If the aircraft is being operated for the purpose of air navigation, FAR § 91.13(a) is applied. If the aircraft is operated on the ground for purposes other than air navigation, then FAR § 91.13(b) is applied. In either case, an element of the charge is to “endanger the life or property of another.” Pilots have argued for years about whether or not their alleged careless or reckless acts endangered other people or their property. Ordinarily, the Board takes the view that the potential for endangerment is a sufficient element of proof to support the violation.

D. ALCOHOL OR DRUGS

Many pilots are not aware of their reporting obligations to the FAA in the event

their driving privileges are denied, suspended, or revoked as a consequence of operating a motor vehicle under the influence of alcohol which is a “motor vehicle action” as defined in FAR § 61.15(c)(1), (2), (3). If the pilot has a motor vehicle action, he or she is supposed to report this matter to the FAA, in writing, within 60 days. Many pilots assume that reporting a driving under the influence conviction on their medical application form is sufficient notice to the FAA. However, the FAA frequently brings actions to suspend the licenses of pilots for a period of between 30 to 60 days in situations where the airmen have not notified the FAA of their motor vehicle actions within 60 days of the event.

Another area of concern relates to the operation of an aircraft while under the influence of alcohol or drugs. While violations of FAR § 91.17 are rare, there are a number of reported cases dealing with this regulation indicating that even in air carrier situations, violations of this regulation appear.

In *Administrator v. Jensen*, NTSB Order Number EA-3795, there was testimony that the pilot checked into a hotel at 11:45 p.m. There was also testimony that he was in the bar until 1:00 a.m., and he reported for duty to fly the next morning. On that flight, his first officer related that the captain was “all over the sky.” The captain landed with a tail wind at a high speed, and his first officer testified “the cockpit of the airplane smelled like a brewery.” The airman’s license was revoked, and he was found to have operated an aircraft within 8 hours after consumption of alcoholic beverages contrary to what was then FAR § 91.11(a)(1) [now FAR § 91.17(a)(1)] and operating an aircraft while under the influence of alcohol contrary to what was then FAR § 91.11(a)(2) [now FAR § 91.17(a)(2)].

In *Administrator v. Pierce*, 4 NTSB 1655 (1984), a passenger said that the first officer smelled of alcohol. A second passenger testified that the first officer’s head dropped to his chest as though he were sleeping for a portion of the 30-minute flight. A police officer who administered a breathalyzer test found that the blood alcohol level in the first officer was .06%. Stanley Mohler, M.D., a specialist in aerospace medicine, testified that given an elimination rate of .015%, the blood alcohol level of the first officer during flight would have been .10%. A revocation of the first officer’s certificate was affirmed.

Finally, for those who have an interest in a discussion of the physiology that applies in the elimination of alcohol, you may wish to read *Administrator v. Boyle*, 7 NTSB 616 (1990), where there was testimony by a physician and a toxicologist about the level of alcohol that was in the pilot’s blood during flight. The pilot was administered a blood test two hours after flying and had a reading of .037%. Applying an elimination rate of 10 milligrams per deciliter per hour, the judge found that the pilot had .047% alcohol in his blood at the time he flew the helicopter, a violation of what was then FAR § 91.11(a)(4) [now codified at FAR § 91.17(a)(4).]

E. ILLEGAL AIR TAXI OPERATIONS

Some aircraft owners will make their aircraft available with flight crew to their associates for air transportation and will receive compensation for this activity. Unless the transaction is properly structured, the FAA may view this as an illegal air taxi operation contrary to FAR § 135.1. Also, it is not uncommon for accountants and corporate lawyers to insist that corporate jets be owned and maintained by a separate business entity. While there is some authority in the regulations for the proposition that subsidiary corporations

can provide transportation to parent corporations and the parent corporations can provide transportation to subsidiary corporations, it is not uncommon for the FAA to take the position that a corporate flight department providing air transportation to its parent corporation is a “commercial operator” as that term is defined in Section 1.1 of the Federal Aviation Regulations. Because the transportation company set up by the parent corporation has no other source of revenue other than income from the parent corporation for providing transportation to the parent corporation’s staff and employees, the FAA may take the position that the transportation company is a commercial operator and requires a Part 135 Certificate of Authority. A discussion of the difference between operations under Part 91 and Part 135 of the Federal Aviation Regulations is beyond the scope of this paper. However, see Armstrong, Alan, *Navigating in the Zone of Confusion – Reflections on Illegal Air Taxi Operations*, Transportation Law Journal of the University of Denver College of Law, Volume XXI, Number 2 (1993).

III.

PROCEDURE AND PRACTICE BEFORE THE NTSB

In aviation enforcement cases, the NTSB acts as the adjudicator of violations asserted by the FAA. The sequence of events typically is that if an infraction takes place, the FAA will issue a letter of investigation (LOI) to the pilot or aircraft operator a few days after the alleged event. The LOI will invite the pilot or aircraft operator to provide comments in writing, within ten (10) days after receiving the LOI.

