



Air & Transportation Law Reporter

International
Air & Transportation
Safety Bar
Association



ISSUE
OCT
2017

President's Message

by
Jim Waldon

INSIDE THIS ISSUE

PAGE TWO

President's Message
Jim Waldon

PAGE THREE

Editor's Column
Greg Reigel

PAGE FOUR

Save the Date

PAGE FIVE

FAA Update
Christopher Poreda

PAGE TWELVE

Personal Jurisdiction
Alexandra Maloney

PAGE EIGHTEEN

IATSBA Luncheon

PAGE NINETEEN

Danger of Bird Strikes
Scott Brooksby

PAGE TWENTY-TWO

Russian Space Program
Investigations
Joe Gutheinz

PAGE TWENTY-SIX

IATSBA Conference

PAGE TWENTY-NINE

IATSBA Membership
Application

PAGE
02

The National Transportation Safety Board turns 50 this year. Due in large part to their efforts, transportation in the United States has never safer. And their efforts continue. We look forward to celebrating their anniversary with many of their team this year at our upcoming conference.

IATSBA Social at NBAA in Las Vegas

IATSBA hosted a social at the NBAA Conference in Las Vegas. Several members attended. It is always nice to be able to connect with IATSBA members in person more than just once a year at our annual conference. We will definitely try and arrange future IATSBA social events as the opportunities may present themselves.

Spring Conference

We are excited about this year's conference. This year the dates are May 16 -20. We will be staying at the Washington DC Holiday Inn again. For those of you who did not attend two years ago the venue is excellent. The Hotel has been completely renovated and is quite nice.

Conference Sponsors

And we are excited about our conference sponsors this year. Already the following firms and other companies have agreed to sponsor our conference

Holland and Knight
UPS

Paramount Law Group, PLLC
Kriendler & Kriendler

The Aviation Law Firm

The Law Offices of Tony B. Jobe
Michael L. Dworkin and Associates

Thank you to our sponsors! If any others would like to sponsor our conference please contact me for additional information.

Scholarship Program

The IATSBA Board just appointed a committee to develop a scholarship program. If you have an interest in assisting, or know of worthy recipients, please let us know.

The Joseph T. Nall Award

Every year we present a Joseph T. Nall Safety Award. A qualified recipient of the award is a person or team of persons who have made a significant contribution to aviation safety during his/her, or their lifetime. Past recipients include:

- 2017 – Boris Popov, Founder and Chairman Emeritus of BRS Aerospace
- 2016 – Nicholas A. Sabatini, Associate Administrator for Aviation Safety, Ret., Federal Aviation Administration
- 2014 – Safeflight Instrument Corporation, Randy Greene, Chief

continued on page 4...



JIM WALDON is a national aviation attorney. His practice focuses on aircraft transactions and regulatory matters. He is currently the managing partner at Paramount Law Group, an aviation law firm based in Seattle, Washington. Prior to founding Paramount, Jim worked as an aviation attorney at Lane Powell, Mokulele Airlines, Alaska Airlines and at TWA.

Editor's Column

by
Greg Reigel



GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas, Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters.

Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

Welcome back to another edition of the International Air and Transportation Safety Bar Association's Air & Transportation Law Reporter. After a brief hiatus, we are back with not only the informative articles you have come to expect, but also with information regarding our May, 2018 conference in Washington, D.C. It is shaping up to be yet another great IATSBA event!

We have a jam-packed issue of the Reporter for you this time-around. First, our President, Jim Waldon, provides us both with a recap of recent IATSBA events, as well as highlights from our upcoming conference. Chris Poreda, former New England Regional Counsel for the FAA, discusses a number of areas of FAA enforcement compliance in which the certificate holder is currently treated unfairly, and he identifies actions the agency could take to more equitably address these situations.

One of our law student members, Ali R. Maloney, analyzes the current state of personal jurisdiction in a post-Daimler world. Scott Brooksby

discusses the impact of bird and animal strikes in aviation, potential liability of airport operators, and suggestions for measures to prevent or mitigate these events. Finally, retired NASA OIG Senior Special Agent, and attorney, Joseph Gutheinz, Jr., gives us the inside scoop on several investigations relating to the Russian space program and the Mir space station.

As you can see, we are blessed to have a number of excellent articles for you in this edition of the Reporter. I want to personally thank each contributor for sharing his or her article with us in this issue. But, as you know, we are always looking for content that would be interesting and useful to our members for future issues. If you would like to submit an article or if you have an announcement, news, a press release or an event you would like to share with other IATSBA members, please send me the details so we can include your information in the Reporter.

