



Air & Transportation Law Reporter

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Greg
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President's Message

by
Justin Green



JUSTIN GREEN joined Kreindler & Kreindler LLP in 1997 after clerking for the Honorable Alfred J. Lechner in the Federal District Court for the District of New Jersey. He became a partner in January of 2003. Justin focuses his practice on helping families of aviation disaster victims, but also litigates other complex matters. Justin learned to fly while in the United States Marine Corps and served as his squadron's aviation safety officer after graduating from the Naval Postgraduate School's aviation safety program. He was responsible for his squadron's aviation safety, and also for investigating accidents. He holds an airplane and helicopter commercial license from the Federal Aviation Administration. As an aviation lawyer, Justin has successfully represented families in dozens of major aviation cases, including most recently the families of Continental Connection Flight 3407 and Turkish Airlines Flight 1951 victims. He edits Kreindler, Aviation Accident Law published by Lexis/Nexis.

The Board has made the decision to move our annual conference from the Fall to the early Spring. The next conference will take place in Washington, D.C. and once we set on the exact dates we will send each of you a save the date notice.

Human factors continue to be a leading cause of accidents. We are all human: pilots, air traffic controllers and aircraft mechanics can all make mistakes. Shoot even lawyers are human! The Federal Aviation Regulations are designed to reduce human error and to save lives. The Federal Aviation Administration does important work in enforcing the rules. Holding airlines, fixed base operators, pilots, mechanics and others accountable for violations deters wrongful conduct and saves lives. At the same time, aviation professionals have a lot invested in their businesses and careers and it is important that their legal rights are protected. Our bar association includes the very best aviation lawyers who can look out for the interests of defendants in FAA enforcement actions. And the entire process must be overseen by a wise and independent judiciary and the aviation community is most fortunate to have the National Transportation Safety Board's Administrative Law Judges on the job. Together these private and government aviation

lawyers and judges ensure that the aviation safety regulations are enforced in a fair and effective manner. Our next conference is going to focus on the exciting and important work that these professionals do and the impact that they have on aviation safety. We hope to have as many hands on deck for the conference as possible and hope that the location and conference focus are big draws.

This summer we will launch a new website. The new website will be more user friendly and will make renewing memberships and registering for conferences easier. One very exciting feature is that each member will be able to post a professional photo and biography with contact information and links to other web pages, such as a website. This improved capability will be an important benefit of membership because it provides valuable professional exposure and will assist with networking within the association. We will be communicating with each of you to provide you with instructions on how to take advantage of this new feature.

We will soon begin our planning for the conference and I ask anyone who is interested in being on the planning committee or who is interested in presenting to contact me.

Editor's Column

by
Greg Reigel

Welcome to the Fall issue of the International Air & Transportation Safety Bar Association's Reporter. But wait, you might be wondering, what happened to the summer edition of the Reporter? The good news is, you didn't miss it because we did not publish a summer edition. The bad news is, we didn't publish a summer edition. Why, you might ask? Unfortunately, we didn't have enough articles to produce a quality edition of the Reporter. As a result, I made the decision to wait until we did have enough articles to publish an edition of the Reporter worthy of our readers. And now we do.

So, welcome to the fall of 2015. Here in the upper Midwest, the crisp fall air signals the change in seasons and the pending cold and snow of winter. This year, however, the change in seasons also brings both professional and temperate changes for your editor: Effective November 1, 2015 I will be joining the law firm of Shackelford, Melton, McKinley and Norton, LLP in the much warmer city of Dallas, Texas. I am looking forward to continuing my work with aviation clients as a member of the Shackelford firm's aviation practice group. And escaping the cold and snow of the upcoming Minnesota winter will be nice too!

Now to the business at hand. In this issue of the Reporter, our President, Justin Green, updates us on the decision to forego a fall meeting in lieu of a spring meeting in D.C. with a focus on aviation regulatory issues. John Yodice provides us with a discussion of a number of recent enforcement cases. From the NTSB,

Katie Inman discusses some of the Board's current rulemaking, as well as a recent D.C. Circuit decision in which the Court refused to review the Board's disposition of a request for reconsideration.

Kathleen Yodice outlines some significant changes coming from the FAA's Office of the Chief Counsel revising the FAA's Compliance Philosophy. And finally, I have included an article regarding accident and incident reporting under 49 C.F.R. Part 830 applicable to both manned aircraft as well as unmanned aircraft systems.

Finally, a personal request: If you are working on a case with an interesting or novel legal issue, perhaps you could use your research to write an article on that topic. Or if you recently filed a motion involving a legal issue that would be of interest or help to our members, maybe you could convert your supporting or opposition memorandum into an article?

If you would like to submit an article but you have questions regarding topic, availability etc., please feel free to contact me. I will be happy to answer questions and help you through the process. Also, if you are aware of an upcoming event that may be of interest to our members, please send me the details so we can include the information in the newsletter.

With your contributions, the IATSBA Reporter will continue to be a valued and respected aviation law and aviation safety publication. I look forward to your contributions!



