

# FLIGHT-WATCH

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## WILL THE PILOTS' BILL OF RIGHTS TRUMP BOARD CASE LAW AUTHORIZING THE FAA TO WITHHOLD PORTIONS OF THE ENFORCEMENT INVESTIGATIVE REPORT?

### I.

#### Introduction

On August 3, 2012, the President signed into law the Pilots' Bill of Rights as Public Law 112-153 (the "PBR" or "Act"). Now that the PBR has become law, it is appropriate to look forward and speculate about the extent to which the Act will have any impact on precedent decided by the National Transportation Safety Board (NTSB) allowing the FAA to withhold certain portions of the Enforcement Investigative Report ("EIR"). While Section 2(b) of the Act allows the airman to obtain the releasable portions of the EIR, it can be reasonably anticipated that the FAA will continue with its long standing practice of withholding portions of the EIR on the theory that they are protected either by the work product privilege or deliberative process privilege. The work product privilege protects the mental impressions and theories of lawyers in the representation of their clients, and the deliberative process privilege is akin to the attorney-client privilege where FAA attorneys coordinate with and communicate with Agency employees concerning the appropriate measures and discipline to be pursued in the case. The focus of this article will be on a significant Board decision sanctioning the non-disclosure of information contained in the EIR.



### II.

#### The Chaparral Decision

In *Administrator vs. Chaparral, Inc., Frederick T. Wachendorfer, Jr., Thomas K. Biondo and Scott Douglas Fesler*, NTSB Docket Nos. SE-14032, SE-14044, SE-14045, and SE-14046 (June 9, 1995) (hereinafter "Chaparral"), Judge Mullins entered an Order granting a motion to dismiss emergency orders of revocation because the FAA failed to comply with a ruling by the court that the EIR was not eligible for protections either under the work product privilege or the deliberative process privilege. The FAA sought an interlocutory appeal from that ruling which was denied. Because the FAA refused to comply with the Order

of Judge Mullins and produce the entire EIR, Judge Mullins ordered that the charges against the airmen and Chaparral be dismissed. The FAA appealed from that order.

The Board reversed Judge Mullins and found that dismissal of the underlying charges was an excessive sanction and concluded that the work product and deliberative process privileges authorized the FAA to withhold information contained in Block Items 18, 25, 26, 29, 30 and 31 of Section A of the EIR, as well as the analysis portion of Section D of the EIR. In essence, these portions of the EIR deal with the regulations the investigating inspector believes were violated, and the sanction that should be imposed for the alleged violations. It is important to note that the EIR is the means of documenting, assembling, organizing, and presenting all of the evidence and other pertinent information obtained during the FAA investigation. It is also important to note that typically the investigating inspector is called to testify as an expert witness in the proceedings against the airman. To the extent that opinions and conclusions contained in the EIR are withheld from counsel for the airman, one may wonder whether this practice adversely impacts on due process of law guaranteed by the Fifth Amendment to the United States Constitution. In any event, the Board appears to have specifically rejected this concept in the words set forth below:

The law judge concludes that the Administrator should forfeit the right to invoke the work product or deliberative process privileges as to the pre-complaint analyses of his inspectors if, as here, the inspectors will be called at the hearing to explain their views as to how the evidence they accumulated demonstrates the violations the Administrator ultimately alleged. We do not agree. In the first place, neither the possibility that the inspectors' views on the evidence would be no different before and after the issuance of the complaint, nor the Administrator's decision to allow them to testify about their post-complaint assessments of the evidence, strips their pre-hearing analysis of its privileged character. The Administrator, we think, is free to waive some of the protection the privilege otherwise would have afforded.

In the second place, while it may be helpful for the respondents to know before the hearing how the inspectors' analyzed the evidence, the law judge's concern that the respondents would suffer unfair surprise if they were unaware of the analysis until the inspectors took the stand is puzzling. The Administrator had already provided the respondents with copies of the inspectors' post-complaint written analyses of the charges in evidence, and the respondents could have requested a pre-hearing deposition of the inspectors if they nevertheless reasonably believed that the inspectors' testimony at the hearing might raise some matter the Respondents had not anticipated.

In view of the foregoing, we conclude that the law judge erred in ordering the Administrator to release information we have previously recognized and treated as privileged. We further conclude that the law judge abused his discretion in ordering the dismissal of the complaints for non-compliance with his orders compelling discovery. Such a sanction would be excessive even in a non-emergency case, where the charges are not represented to implicate an immediate and serious threat to air safety.



### III.

#### Conclusion

While the passage of the Pilots' Bill of Rights may require the FAA to provide to the airman the releasable portions of the EIR, one can reasonably anticipate that the FAA will continue the practice of withholding portions of the EIR that deal with the opinions and impressions of Agency employees about the regulations violated and the sanction to be imposed. Currently, there is no reason to believe that the National Transportation Safety Board will abandon or reverse its ruling in *Chaparral*. Perhaps in time, in a proper case and with proper facts, an airman may be successful in persuading the Board that withholding portions of the EIR from disclosure adversely impacts on his rights to due process of law. Until and unless that day comes, one can reasonably anticipate that the Board will sanction and approve of the Administrator's decision to withhold portions of the EIR that include the mental impressions and theories of Agency attorneys and Agency inspectors.

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