I hope you enjoy this edition of the Reporter.

National Officers

President
Executive Vice President
Member at Large
Secretary
Treasurer
Membership Chairman
Emerging Leaders Chairman
FAA Liason
Immediate Past President

Jim Waldon
James Rodriguez
Tony B. Jobe
John Yodice
Ray Speciale
Matt Robinson
Sean Barry
Linda Modestino
Justin Green
Seattle, Washington
Washington, DC
Madisonville, Louisiana
Frederick, Maryland
Frederick, Maryland
Denver, Colorado
New York, New York
Oklahoma City, Oklahoma
New York, New York

Regional Vice Presidents

Alaskan
Central
Eastern
Great Lakes
New England
Northwest
Southern
Southwest
Western Pacific

Brent Cole
Elizabeth Vasseur-Browne
Jeffrey Small
Brett Venhuizen
Paul Lange
Scott Brooksby
Wayne Ferrell
Mitch Llewellyn
John T. Van Geffen
Anchorage, Alaska
Kansas City, Missouri
Coraopolis, Pennsylvania
Grand Forks, North Dakota
Stratford, Connecticut
Portland, Oregon
Jackson, Mississippi
Ft. Smith, Arkansas
San Francisco, California

Save the Date



Air & Transport Law Conference 2018

May 16-19, 2018 (Room Rate thru Monday, May 21)

Holiday Inn Washington - Capitol

[Reserve Your Room Today >>](#)

SEE PAGE 26
FOR ADDITIONAL CONFERENCE DETAILS

President's Message

...continued from page 2

Executive Office, and his father Leonard Greene

- 2013 – Cirrus Aircraft SR Safety Design Team

- 2012 – Dr. John K. Lauber, NTSB Board Member, Senior Vice President and Chief Product Safety Officer, Airbus SAS

- 2011 – William R. Voss, President and CEO, Flight Safety Foundation

- 2010 – Herbert D. “Herb” Kelleher, Co-Founder and CEO, Southwest Airlines

- 2009 – Captain Alfred C. Haynes, United Airlines Flight 232, Sioux City, Iowa

We have asked for and received your recommendations along with the

reason or reasons why that nominee is worthy of being our next nominee. After reviewing all of the nominations, the IATSBA Board will select the recipient. The award will be presented at our gala dinner in Washington DC in May. We look forward to seeing many of you at the event.

Many of you have been helpful in our efforts listed above. Thank you! If anyone else is interested in joining and/or being active with us please visit IATSBA.org. We are a great group of aviation law practitioners and we would love you have you join us.

Jim Waldon, President, IATSBA

FAIRNESS IN FAA ENFORCEMENT MATTERS: STEPS TO TAKE RIGHT NOW

Little more than two years ago, I retired from the Federal Aviation Administration's Office of the Chief Counsel (hereinafter referred to as the "FAA Legal Office") after serving the agency for 25 years, the final 12 of which as Regional Counsel for the New England Region. As Regional Counsel, I oversaw the handling of compliance and enforcement matters referred to the FAA Legal Office for prosecution and litigation by the FAA's Program Offices¹ in the New England region, and on occasion some matters from other regions. At the time, I thought I had a pretty good handle on the pulse of compliance with the Federal Aviation Regulations² and the enforcement policies of the Administrator. In litigating the matters referred to us, I believe my office treated the respondents in those matters, whether they be individuals, companies, or other entities, reasonably and fairly—even before Congress passed the Pilots' Bill of Rights.³

Since I retired, as I represent pilots and other certificate holders in such matters, I have seen first-hand the kinds of conduct ingrained in the culture of the FAA's Program Offices that serve as a source of frustration for pilots and defense counsel, and which may have fueled support for the Pilots' Bill of Rights. This past spring, Sen. James Inhofe (R-OK) introduced additional legislation that he calls the "Fairness for Pilots Act,"⁴ to again address apparent unfairness in the FAA's compliance and enforcement program.