GREG REIGEL is an aviation attorney and holds a commercial pilot certificate (single engine land and sea and multi-engine land) with instrument rating. His practice concentrates on aviation transactional and litigation matters. Greg is also an Adjunct Professor at William Mitchell College of Law teaching the Advocacy and Advanced Advocacy courses, and he is an Adjunct Professor at Minnesota State University - Mankato teaching the Aviation Law and Aviation Transactions courses.

This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

THE FAA'S POWER TO SEEK JUDICIAL REVIEW; THE NTSB STALE COMPLAINT RULE

In this case, a Federal Circuit Court addressed the rarely used power of the FAA Administrator to petition for judicial review of a decision/order of the National Transportation Safety Board. To put this in context, an airman or air agency has already prevailed through two levels of appeal - an administrative law judge and the full NTSB - and now may have to litigate before a federal appeals court. To ameliorate this circumstance, the Administrator can only appeal NTSB orders in which the Administrator has first decided that

the NTSB order will have a significant impact on his ability to carry out his enforcement responsibilities. So far, there have only been about three such appeals since the FAA was given such authority in 1992. There is much in the Court's opinion that settles law of which practitioners should be aware. Just as importantly, the Court specifically left open issues that practitioners should be prepared to address in the future.

The case raising these issues involved the emergency revocation of

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a pilot's license (immediate grounding that invokes special procedures) based on a charge of intentional falsification and several other related charges. The pilot moved for dismissal of the charges before the administrative law judge, arguing that the charges are stale under the NTSB stale complaint rule (49 C.F.R. 821.33). That is because the Administrator's complaint was filed more than six months after the conduct the triggered the revocation (actually almost two years). However, the stale complaint rule does not apply when the "complaint alleges lack of qualification."

The procedural posture becomes complicated. The ALJ initially rejected the pilot's stale complaint argument, which, if proven, would establish a lack of qualifications and thus serve as an exception to the stale complaint rule. But, after a hearing the ALJ dismissed the intentional falsification charge because the Administrator's failed to meet its burden of proof. The ALJ then renewed his review of the stale complaint argument and dismissed the remainder of the complaint as being stale. On appeal to the full NTSB, the Board affirmed the dismissals on different grounds than those used by the ALJ, in particular on the basis that lack of qualifications charges were not pled in the complaint with sufficient specificity to be able to demonstrate a lack of qualifications warranting treatment as an exception to the stale complaint rule. The Administrator then appealed the NTSB's decision to the US Court of Appeals for the DC Circuit,

exercising its right to do so on the basis that the Board's decision would have a significant adverse impact on the FAA's ability to carry out its statutory duties. In this regard, the Administrator signed a memo that stated generally that the NTSB's decision advanced an entirely new interpretation of its stale complaint rule that is vague, unworkable, and inconsistent.

The Aircraft Owners and Pilots Association participated as amicus curiae before the Court of Appeals. AOPA sought to preserve the important procedural protections afforded by the NTSB's stale complaint rule that prevents the FAA from pursuing enforcement actions for conduct that occurred long ago and would leave the person with limited ability to fairly defend against the FAA's charges. In addition, AOPA sought to protect the membership interest in assuring that the FAA did not abuse its statutory authority to appeal an NTSB decision that was favorable to an airman/air agency's interests, thus causing the case to be dragged on longer after winning through two appellate levels, at significant cost and time to continue defending against the FAA's arguments.

AOPA urged the Court to hold the Administrator accountable to the limited standing he has to appeal cases to the courts of appeals, suggesting to the Court that the Administrator's simple conclusory statement of "significant adverse impact" was not sufficient to meet the FAA's statutory burden to invoke



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the Court's jurisdiction. AOPA further urged the Court to uphold the NTSB's interpretation of its stale complaint rule, set forth clearly in the NTSB's precedent in the *Armstrong* case (NTSB Order No. EA-5629, reconsidered EA-5660 (2013)), essentially that when lack of qualifications is the basis for proceeding with otherwise stale charges, if the FAA cannot prove lack of qualifications at the hearing, the stale complaint rule remains relevant and requires dismissal of any remaining stale charges. And, that the complaint must be pled with sufficient specificity to allow a law judge to conclude that lack of qualifications exist, simply alleging "lack of qualifications" is not enough and subject to abuse by FAA.

In what is a case of first impression, the Court held that the statutorily required determination of "significant adverse impact" is not a jurisdictional requirement (contrary to AOPA's argument), but rather something the Administrator is merely required to do prior to bringing suit. However, importantly for practitioners, the Court left open whether or not the Administrator's determination of significant adverse impact in this case was appropriate, or whether such determination is something that the Court should or can review, since the matter was outside the issue of jurisdiction and beyond what the Court agreed to review. Under what standard the Administrator's "significant adverse impact" determination can or should be reviewed remains an issue to potentially be raised in future cases.

