ALAN ARMSTRONG'S
FLIGHTWATCH
VOLUME 314 May 19, 2023

ON OCCASION, THE NATIONAL TRANSPORTATION SAFETY BOARD ADMINISTERS JUSTICE

By: Alan Armstrong*

INTRODUCTION AND OVERVIEW

It is no secret that many aviation practitioners do not hold the National Transportation Safety Board ("NTSB" or "Board") in high esteem in terms of administering justice in aviation enforcement proceedings. The ability of the Board to administer justice is dubious at best. The *ad hoc* nature of many Board decisions is legendary. Several cases reinforce this conclusion. We will consider some of them below.

In *Hart v. McLucas*, 535 F.2d 516 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit reversed the Board noting:

> In effect, the FAA and the NTSB would interpret s 61.59(a)(2) as establishing strict liability: the making of a false statement would be punishable, under their interpretation of s 61.51(a)(2), even if the person who made the statement did not know the statement to be false.

Id. at 519.

In *Moshea v. National Transportation Safety Board,* 570 F3d. 349 (D.C. Cir. 2009), the Board was reversed for refusing to allow an airman to avail himself of the protections of an Advisory Circular. The United States Court of Appeals for the District of Columbia reversed the Board declaring:

> The Board's analysis suffers from a separate flaw that also requires vacatur. The Board's position in *Moshea's* case is inconsistent with its handling of a prior case. In *Liotta*, the Board allowed an employee of an air carrier to assert an "affirmative defense" based upon Advisory Circular 00-58. *Liotta*, NTSB No. EA-5297, slip op. at 6, 2007 WL 1920600 (June 27, 2007). In *Liotta*, the Board thus exercised its jurisdiction to consider and a defense virtually identical to Moshea's. By departing the *Liotta* precedent without explanation, the Board here acted in an arbitrary and capricious manner. *Cf. Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003). ("An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.") (internal quotation marks omitted). The Board's inconsistent treatment of *Moshea's* case and *Liotta's* case supplies an independent basis for vacating the Court's Order in this case.

Id. at 442-443.

---

*Alan Armstrong is an aviation lawyer who practices in Atlanta, Georgia. He appears in the Bar Register of Preeminent Lawyers published by Martindale-Hubbell and recognized in the 2023 Edition of Super Lawyers. An Airline Transport Pilot, he flies a replica Nakajima Type 97 "Kate" Bomber on the airshow circuit and appears in television interviews concerning flight operations, air disasters and aviation accidents.

In *Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121 (D.C. Cir. 2003), the United States Court of Appeals for the District of Columbia reversed the Board observing:

> Learned Hand once remarked that agencies tend to "fall into grooves,…and when they get into grooves, then God save you to get them out." Judge Hand never met the National Transportation Safety Board. In this case, we grant the petition for review because the Board has failed adequately to explain its departures from its own precedent in no fewer than three significant respects.

Id. at 1122.

In *Dillmon v. National Transportation Safety Board, et al*., 588 F.3d 1085 (D.C. Cir. 2009), the United States Court of Appeals reversed the NTSB after the trial judge (Judge Fowler) specifically found the airman did not have the requisite intent to deceive when completing his medical application form. In reversing the Board, the United States Court of Appeals for the District of Columbia remarked:

> Petitioner Jack Rondal Dillmon accuses the National Transportation Safety Board (Board) of hypocrisy—saying one thing while doing another. Dillmon argues the Board departed from its prior decisions without adequate explanation when it affirmed the Federal Aviation Administration's (FAA's) emergency revocation of his airman and medical certificates. We agree with Dillmon: The Board has failed to exhibit the reasoned decision making we require of agencies. We therefore grant his petition for review.

Id. at 413.

From the author's perspective, the Board is an extraordinary disappointment lacking the vision to thoroughly and impartially dispense justice to airmen. See, e.g., Alan Armstrong's *Call for An Inquiry into the Arbitrary and Capricious Decisions of the National Transportation Authority Safety Board.* 75 J. Air L. & Com. 3 (2010); Alan Armstrong, *Why Jurisdiction Over Airmen Enforcement Certificate Cases Should Be Transferred from the National Transportation Safety Board to Federal District Court,* 83 J. Air L. & Com. 257 (2018). The fact that §44701(d)(1)(A) authorizes the Board to amend, modify or reverse the FAA in the event the Board finds "safety in transportation in the public do not require affirmation of the order," neither explains nor excuses the *ad hoc* decisions of the NTSB. In light of the foregoing, it is with some degree of relief that the author can report that the NTSB, on occasion, is successful in administering justice.

THE *MASHADOV* DECISION

In *Administrator v. Mashadov*, NTSB Order No. EA-5627 (N.T.S.B.), 2012 WL 1795820 Judge Fowler found a violation of 14 C.F.R. §67.03(a)(1) which prohibits making an intentionally false statement on a medical application form, and further found a violation of 14 C.F.R. §61.15(e) requiring an airman to report a motor vehicle action within sixty days of the triggering event. Of interest is the fact that the FAA elected not to place into evidence Mashadov's medical file as part and parcel of its attempt to make out a *prima facie* case. On appeal from the decision of Judge Fowler, affirming the emergency order revoking all of Mashadov's certificates, Mashadov maintained the FAA failed to place his medical records into evidence and failed to make out a *prima facie* case. The Board, in reversing a violation of §67.403(a)(1) declared:

> We find respondent's medical file, including the medical application at issue, was not admitted into evidence at the hearing. Since the record before use fails to contain the very document the Administrator alleges respondent falsified, we will not affirm the Administrator's order. While we consider the Federal Rules of Evidence—including the "best evidence rule" -- to be only instructive in these proceedings, the fact that the Administrator would bring an intentional falsification case attempting to revoke all of respondent's certificates, yet not move to admit the very document the Administrator accuses respondent of falsifying, strains credulity. Due process demands we not overlook this error, despite the fact the record contains certain hearsay references to the document as well as some admissions by respondent. When the case turns on an alleged falsified document, it is imperative the Administrator produce that document to meet his burden of proof or provide good cause for why the Administrator could not product the document.
>
> Given our resolution of this appeal based upon respondent's evidentiary argument, we need not reach the other issues respondent raises. We find the Administrator met his burden of proof as the failure to report the DWI under section 61.15(e). Since the parties stipulate a 60-day suspension of respondent's certificate is the appropriate sanction for this violation, we affirm that penalty.

Id. at 2.

CONCLUSION

The Board's decision in *Mashadov* demonstrates that on the most elementary level, it is possible for the NTSB to render a decision that is just. Since the FAA elected not to place one essential document into evidence, it should never have prevailed. If rational and logical decisions of this nature became a more common occurrence, the Board might restore some credibility to that institution.