This article is not intended as a substantive critique of the Fairness for Pilots Act or a comment on whether the Congress should or should not act favorably on it. Some of the things I mention may be addressed by that legislation, some may not. Rather, I offer this article as an observation from one who once served the agency and who now represents holders of FAA certificates about what the FAA can do on its own, right now, without further statutory authority or mandate, to address perceived unfairness in its compliance and enforcement program.⁵

1. The term "Program Offices" means the offices within the FAA that have regulatory oversight responsibility, including the Flight Standards Service; the Office of Aerospace Medicine, including its Drug Abatement Division; the Security and Hazardous Materials Safety Office; the Aircraft Certification Service; the Office of Airport Safety and Operations; and the Office of Commercial Space Transportation. These are the offices from which the FAA Legal Office receives enforcement matters for prosecution. See, FAA Order 2150.3B, ch. 1, ¶2.a. (p 1-1), and ch. 3, ¶2.c. (p3-3).

2. Chapter I of Title 14 of the Code of Federal Regulations (14 CFR Parts 1 to 199).

3. P.L. 112-153, codified in Chapter 447 of Subtitle VII of Title 49 of the United States Code.

4. Senate Bill 755, introduced March 29, 2017. An identical bill was introduced in the House as HR 2107, introduced on April 20, 2017, by Rep. Sam Graves (R-MO), and co-sponsored in the House by four other members, Todd Rokita (R-IN), Daniel Lipinski (D-IL), Colin Peterson (D-MN), and Ralph Lee Abraham (R-LA). The Senate bill has no co-sponsors as of this writing. Both bills await committee action.

5. This article is also not a comment on how the FAA Legal Office now organizes and manages its Enforcement



CHRIS POREDA served as the FAA's Regional Counsel in the New England Region from 2002 until his retirement from the FAA in 2015. He remains an active flight instructor and of counsel to the Law Offices of Paul A. Lange, LLC. Chris earned his law degree from Northeastern University School of Law in Boston in 1985 after serving in the US Air Force flying F-4 Phantom's and as a flight instructor in T-37's. Chris is a graduate of the US Air Force Academy, Class of 1974.

Here are four practices the FAA should change now to make the enforcement process fairer:

1. Investigate and vet complaints against pilots sent to the medical office before sending the pilot a request for additional medical information.

Over the 25 years I worked at the FAA's New England Region, the Regional Flight Surgeon at the time routinely received calls and letters from persons, some wanting to remain anonymous, claiming to know that pilots were engaging in medically disqualifying conduct (such as drug use), or had suffered a medically disqualifying event (such as a heart attack). Often the Flight Surgeon would seek our counsel in how to deal with those complaints and anonymous tips. While a valuable tool for the FAA to use to ensure pilots do not operate aircraft with medically disqualifying conditions, the FAA needs to first do at least some basic investigation to verify the substance of the tip. Unfortunately, it appears that some Regional Flight Surgeon's offices routinely accept such tips as true until proven otherwise, instead of as just an investigative lead to verify the pilot's medical condition.

The result is a letter sent from the Regional Flight Surgeon to the pilot seeking additional information about the pilot's medical history, invoking the broad authority of the FAA to "re-examine" an airman.⁶ The letter, a form letter constructed by the Office of Aerospace Medicine, is accusatory

practice. These suggestions primarily address practices by the FAA's Program Offices, not the FAA Legal Office. 6. 49 USC 44709(a), "The Administrator of the Federal Aviation Administration may ... reexamine an airman holding a certificate issued under section 44703 of this title." The Administrator has delegated this authority to the Program Offices, and to the FAA Legal Office. 14 CFR 13.3(b).

in tone, threatens legal action if the request is not complied with, implies that the pilot may already be unable to exercise the privileges of any medical certificate the pilot holds, and intimidates pilots into thinking that they should surrender their medical certificate to the FAA forthwith. And if a pilot does surrender a medical certificate under such circumstances, it may take months before the FAA reviews the information provided and determines whether the pilot qualifies under Part 67 to hold a medical certificate.⁷

When I recently asked a Regional Medical Office why they take such tips as true instead of attempting to investigate first, the answers startled me. First, I was told that the medical office does not have a cadre of investigators to conduct even a basic vetting of the allegations in the tip. Second, I was told that "in the experience of the office" such tips are more likely true than not, so why shouldn't the FAA accept them as true? I find both of those answers disingenuous. And, when I told the Counsel's office about this practice, I found that there is little communication between the two offices. But that lack of communication between FAA offices did not surprise me based on my experience working at the agency.