As far as the stale complaint rule, the Court reversed the NTSB's dismissal of both the intentional falsification charge and of the remaining charges as stale, rejecting what the Court saw as the Board imposing a heightened pleading standard upon the FAA that the Board had not previously ever imposed on the FAA. However, the Court clarified that it was not finding that the NTSB could not demand a heightened pleading or evidentiary showing in order to avoid the stale complaint rule, merely that the Board may not do so in this case, in part because of the NTSB's departure from its handling of similar pleadings in previous cases that were not dismissed under the stale complaint rule.

The Court's holding is limited to the specific facts of this case. Moreover, the Court did not specifically address whether or not dismissal of a charge alleging lack of qualifications warrants dismissal of any remaining, non-lack of qualification charges as stale under the stale complaint rule, as the Board held in *Armstrong* and was the ALJ's basis for dismissal this case. Importantly, the Court specifically stated this in a footnote – i.e., that it was not addressing whether the stale complaint rule could be applied to dismiss stale charges even after a full evidentiary hearing, as the ALJ did in this case. So, this protection and the ability to raise the stale complaint rule at any time in a proceeding still is not foreclosed.

It is an open question whether we should expect more FAA appeals to the Circuit Court, in light of this decision. It is still an open question whether the NTSB will require a heightened pleading or evidentiary showing of lack of qualification in order for the

FAA to avoid the stale complaint rule. Practitioners are encouraged to study the Court's opinion in this complicated procedural case. *Administrator v. Ducote*, June 30, 2015 (D.C. Cir. 2015).

FAA ANNOUNCES NEW COMPLIANCE AND ENFORCEMENT POLICY

While the changes will significantly affect and reorganize FAA counsel responsibilities, so far the effect on outside counsels' handling of FAA enforcement cases seem minimal but is still developing. We will

continue to monitor. For now, see Kathy Yodice's most current analysis of: "An Outline of the Changes Occurring in the FAA's Legal Offices," reported *infra*.

AIRCRAFT REGISTRATION CERTIFICATE REVOKED EVEN THOUGH PILOT NOT CONVICTED OF UNDERLYING CRIME

49 U.S.C. § 44106 provides for the revocation of an aircraft registration certificate if the aircraft owner permitted the use of the aircraft to carry out, or facilitate, a criminal activity punishable by death or imprisonment for more than one year. The pilot-owner (president of the corporate owner of the aircraft) was charged with, and admitted, knowingly transporting 15 pounds of marijuana in the aircraft.

The search warrant that was used to discover the marijuana on board the aircraft was ruled invalid; the evidence was suppressed; and the prosecutor dismissed the criminal case. The Board ruled that the dismissal was not an acquittal. The terms of the statute were met by the pilot-owner's admission. The revocation of the aircraft registration certificate was affirmed. *Administrator v. Connors*, NTSB Order No. EA-5731 (2014).

NTSB General Counsel

by:
Katie Inman



KATIE PLEMONS INMAN

joined the Office of General Counsel in 2005. Ms. Inman handles cases on the Board's enforcement docket, and serves as the attorney overseeing rulemaking under the Administrative Procedure Act. Ms. Inman has also served as the attorney overseeing compliance with and litigation regarding various statutes involving the availability of information, such as the Freedom of Information and Privacy Acts. Prior to joining the Board, Ms. Inman served as a law clerk to a Federal judge in the Eastern District of Texas, where she assisted in research and drafted opinions on a variety of issues. Ms. Inman has also authored and published articles in scholarly journals concerning the legislative process and Federal programs.

In addition to several major investigations in the past year, the NTSB has also been active in updating several parts of its regulations. The agency also successfully defended its position on the non-reviewability of petitions for reconsideration of a probable cause finding of a transportation accident or incident.

On June 18, 2015, the NTSB published a [Notice of Proposed Rulemaking \(NPRM\) to add a new subpart to 49 C.F.R. part 800](#) (Organization and Functions of the Board and Delegations of Authority). The new subpart, to be codified as Subpart C within part 800, will describe NTSB's rulemaking procedures. Comments in response to the NPRM regarding part 800 were due July 20, 2015. The NPRM is available on [www.regulations.gov](#) (Docket No. NTSB-GC-2012-0002), and the website provides a mechanism for submitting comments online.

The new subpart will describe a procedure for promulgating direct final rules. Through such a procedure, the agency may publish an alteration to a rule as final, and in the absence of comments in response, the change will become final. Such a process may be used to issue modifications that are not controversial. In addition, the new subpart will describe the process for the public's submission of petitions for rulemaking, as well as the agency's procedure for promulgating interim final rules.

In addition, as mentioned in the last issue of the IATSBA newsletter, the NTSB published an [NPRM to update 49 C.F.R. part 845](#) (Rules of Practice in Transportation: Investigative Hearings; Meetings; Reports; and Petitions for Reconsideration) on March 19, 2015. Comments in response to the NPRM were due May 18, 2015. The agency received five comments, all of which are available to the public at [www.regulations.gov](#) (Docket NTSB-GC-2012-0002).

