FLIGHT-WATCH

VOLUME 244 By: Alan Armstrong, Esq. AUGUST 2012

GOVERNMENT BEGINS IMPLEMENTATION OF PILOTS' BILL OF RIGHTS

I.

Introduction

The Pilots' Bill of Rights, Public Law 112-153 (the "PBR" or "Act") was signed by the President on August 3, 2012. Within days, the government began taking steps to implement the provisions of the Act. For example, on August 7, 2012, Chief NTSB Administrative Law Judge Montaño issued an Order in all pending cases addressing the applicable provisions of the Act. The next day, John Allen, the Director of FAA Flight Standards, issued notice N8900.195 effective that date implementing the requirements of the PBR.

Frequently, we find that the implementation of the law is extremely important in determining the rights of citizens. This is certainly the case with the PBR. This issue of *Flightwatch* will address the steps taken by Judge Montaño of the NTSB and Director Allen of the FAA Flight Standards Division in implementing the Act.

II.

The Order of Chief Judge Montano

On August 7, 2012, Chief Administrative Law Judge Montaño issued an Order in all pending cases before the National Transportation Safety ("NTSB"). In issuing his Order, Judge Montaño included in the caption a reference to 49 U.S.C. §§44703, 44709, and 44710. The reason he referenced those code sections is because prior to the passage of the Act, those code sections provided for deference by the NTSB with reference to the validly adopted and publicly available interpretations of the Federal Aviation Regulations promulgated by the FAA. As discussed in the June issue of *FlightWatch*, these so called "deference" provisions had the effect of undermining the FAA's burden of proof required in 49 CFR §821.32, Rule 32 of the NTSB's Rules of Practice. That "deference" clause has now been rescinded by the Act.

In Judge Montaño's Order of August 7, 2012, he announced that to the extent practicable, the Federal Rules of Civil Procedure and the Federal Rules of Evidence will now be applied in proceedings before the NTSB. These proceedings relate to any action undertaken by the FAA to deny an airman a medical certificate or to amend, modify, suspend or revoke an airman's certificate. In implementing his Order, Judge Montaño noted that previously Rule 19(c) of the NTSB's Rules of Practice codified at 49 CFR §821.19(c) made the Federal Rules of Civil Procedure a source of guideline to be employed in discovery, and those rules were instructive rather an controlling. Now, with the implementation of the Act, it is clear that the Federal Rules of Civil Procedure are mandatory "to the extent practicable." The same can be said for the Federal Rules of Evidence. Practitioners and persons appearing before the Board are now on notice that the Federal Rules of Civil Procedure and the Federal Rules of Evidence are to be followed "to the extent practicable."

Furthermore, as noted above, 49 U.S.C. §§44703, 44709, and 44710 contained provisions requiring deference by the NTSB to the FAA's validly adopted and publicly available interpretations of the regulations by the Administrator. Those deference provisions have been eliminated by the passage of the Act. Judge Montaño has put litigants and their counsel on notice that these deference provisions no longer apply. It is clear by the execution of the Order of Judge Montaño of August 7, 2012, that the provisions of the Act are to be taken seriously.

III.

FAA Notice N8900.195

As noted above, Director Allen of the FAA Flight Standard Service executed FAA Notice N8900.195 on August 8, 2012. The Notice is an interim measure that takes effect immediately until such time as the FAA can publish changes to FAA Order 8900.1 which deals with the activities and obligations of aviation safety inspectors in enforcing the Federal Aviation Regulations. Notice N8900.195 is very explicit. It sets forth specimen letters to be sent to airmen in the context of investigations and also sets time limits to be observed in giving notice to airmen. Just as the Internal Revenue Service implements regulations in the furtherance of its statutory authority, the FAA Notice published August 8, 2012, provides structure and procedures to be followed in the implementation of the Pilots' Bill of Rights. In that regard, it is important to note that the Supreme Court of the United States has refused to sanction an Agency's noncompliance with its procedural rules. See *Vitarelli vs. Seaton*, 359 U.S. 535 (1959). The holding in *Vitarelli vs. Seaton*, was cited with approval by the NTSB in the case of *Administrator v. Randall*, 3 NTSB 3624 (1981). For that reason, astute counsel may wish to carefully study the provisions of the FAA Notice published August 8, 2012, because a failure of the FAA to follow its own procedural rules may result in dismissal of the FAA's case or other adverse actions taken against the Administrator in the event Agency employees fail to follow the specific provisions of the Notice. The FAA Notice may be found at http://www.faa.gov/regulations_policies/orders_notices.