The medical office actual does have at its disposal investigators that could perform that basic vetting of

7. For allegations of drug abuse, the Medical Office letter affirmatively states, without supporting evidence, that the pilot has and continues to abuse drugs and demands the pilot provide the results of a "12-panel" drug test within 48 hours of receiving the letter. Such a 12-panel test exceeds the testing required under an approved DOT drug testing program used by air carriers. See, 14 CFR Part 120.109, 49 CFR 40.85. That is well beyond the requirements of Part 67.

these tips. And, realistically, I believe it would not take much effort for the medical office to look up the medical history of the pilot in the medical office's own electronic database. The investigators in the agency's Security and Hazardous Materials Safety Office are available to perform investigations, and do so to support other offices. And, while the medical office I spoke with believes that most tips pan out, the tip might also have come from a jilted lover or vengeful former employer (I saw both while at the agency). Such requests include a level of detail that most pilots, on their own, will not likely respond to the satisfaction of the medical office. Therefore, the resulting FAA legal action will be based on the failure to completely respond to the request, not the substance of the tip. That might lead the medical office to the false conclusion that the tip was based on fact.

Therefore, the Office of Aerospace Medicine should first investigate any complaint or anonymous tip before sending a request for additional information to a certificate holder. And the Office of Aerospace Medicine should also engage with the FAA Legal Office to better craft individualized letters seeking that information once the tip is verified. The Administrator can direct these changes in policy right now without waiting for Congressional mandate.

2. Limit the use and scope of requests to "re-examine" an airman under 49 USC 44709.

Flight Standards could also act more fairly in invoking the authority to re-examine certificate holders. In June 2015, the Administrator issued

FAA Order 8000.373 (Compliance Philosophy), in which he stated that the agency "recognizes that some deviations arise from factors such as flawed procedures, simple mistakes, lack of understanding, or diminished skills" and that deviations of that nature can be most effectively dealt with through training and education rather than legal enforcement action.⁸ Since the Compliance Philosophy Order was issued, Flight Standards management has implemented it with a full educational effort reaching down to the FSDO's across the nation. The other Program Offices (Aerospace Medicine, HazMat, Drug Abatement, Airports, Commercial Space), however, appear to have shown less enthusiasm.⁹

While Flight Standards management has fully embraced this policy change, the field inspectors seem unimpressed. The Compliance Philosophy order also contains the statement that "[m]atters involving competence or qualification[s]" will be addressed using the "appropriate" remedial measure, which might include retraining or enforcement.¹⁰ That additional statement effectively removes requests for re-examination from the reach of the Compliance Philosophy since, by definition, a

8. FAA Order 8000.373, ¶4.e.

9. Compare Flight Standards Order 8900.1, ¶14-1-1 (Flight Standards Compliance Philosophy) with the statement of the Security and Hazardous Materials Safety Office in FAA Order 2150.3B, ch. 5, ¶10 (pp 5-7 to 5-8) ("Noncompliance by non-certificated persons is not addressed with compliance action."), and the very objective guidance for determining sanction provided by the Drug Abatement Office in FAA Order 2150.3B, ch. 7, ¶8 (pp 7-14 to 7-18). Both of those statements from offices other than Flight Standards appear to run counter to the basic principal of the Administrator's Compliance Philosophy that each matter will be treated subjectively on its own facts without objective application of standards that have limited, if any, room for modification.

10. FAA Order 8000.373, ¶4.g.

request to re-examine is a matter involving competence or qualification. Recently, I have seen so-called “709 Requests” that appear based on inspectors’ frustration that because of the new Compliance Philosophy their management would not support a legal enforcement action. True, the standard for whether a request meets the statutory requirement for “reasonableness” remains low, but it is not non-existent. The NTSB has held that such a request must be based on a finding that the certificate holder’s actions (or inactions) could have been the cause of the event in question (accident or incident).¹¹ Flight Standards has set for itself a higher standard, requiring a finding that the “airman’s competence was the apparent cause of the occurrence.”¹² Sometimes I think that inspectors base their 709 Requests solely on the conclusion that regardless of the evidence if a pilot ended in that situation, the pilot must have done something wrong, so a 709 Request is in order. Then, after issuing the 709 Request, the inspector gradually expands the scope of the examination until finally the pilot faces a complete certification flight check.

Unfortunately, pilots often resolve to take the reexamination flight check rather than challenge the basis for the request. Challenging the FAA in this context means initially accepting an Emergency Order of Suspension and possibly engaging counsel.¹³ And, inspectors will often use the rationale that the scope of the check must

broaden as the length of time grows between the time of the request and the time of the re-examination flight.¹⁴ So, under the present policies, challenging the request runs counter to the pilot’s interests by delaying the flight check, which results in an expanded scope of the check. But, not challenging the request only reinforces inspectors’ belief that 709 Requests can be sent at any time for any reason with no checks and balances.