Currently, the NTSB is considering the comments it received in response to the NPRM for part 845. The agency anticipates publishing a Final Rule for part 845 by the end of the year.

Prior to the NPRM for part 845, the NTSB published a lengthy [NPRM](#) to reorganize and update the provisions of 49 C.F.R. part 831, which address the agency's investigation procedures. The NTSB received more than three dozen comments in response to the NPRM, from individuals and all types of organizations. Many commenters have been involved directly in one or more NTSB investigations, and provided specific examples to articulate their viewpoints. The agency has carefully considered the comments, and has found the suggestions and considerations offered to be helpful. As with part 845, the NTSB anticipates publishing a Final Rule for part 831 by the end of the year.

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As many participants in NTSB investigations are aware, the agency's rules provide a process by which a party to an investigation or other person having a direct interest in the investigation can submit a petition for reconsideration of a probable cause finding. 49 C.F.R. § 845.41. The NTSB considers such petitions often.

In a recent order denying a petition for review, the Court of Appeals for the D.C. Circuit held the NTSB's disposition of a petition for reconsideration was not subject to review in federal court. *Joshi v. Nat'l Transp. Safety Bd.*, 791 F.3d 8, 2015. The Joshi case arose out of an aircraft accident in which the pilot and four passengers died in Indiana in April 2006.

Pursuant to § 845.41, the father of the deceased pilot submitted a petition, along with new evidence, to challenge the NTSB's finding that pilot error was the most likely cause of the accident. In particular, Mr. Joshi believed the investigation was not sufficient and the NTSB's reports were defective. Mr. Joshi chose to hire an engineering firm to reconstruct the accident by analyzing radar data, air traffic control transmissions, witness statements, and other items that the NTSB had available to it during the investigation. After gathering and reviewing evidence, the engineering firm concluded another plane most likely interfered with the pilot's flight path and caused her to take evasive

action, which caused the crash.

The NTSB reviewed the engineering firm's suggested conclusions and the evidence. The agency denied the petition for reconsideration, and Mr. Joshi sought review of both the NTSB's reports of its investigation and the response to his petition for reconsideration. The D.C. Circuit held that, because neither the reports nor the response can be considered a final order subject to judicial review, the court lacked jurisdiction to hear the case.

In reaching its conclusion, the court cited 49 C.F.R. § 831.4 ("Nature of investigation"), which states the NTSB uses its investigations "to ascertain measures that would best tend to prevent similar accidents or incidents in the future." 49 C.F.R. § 831.4. The court went on to quote the regulation further, which states NTSB investigations are considered "fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act and are not conducted for the purpose of determining the rights or liabilities of any person."

The court went on to state it lacked jurisdiction to consider not only the agency's reports and conclusions, but it also could not review the NTSB's denial of the petition for reconsideration. The court based this conclusion on the fact that the reconsideration procedure

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Mr. Joshi used was not created by any statute, but was a process found in the NTSB's regulations. The court described the process as one that allows the agency to receive new evidence after it completes an accident investigation, and noted this procedure functions to ensure the NTSB "develops safety recommendations based on the most complete record possible." As a result, the court characterized petitions for reconsideration as "simply another stage of the accident investigation procedure." Therefore, the NTSB's disposition of petitions are not subject to a federal court's review. In this regard,

the court equated NTSB responses to petitions for reconsideration with NTSB reports: neither document "impos[es] any legal consequences." As a result, federal courts may not review them.

The *Joshi* holding emphasizes the importance of observing the plain language of the NTSB's regulations. As the agency underscored in the preambles of the aforementioned NPRMs, the agency is keenly aware its regulations must contain plain language that accurately reflects the NTSB's processes in achieving its statutory mission.

FAA Update

continued

SUCCESSFUL REEXAMINATION DOES NOT BAR SIMULTANEOUS OR SUBSEQUENT LEGAL ENFORCEMENT ACTION

The FAA imposed a 135-day suspension of a mechanic's certificate charging that he improperly performed maintenance on a Piper PA28-140. On appeal to the NTSB, the suspension was affirmed by the NTSB, notwithstanding the mechanic had successfully passed an FAA reexamination requested based on the same allegation. This case is

instructive to practitioners because in most instances the FAA does not pursue legal enforcement action following a successful reexamination. An airman faced with a reexamination request, and his/her counsel, should not be misled by this predominant practice. *Administrator v. Gundersen*, NTSB Order No. EA-5735 (2014).

Changes Occuring in the FAA's Legal Offices

by:
Kathleen Yodice

The FAA is in the throes of implementing its new Compliance Philosophy that was announced by the Administrator this past June. We understand that the FAA Administrator and the heads of the various FAA divisions will be engaging in outreach over the next several weeks to advise and educate the public about this apparent "kindler and gentler FAA", which is set to officially be implemented on October 1, 2015.

To support the new philosophy, the FAA's Chief Counsel's office made changes to how enforcement would be handled by its attorneys. These organizational changes went into effect on July 26, 2015, following an earlier organizational change that affected the entire Chief Counsel's Office, http://www.faa.gov/documentLibrary/media/Notice/N_1100.357_.pdf.