As discussed in the June issue of *FlightWatch*, the Act requires written notice to the airman with respect to the following:

1. The nature of the investigation,
2. That an oral or written response to a letter of investigation (LOI) from the Administrator is not required,
3. That no action of adverse inference will be taken against the airman for declining to respond to an LOI,
4. That any response to the LOI by the airman may be used as evidence against him,
5. That the releasable portions of the Administrator's Enforcement Investigative Report (EIR) will be available to the pilot at an appropriate time, and
6. Where applicable, the airman is entitled to access or to otherwise obtain air traffic data.

The air traffic data which is subject to the Pilots' Bill of Rights includes:

1. Communication recordings between the flight crew and air traffic control;
2. Communication recordings among air traffic controllers concerning the subject aircraft;
3. Communication recordings between air traffic controllers and other aircraft in the area of the subject aircraft;
4. Radar information such as radar data regarding the subject aircraft and other aircraft in the vicinity;
5. Air traffic controller statements concerning the subject aircraft and the subject event;

6. Communications other than taped communications between air traffic controllers and the flight crew;

7. Other non-radar data in the possession of the FAA's Air Traffic Organization ("ATO") identifying the location of the aircraft at all relevant times during the flight operation under investigation;

8. Weather reports;

9. Relevant Notices to Airman ("NOTAMs") in effect on the date of the flight operation under investigation;

10. Any FAA Form 8020-17, Preliminary Pilot Deviation Report;

11. Statements from Flight Service Station briefers provided to the FAA in connection with the flight operation under investigation; and

12. Any other air traffic or flight data in the FAA's possession that would facilitate the pilot's ability to productively participate in a proceeding related to the flight operation under investigation by the FAA.

In addition to the data listed above, the airman is entitled to obtain from the FAA government contract data such as information developed at contact control towers and flight service stations. In order to obtain this information, the airman must identify the facility and the date on which such information was generated.

The Notice requires that during the thirty day interval beginning on the date on which any air traffic data is made available to the airman, the FAA may not proceed against the airman except in an emergency case. In other words, in the absence of an emergency, the FAA must provide the airman with the data and not undertake certificate action until thirty days after the provision of the data.

To the extent the FAA is now recognizing the obligation to provide information generated by government contractors of air traffic data, the FAA is going to publish in the Federal Register a notice and establish a website to inform airmen about how to request and obtain air traffic data from government contractors. Further, the FAA expects to provide a centralized means through which airmen may seek FAA assistance in obtaining air traffic data from government contractors. This is an important step in implementing the requirements of the Pilots' Bill of Rights.

FAA inspectors acting in the furtherance of an investigation must request that the ATO maintain all air traffic data relating to the investigation or apparent operational violation. Even if the air traffic data will not be included as an item of proof in the EIR, still, the FAA inspector must preserve all relevant air traffic data associated with the apparent operational violation. The reason for this requirement is obvious. The FAA inspector may not believe that all of the air traffic data is relevant while the airman's lawyer may believe it is. For example, a controller who worked the aircraft prior to the incident may have given the flight an instruction or clearance that had an adverse impact on their thought process while complying with an air traffic control instruction or clearance subsequent to that communication. Also, there may be communications on the land line between air traffic controllers or other communications that exonerate the pilot. One can appreciate why the FAA is requiring that all relevant data be preserved, even if it is not included in the EIR. Further, the FAA, in the furtherance of this policy has made reference to FAA Order 1350.15(c), dealing with the obligation of the FAA to preserve and retain information.