If the FAA believes it has sufficient evidence to go forward, then an enforcement investigative report (EIR) will be developed by the aviation safety inspector in charge of investigating the suspected violation. The EIR of the inspector is, in turn, evaluated by his supervisor. If the FAA office in charge of the investigation believes it has reason to go forward, the EIR is forwarded to the FAA lawyers. If the FAA lawyers believe that evidence has been collected that supports a finding of a violation of the Federal Aviation Regulations, then a notice of proposed certificate action (NOPCA) or notice of proposed civil penalty (NOPCP) will be issued to the owner or pilot of the aircraft. If the matter involves a NOPCA, the pilot will be given a number of options. Among them is the opportunity to discuss the matter with the FAA at an informal conference. Before attending the informal conference, the pilot would be well advised to get a copy of the EIR under the Freedom of Information Act (5 U.S.C. § 552) and evaluate for himself or herself the merits of the FAA’s case.

The informal conference may be convened in the offices of the FAA attorney or may be handled by telephone. Sometimes, cases are resolved at the informal conference either by the FAA agreeing to drop the case or by substantially reducing the charges made against the pilot. If a civil penalty is in issue, the FAA may reduce the amount of the civil penalty. If the informal conference does not result in the case being concluded to the satisfaction of the parties, then the FAA may issue an order either suspending or revoking the license of the pilot or assessing a civil penalty against the aircraft operator. An order against a pilot to suspend or revoke his license can be appealed to the NTSB. A civil penalty against an aircraft owner or operator can be appealed to the Department of Transportation. If the pilot or aircraft operator has filed an appeal with the appropriate adjudicative body, then the FAA will file a complaint, and the pilot or aircraft operator can

file an answer. As is the case in civil cases, discovery can take place. Each side can exchange interrogatories, requests for production of documents and requests for admission. The parties can be required to identify expert witnesses and to disclose the opinions of the experts. Eventually, the matter will be set for trial. However, before the case is tried, the pilot may attempt to get the charges dismissed.

One basis for dismissing charges is the Stale Complaint Rule, which is Rule 33 of the NTSB's Rules of Practice. Generally, the FAA is supposed to notify a pilot of an apparent violation within six months of the date of the violation. However, if the FAA can demonstrate that there was good cause in failing to notify the pilot within six months, then that may defeat a motion to dismiss on the Stale Complaint Rule. Also, if the FAA can demonstrate that the pilot is not qualified by virtue of his actions that may defeat a motion to dismiss based on the Stale Complaint Rule. Finally, a case may go forward even though it is stale if the Board deems it is appropriate "in the public interest."

In *Administrator v. Ramaprakash*, NTSB Order Number EA-4947 (February 7, 2002), the airman had a motor vehicle action on February 25, 1997. He failed to report this to the FAA within sixty days as required by FAR § 61.15(e), (f). On May 16, 1997, the FAA came into possession of a computer tape with information identifying this pilot as someone who had had action taken against his driving privileges based upon the offense of driving while intoxicated, but the FAA did not issue a Letter of Investigation until nine months later, on February 4, 1998. The NTSB, in the 3-2 vote, refused to dismiss the charges on stale complaint grounds. Mr. Ramaprakash appealed that decision to the United States Court of Appeals for the District of Columbia, which reversed the NTSB. See *Tilak S. Ramaprakash v. Federal Aviation Administration and National Transportation Safety Board*, United States Court of Appeals for the District of Columbia, Case Number 02-1283 (October 21, 2003). The Court of Appeals found that the NTSB had misapplied the Stale Complaint Rule, since there was no evidence in the record showing that good cause existed for the delay. The case was remanded to the NTSB from the Court of Appeals. The NTSB reversed its decision and concurred with the finding of the District of Columbia Court of Appeals. See *Administrator v. Ramaprakash*, NTSB Order Number EA-5076 (January 30, 2004).

Excerpts from the rules followed by administrative law judges of the National Transportation Safety Board are appended to this paper. The judge who tries the case brought against the pilot by the FAA is not an Article III judge under the United States Constitution. He is not appointed by the President and confirmed by Congress. Rather, he or she is a hearing officer employed by a government agency. The hearing officer makes findings of fact and reaches conclusions of law which are embodied in an initial decision. In hearings before NTSB law judges, hearsay may be admitted. Administrative law judges of the NTSB are not required to follow the rules of evidence. Generally, if there is evidence to support the findings of the administrative law judge, the NTSB will affirm his or her initial decision. If the airman is unhappy with the decision of the NTSB, an appeal can be taken to an appropriate Court of Appeals. In *Andrew van Dyke v. National Transportation Safety Board and Federal Aviation Administration*, the United States Court of Appeals for the District of Columbia, Case Number 01-1202 (April 23, 2002), the NTSB was reversed for finding violations of Federal Aviation Regulations where the only eyewitness who was alleged to have sponsored this testimony never actually saw the event take place. Because of this, the findings of the NTSB were reversed by the D.C. Court of Appeals.

IV.

CONCLUSION

In this paper, we have examined some of the very basic legal issues that are presented when pilots or aircraft operators are accused of violating the Federal Aviation Regulations. We have also examined the tension between pilots and air traffic controllers and the National Airspace System. It is the impression of the author that the National Airspace System of the United States is the envy of the civilized world. American pilots and air traffic controllers do a very good job of efficiently and safely moving aircraft through our skies. On occasion, there may be breakdowns in communication between ATC pilots. On occasion, aircraft operators do not fully appreciate their regulatory responsibilities. In those circumstances, there are legal procedures administered by the National Transportation Safety Board and/or the Department of Transportation to address any safety concerns that may be raised by the Federal Aviation Administration against a particular aircraft owner or operator.