Here are the highlights of the reorganization of the FAA's enforcement practice and what we can expect to see developing.

The FAA's legal enforcement practice has been shifted from 9 regional offices plus the Aeronautical Center and will now be carried out through 5 teams, in addition to the Headquarters office. The teams are aligned under the FAA Headquarter's enforcement division, AGC 300. Each team will be headed up by an Enforcement Team Manager who reports to the Assistant Chief Counsel for Enforcement (Peter Lynch) and the Deputy Assistant Chief Counsel for Enforcement (Cindy Dominik). They report to the new

Deputy Chief Counsel for Regulations and Enforcement (Mark Bury).

The five teams are as follows:

- The Northeast Team encompassing the Eastern and New England Regions and managed by Brendan Kelly out of the FAA's Eastern Regional Counsel's Office.
- The Southern Team will be managed by Gerald Ellis out of the FAA's Southern Regional Counsel's Office.
- The Midwest Team encompassing the Great Lakes and Central Regions and managed by James Tegtmeier out of the FAA's Great Lakes Regional Counsel's Office.
- The Southwest Team encompassing the Southwest Region and the Aeronautical Center in Oklahoma City and managed by Rena Price out of the FAA's Southwest Regional Counsel's Office.
- The Western Team encompassing the Western-Pacific, Northwest Mountain, and Alaska Regions and managed by Carey Terasaki out of the Western-Pacific Regional Counsel's Office.

The 27 FAA attorneys in these teams will be specializing in enforcement and those attorneys along with the managers and the FAA Headquarters legal enforcement staff will be dedicated to enforcement and will no longer be handling the other legal services that they had provided in the past. They will function as one team in close coordination focused



KATHLEEN YODICE has been representing aviation legal interests for 20 years, beginning her career as an FAA prosecutor and then moving into private practice defending air Carriers, commercial operators, repair stations, pilots, and mechanics against FAA enforcement actions and assisting entities and individuals in aviation compliance MAatters, medical certification concerns, and aviation-related business issues. She is a Past President of the Lawyer-Pilots Bar Association and currently sits on their Board, and she serves on AOPA's Board of Aviation Medical Advisors. She was appointed to, and continues to serve on, the Editorial Board for the ABA Forum on Air and Space Law.

Changes Occuring in the FAA's Legal Offices

continued

on enforcement. The FAA's Regional Counsel's Offices will continue to exist and the attorneys in these offices will handle all the remaining non-enforcement legal work.

Several FAA program offices have issued guidance to apply the new philosophy to their business practice, including the Flight Standards office's issuance of new guidance in the inspector's manual, http://www.faa.gov/documentLibrary/media/Notice/N_8900_323_FAA.pdf, and as it relates to remedial training, http://www.faa.gov/documentLibrary/media/Notice/N_8900.325.pdf, and the FAA Chief Counsel's issuance of Change 9 to its FAA Order 2150.3B, http://www.faa.gov/documentLibrary/media/Order/2150.3B_Chg_9.pdf. We expect that there will be additional guidance issued over the next several weeks and months by other FAA program offices.

We expect to see these changes, and future changes, reflect the move to safety initiatives such as SMS and the goal of voluntary compliance that is achieved, in part, by learning from safety concerns and making corrective changes. This is all part of the FAA's effort to use risk-based decision making to fulfill its critical aviation safety oversight role. The FAA wants to work with industry to address and correct problems. Therefore, when there is a non-compliance, the agency intends to use a tool that prevents reoccurrence, including education, training, and improvements to procedures. This activity will be documented but will not be considered either an administrative or legal enforcement action.

Legal enforcement action will be appropriate in cases involving

intentional or reckless conduct, lack of qualifications, unacceptable risks to safety, and failure to complete corrective action that had been agreed upon. The FAA expects that legal cases that rise to the top and are initiated are expected to be solidly based and well supported in fact, law, and precedent, so that there may be little room to argue over the merits and the sanction, but there will still be an opportunity for dialog between FAA and industry counsel at an informal conference to raise matters that may not have been known by the FAA in its investigation. Any negotiation that results in a change in an initiated case will need to be justified in the file.

The legal enforcement workload will not necessarily be handled under the traditional geographic boundaries as seen in the past. This means that we should not be surprised to see a case that arises in one area geographic but it is assigned to an attorney in a team from another geographic area.

The FAA does not yet know the impact that these changes will have on the FAA workload. Punitive legal actions such as suspension and civil penalty actions will likely go down. We don't know yet if certain categories of cases will be handled differently under the new philosophy, such as security-related NOTAM and TFR cases and cases arising out of the FAA's drug and alcohol abatement programs.

The FAA work force is being trained to understand what the compliance philosophy means and how to implement it as intended. The FAA maintains that there is a lot yet to be seen in how this works out in practice and how it may evolve. We agree. So, stay tuned.

