FLIGHT-WATCH

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VOLUME 255 By: Alan Armstrong, Esq.[1] **JUNE 2013**

THE DEFENSE OF AN AIRMAN IN ALLEGATIONS OF ILLEGAL 135 OPERATION

I. Perhaps No Area of the Federal Aviation Regulations is More Fraught With Uncertainty and Ambiguity Than Issues Surrounding Alleged Illegal Air Taxi Operations.

The case of *Administrator v. Fulop*, 6 NTSB 298, NTSB Order No. EA-2730, 1988 WL 250619 (N.T.S.B.) [the "*Fulop* case"] confirms that the NTSB does not apply a standard of strict liability against pilots in cases involving allegations of illegal air taxi operations. Even if the pilot's recitation of the facts portrays him as being naïve about the underlying economics of the flights, still, the pilot is given the benefit of the doubt in that regard. This article will discuss the *Fulop* case and the lessons we can draw from that decision.

II. The Facts in *Fulop.*

Fulop was hired as a pilot for Edrei Communications ["Edrei"] and was told the company would be conducting Part 91 operations carrying its own products.[2] Neither Fulop nor his son (who flew as a first officer) had any contact with the financial side of the business.[3]

Fulop was charged with engaging in the transportation of property without an air taxi certificate in relation to flights that took place on August 20, 21 and 22 and September 2, 1985. Fulop who was piloting an Israeli Westwind was confronted by three Agency inspectors on August 20, 1985.[4] Although none of the FAA personnel could state with certainty the basis of their belief that the carriage of goods was illegal, they did tell Fulop that if they so found, he would be penalized.[5] Despite concerns expressed by the FAA inspectors, Fulop still believed the flights he was conducting were authorized by Part 91 of the Federal Aviation Regulations.[6] Nevertheless, Fulop telephoned Mr. Harpaz, a principal at Edrei, and Harpaz assured Fulop that the publications being carried aboard the aircraft belonged to Edrei.[7] When publications to be transported aboard the aircraft were delivered, Fulop did not notice that some of the drivers were college students and some of the vehicles were marked as courier services hired to transport publications from the factory to the aircraft.[8]

There had been an earlier FAA ramp check on April 15, 1985, and Fulop pointed out to the FAA inspector the labels on the packages, and Fulop stated to his knowledge Edrei owned the packages being carried aboard the aircraft.[9] Fulop referred the Agency inspector to Mr. Harpaz as the man to speak with about the nature of the flights.[10] At the time of that ramp inspection, Mr. Walsh, the Agency inspector, told Fulop that the flights were proper and legal.[11]

[1] See Alan Armstrong, *Navigating in the Zone of Confusion — Reflections on Illegal Air Taxi Operations,* 21 Transp. L.J. 329 (1993).
[2] 6 NTSB at 300.
[3] *Id.* at 301.
[4] *Id.* at 303.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

Ultimately, the FAA sought to suspend Fulop's ATP Certificate for 120 days alleging multiple violations of the Federal Aviation Regulations.[12] While the FAA sought 120 day suspension of Fulop's ATP, the Administrative Law Judge reduced the sanction to a 90 day suspension from which the Administrator did not appeal.

Fulop appealed the 90 day suspension of his Airline Transport Pilot Certificate contending there was no proof he was aware of the financial transactions which were the basis for the flights in question. The NTSB reversed the judge, exonerated Fulop, and found there was no proof he was aware of the underlying financial transactions that were the basis for the flights. In reversing the findings of the Administrative Law Judge and exonerating Fulop, the Board declared:

> The Board finds that the Administrator failed to establish that respondent knew or should have known that the cargo carried did not belong to Edrei and that it was not being carried incidental to a major enterprise for profit [Edrei Communications], but was being carried for compensation for hire. The standard against which respondent can be judged in this instance is not one of strict liability. The Administrator was required to prove by a preponderance of the evidence that respondent knew or should have known that the flights were in violation of FAR Section 135.5 and that the reassurances he was obtaining from Mr. Harpaz, his supervisor were untrue.[13]

The position of the FAA was that Fulop was flying the aircraft on behalf of Midwestern Pouch Express, Inc. ("Midwestern"), and Midwestern did not have a Part 135 Certificate authorizing it to carry the property of others for compensation or hire.[14] On the other hand, Fulop maintained that Midwestern was a subsidiary corporation of Edrei Communications, Fulop's employer; and the Board again concluded the evidence advanced by the Administrator was insufficient declaring:

> There is no showing in the record that respondent had had access to the invoices that Midwestern used to bill customers. As it was, the bills of lading merely attested to the fact that the packages were being delivered for carriage by air, not who owned the package. In order to establish that respondent should have known that the packages were not the property of Edrei, respondent would have been required to contradict his supervisor, Mr. Harpaz, who repeatedly instructed respondent that the packages contained publications that were owned by Edrei, and to demand a showing by company management that his supervisor was lying to him.
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> Respondent testified as to what his employer told him about the copies of the *New York Post* that were carried. (Tr. p. 560-561). Mr. Harpaz told him, he claims, that the company bought copies of the paper to distribute in Detroit as a market test, i.e., a test of whether the *Post* (a New York paper) would sell in Detroit. Perhaps respondent should have been astute enough to challenge Harpaz's explanation. If he was, he would have been required to demand a further explanation from either Harpaz or Edrei.

[12] *Id.* at 300. See e.g.: (1) 14 CFR §§135.3 [operating an aircraft for compensation or hire without a Part 135 Certificate and operation specifications]; (2) §135.343 [stating no person may serve as a crew member in the absence of initial or recurrent training]; (3) §135.293(a) [no certificate holder may use a pilot unless the pilot has passed a competency check]; (4) §135.293(b) [no certificate holder may use a pilot unless the pilot has accomplished a competency check]; (5) §135.297(a) [requiring an instrument proficiency check under Part 135]; (6) §135.299(a) [the requirement that the pilot has passed a flight check]; and (7) §91.9 [careless or reckless operation of an aircraft].
[13] 6 NTSB at 303.
[14] *Id.* at 298.

> Although air carriage of the *New York Post* gives us pause, (see however, the discussion of dates of carriage), air carriage of *Investor's Daily* does not, (sic) Mr. Edrei could have been in the business of publishing *Investor's Daily*, a newsletter. The facts as the law judge found them and the record reveals them indicate that the ownership of the publications being carried was not so obvious that respondent should have known that they were not owned by Edrei.[15]

The Board concluded that Fulop, having recently been hired by Edrei "was not in a position to demand that Edrei Publications prove to him, by a showing of paperwork, that it owned the cargo being carried."[16] While it is true that the initial ramp inspection occurred on April 15, 1985, months before the flights in August and September of that year, still, the Board rejected the FAA's argument that it had proven the pilot knew or should have known the cargo aboard his aircraft did not belong to his employer, the Board noting: "...in order to determine that Edrei Publications did not own the publications carried, respondent would have been required to investigate, and, from investigation, formulate a legal conclusion as to ownership."[17]

III. Conclusion

The case brought by the Administrator against Fulop highlights the fact that airmen are not required to investigate the financial affairs of their employers to ensure that operations portrayed to the pilots as Part 91 flights are, indeed, in compliance with the regulations. Even in *Fulop*, while there was evidence from which the airman could have reached a conclusion that possibly he was not carrying property that belonged to his employer, still, having been told repeatedly by his superiors that the property did belong to his employer, the Board rejected a strict liability standard and found that the pilot did not have an obligation to investigate and ascertain the nature of the relationship between Edrei and Midwestern.

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[15] *Id.* at 304.
[16] *Id.*
[17] *Id.* at 305.