While the Notice requires the FAA to preserve data that may not be included in the EIR, it goes on to state that the inspector must coordinate the release of such data with FAA Regional Counsel. What this means is that the release of the data must be coordinated with the FAA attorney because the FAA is concerned that the release of the data may give the pilot the upper hand. This provision in the Notice requiring the inspector to coordinate with Regional Counsel about the release of air traffic data is very important. If ever there were a situation where air traffic data was not preserved or was withheld from the airman so as to alter the outcome of the case, that could have significant implications from a standpoint of due process.

As mentioned above, the importance of the timing provisions contained in the Notice are not to be ignored. For example, a LOI should be sent to the pilot within five days after an EIR is opened by the Agency inspector in the Enforcement Information System (EIS). It is clear that written notice must be given to the airman in the form of a letter of investigation (LOI). The obligation of the Agency inspector to give written notice may apply in other circumstances such as when the airman applies for an airman certificate, in a letter requesting a re-examination, in situations involving possible violations by the airman involving air traffic data, or in other circumstances that result in an investigation (e.g., a ramp inspection).

The Notice specifies the content of the LOI which is attached to the notice as Appendix A. The notice specifies that the LOI must be delivered by certified mail or hand delivery.

The Notice makes clear that when the triggering event is the application for an airman certificate or a letter requesting a re-examination by the agency of the pilot, then not all of the written notification requirements under the Pilots' Bill of Rights will apply. In those circumstances, there is a specific letter to be sent to the pilot when an investigation commences as a result of an application or rating (Appendix B to the Notice); and a specific letter will be employed when the inspector requests a re-examination of the airman to determine his competency (Exhibit C to the Notice).

In those circumstances where there is a possible violation by the pilot in providing air traffic data, then a specific notice of investigation will be employed (Appendix D to the Notice). In those circumstances where the event that generated the investigation was something routine like a ramp inspection, then a different form of written notification will be employed (Appendix E to the Notice). Finally, if remedial training is an issue, then a sample LOI is referenced in the Notice (Appendix F to the Notice).

While generally, the FAA should issue a letter of investigation to the pilot within five days after opening the EIR, there are exceptions. If the FAA is convinced the airman will destroy evidence or conceal evidence, then the five day period within which to give notice will be tolled until the evidence has been obtained. If there is a concern that giving notice to the airman could result in death or serious bodily harm, then the requirements to give notice to the airman will be delayed beyond five days from the opening of the EIR until that risk has been alleviated or abated. Of concern to the author of this newsletter is that there does not appear to be any mechanism to prevent these "exceptions" from being abused. How will an individual FAA inspector determine there is a risk an airman will destroy evidence or threaten the life or safety of other persons? The author would respectfully suggest that there should be some mechanism or procedure in place to ensure these "exceptions" are not abused. Finally, the FAA has given itself an out from the five day notice requirement in circumstances where there is not enough time to give written notice until the Act, but oral notification can be provided. Only with respect to the obligation of the inspector to give oral notification rather than written notification does the Notice require the inspector to consult with Regional Counsel of the FAA.

There is no requirement to give written notice to an airman who voluntarily surrenders his certificate.

IV.

Conclusion

The passage of the Pilots' Bill of Rights is beginning to take effect in government. The Chief Judge of the NTSB has issued an Order declaring that the provisions of the Pilots' Bill of Rights will be followed. The Director of the FAA's Flight Standards Service has published a detailed Notice requiring Agency inspectors to give notice to airmen within five days of opening an enforcement investigative report, subject to the exceptions noted above. These are important steps in the implementation and fulfillment of the rights to airmen under the Act. However, the devil may be in the details. Consider the following:

Will the NTSB determine the Federal Rules of Procedure or the Federal Rules of Evidence will not be followed based on language in the Act, i.e. "to the extent practicable"?

How will the FAA and/or NTSB prevent abuses by the FAA if there is a failure to timely give notice or preserve all the evidence?

What sanctions will be imposed if there is a deliberate violation of the Act by the FAA?

While passage of the Act is a very important step in restoring fairness to the airmen in proceedings before the NTSB, and possibly in other adjudicating fora, only as cases are tried, litigated and appealed will we begin to evaluate whether the Act will have a meaningful impact on affording airmen meaningful due process of law.