Unmanned Aircraft Accident Reporting

by
Greg Reigel

In the past, airmen have asked me whether they needed to report an aircraft “mishap” in which they were involved to the Federal Aviation Administration (“FAA”) or National Transportation Safety Board (“NTSB”). My usual response was to tell the airman that it depended upon exactly what type of “mishap” to which he or she was referring. The airman would then provide me with a more detailed explanation of what had happened. With that information in hand, and a quick review of 49 C.F.R. Part 830 (also known as NTSB Rule 830), I was often able to tell the airman that he or she did not need to report the “mishap”.

Unfortunately, quite a few airmen are either uncertain of or unfamiliar with the reporting requirements of Part 830 and they don’t discuss the issue with an aviation attorney prior to making the decision whether to report. This is unfortunate because some airmen have reported aircraft incidents when they weren’t obligated to make the report and have drawn undue attention from the FAA. Knowing when you are required to report, and when you are not, can save an airman a lot of unnecessary grief.

Today, with the proliferation of unmanned aircraft systems (“UAS”), and after the Board’s decision in the *Pirker* case,¹ I anticipate receiving that same question in the context of a UAS “mishap.” So, if that “mishap” involves a UAS, does that make a difference in whether or not the airman needs to

report? Well, depending upon the size of the UAS and the type of operation in which the UAS is engaged, yes it does. And just as important, the consequences of an incorrect answer to the question are still the same.

What Is An Unmanned Aircraft System?

The FAA Modernization and Reform Act of 2012 Public Law 112-95 (“the Act”) defines a UAS as “an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system.”² A “small unmanned aircraft”, as opposed to simply a UAS, is defined as “a UAS weighing less than 55 pounds.”³

What Is An Unmanned Aircraft Accident?

49 C.F.R. 830.2 defines an unmanned aircraft accident as

[A]n occurrence associated with the operation of any public or civil unmanned aircraft system that takes place between the time that the system is activated with the purpose of flight and the time that the system is deactivated at the conclusion of its mission, in which: (1) Any person suffers death or serious injury;⁴ or (2) The

¹ *Administrator v. Pirker*, NTSB Order No. EA-5730 (Nov. 18, 2014) in which the Board held the FAA could apply 14 C.F.R. § 91.13(a)’s prohibition on careless or reckless operation of aircraft to a UAS.

² FAA Modernization and Reform Act of 2012, Public Law 112-95, Section 331(9).

³ *Id.* at § 331(6).

⁴ 49 C.F.R. 830.2 defines serious injury as “any injury which: (1) Requires hospitalization for more than 48 hours, commencing within 7 days from

Unmanned Aircraft Accident Reporting

continued

aircraft has a maximum gross takeoff weight of 300 pounds or greater and sustains substantial damage.⁵

However, when it promulgated this definition, the NTSB did not intend to include “model aircraft” within the notification requirements for an unmanned aircraft accident.⁶ According to the NTSB, “model aircraft” means UAS that is:

- (1) capable of sustained flight in the atmosphere;
- (2) flown within visual line of sight of the person operating the aircraft; and
- (3) flown for hobby or recreational purposes.⁷

the date of the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface.”

5 49 C.F.R. 830.2 defines substantial damage as “damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered “substantial damage” for the purpose of this part.”

6 75 FR 51953, 51954. See also 80 FR 54736 stating that “[t]he NTSB has consistently excluded unmanned aircraft systems (UAS) flown for hobby and recreational use from the definition of “accident” under 49 CFR part 830, and has historically not investigated the rare occasions in which a model aircraft has caused serious injury or fatality.”

7 See 80 FR 54736 adopting as instructive the definition of the term model aircraft that appears in section 336(c) of the Federal Aviation

This definition and exclusion from accident notifications and investigations is also consistent with international law and practice.⁸

Who Is Required To Provide The Notification?

49 C.F.R. Part 830.5 requires that the operator of an aircraft provide an initial notification of any “accident”⁹ and certain “incidents”¹⁰ immediately.

Administration (FAA) Modernization and Reform Act of 2012, Public Law 112-95; 126 Stat. 77-78 (Feb. 14, 2012), Section 336(c). According to the NTSB, this exclusion is also consistent with Section 336(a)’s restriction prohibiting the FAA from promulgating regulations concerning a model aircraft “if the aircraft: (1) Is flown ‘strictly for hobby or recreational use’; (2) is ‘operated in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization’; (3) is limited to not more than 55 pounds unless otherwise certified; (4) is ‘operated in a manner that does not interfere with and gives way to any manned aircraft’; and (5) when flown within 5 miles of an airport, the model aircraft’s operator provides the airport operator and air traffic control tower with prior notice of its operation.”

8 80 FR 54736. See also International Civil Aviation Organization, *Unmanned Aircraft Systems (UAS)*, Circular 328, 3, ¶ 2.4 (2011) which states “[i]n the broadest sense, the introduction of UAS does not change any existing distinctions between model aircraft and aircraft. Model aircraft, generally recognized as intended for recreational purposes only, fall outside the provisions of the Chicago Convention, being exclusively the subject of relevant national regulations, if any.”

9 The NTSB defines an aircraft accident as “an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. For purposes of this part, the definition of “aircraft accident” includes “unmanned aircraft accident,” as defined herein.” 49 C.F.R. 830.2.

10 The NTSB defines an incident as “an occurrence other than an accident, associated with the operation of an aircraft, which affects or could affect the

Unmanned Aircraft Accident Reporting

continued

Although a quick search did not reveal any enforcement or civil penalty actions based upon a failure to provide notification of an accident or incident, such an action is possible.¹¹

The rule defines an “operator” as “any person who causes or authorizes the operation of an aircraft” which may include the owner, lessee, or anyone flying or using the aircraft.¹² Please note that this does not necessarily mean the pilot. An aircraft owner or FBO can make the report even if the pilot does not.

In the context of an unmanned aircraft accident, this same analysis presumably applies. Not only would the individual actually manipulating the controls of the UAS be considered an operator, but also the owner or Part 333 exemption holder could be considered the operator.

However, if someone other than the crewmember(s) makes the report, the crewmember(s), assuming they are physically able at the time the report is submitted, must attach a statement providing the facts, conditions, and circumstances relating to the accident or incident as they appear to him or her.¹³ If the crewmember is incapacitated, he or she must submit the statement as soon as he or she is physically able.¹⁴

To Whom Is The Notification Provided?

It is important to note that the operator must notify the NTSB,

safety of operations.” 49 C.F.R. 830.2.

11 49 U.S.C. 1155(a)(1).

12 49 C.F.R. 830.2.

13 49 C.F.R. 830.15(b)

14 *Id.*

not the FAA.¹⁵ As a federal agency separate from the Federal Aviation Administration, the NTSB has the authority to investigate aircraft accidents and reportable incidents.¹⁶ Although the NTSB delegates some accident investigation to the FAA,¹⁷ Part 830 requires the notification to be made directly to the NTSB without any mention of notification to the FAA.¹⁸

What Information Must Be Included in the Notification?

The initial notification must be given to the NTSB immediately and must include the following information:

- (1) Type, nationality, and registration marks of the aircraft;
- (2) Name of owner, and operator of the aircraft;
- (3) Name of the pilot-in-command;
- (4) Date and time of the accident;
- (5) Last point of departure and point of intended landing of the aircraft;
- (6) Position of the aircraft with reference to some easily defined geographical point;
- (7) Number of persons aboard, number killed, and number seriously injured;

15 *See* 49 C.F.R. 830.5 requiring notification to the nearest NTSB field office and 49 C.F.R. 830.6 requiring filing of a report on Board Form 6120.1 with the NTSB office nearest the accident or incident. NTSB regional offices are located in the following cities: Anchorage, Alaska; Atlanta, Georgia; West Chicago, Illinois; Denver, Colorado; Arlington, Texas; Gardena (Los Angeles), California; Miami, Florida; Seattle, Washington; and Ashburn, Virginia. In addition, NTSB headquarters is located at 490 L’Enfant Plaza, SW., Washington, DC 20594.

16 49 U.S.C. 1132(a)

17 49 C.F.R. Part 800, Appendix 800.

18 49 C.F.R. 830.5.

Unmanned Aircraft Accident Reporting

continued

(8) Nature of the accident, the weather and the extent of damage to the aircraft, so far as is known; and

(9) A description of any explosives, radioactive materials, or other dangerous articles carried.¹⁹

Although this initial notification requirement was originally promulgated in contemplation of “manned” aircraft operations, all of the information that must be included in the initial notification could be equally applicable to an unmanned aircraft accident.²⁰

Subsequent to the initial notification, a written report of an accident must be made on NTSB Form 6120.²¹ If an incident was the type requiring an initial notification under Section 830.5, then a written report regarding the incident need only be filed if requested by an authorized representative of the NTSB.²² In either case, a required report must be filed with the nearest NTSB field office within 10 days of the accident or incident.²³

¹⁹ 49 C.F.R. 830.6.

²⁰ Although Section 830.6(a)’s request for “persons on board” would appear to be inapplicable by virtue of the “unmanned” nature of an unmanned aircraft accident, if the accident involved the collision between an unmanned and a manned aircraft then this information would be available for inclusion in the initial notification, if known by the operator of the unmanned aircraft.

²¹ 49 C.F.R. 830.15(a)

²² *Id.*

²³ 49 C.F.R. 830.15(c). Form 6120.1 is available from the NTSB field offices, online at http://www.nts.gov/Documents/6120_1web.pdf, and can also be obtained from the local FAA Flight Standards District Office. 49 C.F.R. 830.15(a) Fn 1.

Conclusion

UAS are here and will, at some point, be integrated into the national airspace. In the meantime, UAS are already operating; some are being operated for commercial uses and others and being operated strictly for hobby or recreational uses. Regardless of the use, UAS operations have the potential to be involved in “mishaps.” Aviation attorneys who assist UAS or aircraft operators in situations in which a “mishap” has occurred, need to familiarize themselves with and compare the facts of their clients’ situations to Rule 830.

An aircraft or UAS “mishap” can be costly and embarrassing enough without drawing undue attention to it with an unnecessary report to the NTSB or FAA. Certainly if a client’s “mishap” fits within the definition of an accident or reportable incident, the advice should likely be to provide notification as required by the rule. However, if the “mishap” does not fit within the definition, a report to the NTSB would not be required.

The FAA has pursued enforcement actions against airmen arising out of reported aircraft “mishaps” that Rule 830 did not require those airmen to report. In light of the *Pirker* decision, this is also a possibility with respect to UAS “mishaps.” By understanding the obligations imposed by Rule 830 aviation attorneys will be able to counsel their clients regarding proper compliance and help them avoid any unnecessary attention from the FAA if they are involved in an aircraft or UAS “mishap”.

Circuit Assignments



NTSB LAW JUDGE CIRCUIT ASSIGNMENTS

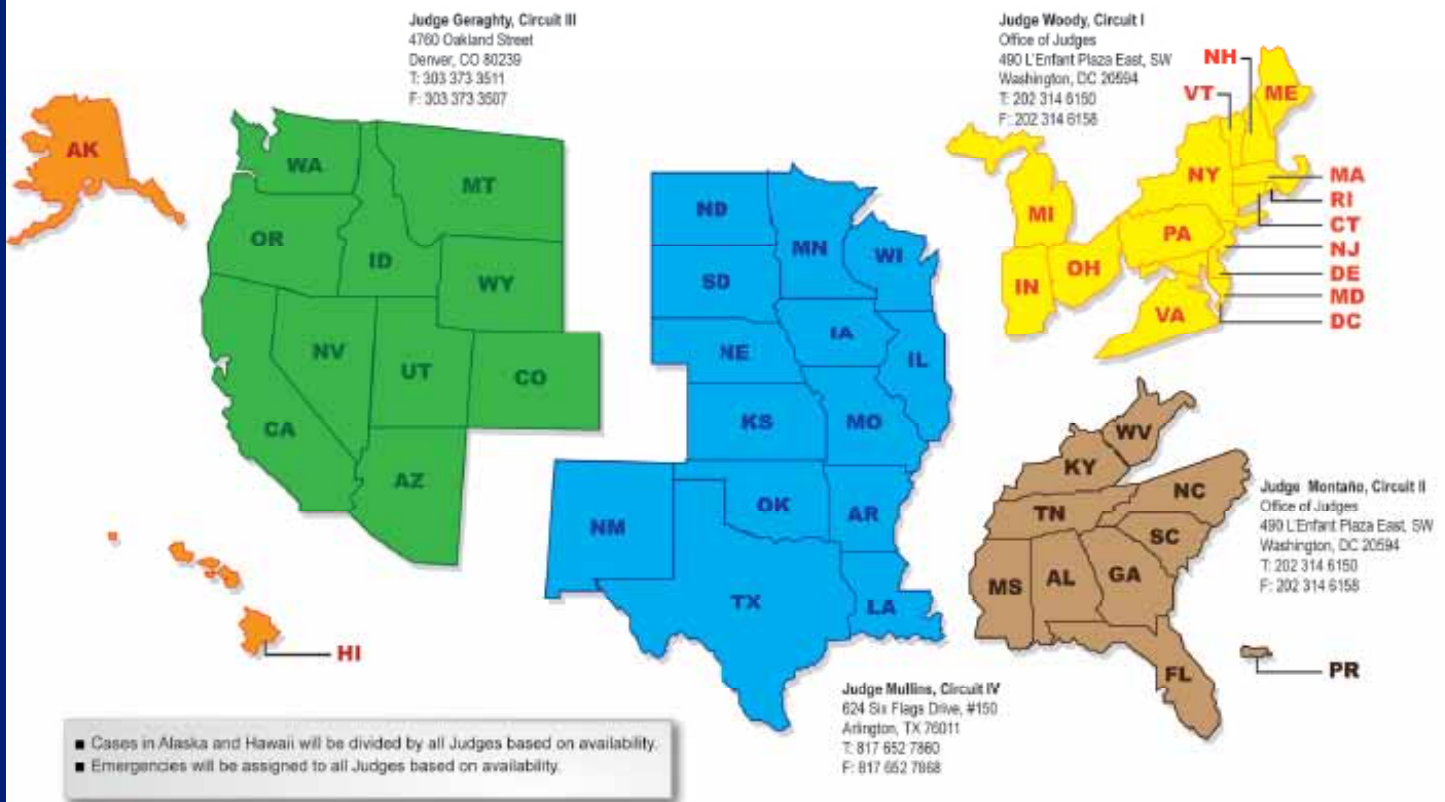


Image courtesy of National Transportation Safety Board, current as of April 1, 2013

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