Flight Standards management and the FAA Legal Office should help keep the reexamination process fair and reasonable by insisting that requests are based on articulable conduct that the inspector uses to demonstrate a real question about the pilot’s qualifications. Such evidence should also be included in the original letter to the pilot, along with a detailed description of the scope of the reexamination with reference to the Airman Certification Standards.¹⁵ And, Flight Standards should limit the scope of such reexamination flights to just those tasks in the Airman Certification Standards implicated by the conduct, regardless of the length of time from the date of the request to the date of the exam.

3. Avoid leveraging individual pilots into providing evidence against companies under investigation for operating air carrier or commercial operations without a Part 119 operating certificate.

It is no secret that one of the more frustrating compliance and enforcement efforts for the FAA is to

11. See, Administrator v. Santos and Rodriguez, NTSB Order EA-4266 (1994) at 3-4; Administrator v. Green, NTSB Order EA-5597 n.4 at 5.

12. Flight Standards Order 8900.1, vol. 5, ch. 7, ¶5-1418(B.) (emphasis added)

13. 2150.3B, ch 5, ¶11.c. (pp 5-10 to 5-11)

14. Although not reduced to writing, I have seen this rationale used to expand the scope of a reexamination.

15. Flight Standards Order 8900.1, vol 5, ch. 7, ¶5-1419(B.) (The letter must specify the “type of examination” which should be viewed as detailing the scope of the examination)

find and take meaningful action against those companies that conduct flight operations covered by Part 119 but which do not hold a Part 119 operating certificate.¹⁶ Those companies harm the industry by providing what appears to the public to be services similar or the same as certificated operators, but without incurring the expenses of certification. Those operators, therefore, can charge their customers less than their certified competition, but also often provide a lower margin of safety to their passengers. Educating new entrants to the market of all the requirements of Part 119 certification has proved to be one of the biggest challenges for the Flight Standards Service, and the Drug Abatement Division of the Office of Aerospace Medicine. Perhaps that is the reason why the regulations in Parts 121 and 135 make the aircrew just as responsible for some of those requirements (such as flight and duty time requirements) as the company for which they work.

Nevertheless, it appears that the culture within Flight Standards drives inspectors to attempt to leverage individual pilots into providing evidence against their company. That practice puts the certificate holders who are least able to challenge their employer, and least able to put their certificates at risk, in the most vulnerable position. The FAA will charge the pilots with heavy suspensions (180 to 270 days) and use those actions as the basis for issuing investigatory subpoenas

16. 14 CFR Part 119, requires, with some exceptions enumerated in §119.1.e., that anyone holding out to the public to provide air transportation for compensation and hire must first obtain economic authority from the DOT and an operating certificate from the FAA, and then operate in accordance with the rules in either Part 121 or Part 135.

against company officials to develop the case against the company. And, under the present organization of the enforcement practice within FAA's Legal Office, there is a good possibility that the pilot cases may not be all assigned to the same attorney, or even assigned to attorneys in the same physical office. Finally, because actions against individual certificate holders must generally be initiated sooner than any action against the company, Flight Standards will refer the individual cases to the FAA Legal Office before any action against the company.¹⁷

Accordingly, individual pilots get squeezed into trying to protect their own livelihood by seeking a settlement with the FAA, but at a cost of agreeing to provide testimony against the company. That puts the individual pilot at risk of an adverse personnel action or worse, an adverse flight check result, which could follow the pilot under the PRIA¹⁸ to new future employers. Yes, such practices by companies are actionable under Whistleblower protection statutes¹⁹ and some state statutes, but we all know how the litigation process can be protracted and sometimes unfulfilling.

17. See, FAA Order 2150.3B, ch 4., Para 5-7, page 4-5 to 4-9. In general, cases adjudicated by the NTSB are subject to the NTSB's so-called "stale complaint" rule, 49 CFR 821.33, which, with some exceptions, requires the FAA to initiate the case by sending the certificate holder a Notice within 6 months of the date of the violation; cases heard administratively by the DOT Office of Hearings, and then decided by the FAA Administrator (acting as the Decisionmaker under 14 CFR 13.203), must be initiated within 2 years of the date of the violation; and for cases referred to DOJ for prosecution, DOJ must file a complaint within 5 years of the date of violation.

18. The Pilot Records Improvement Act of 1996, Pub.L. 104-264, §502, as amended, codified in 49 USC 44703.

19. See, Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (known as AIR-21), §519, codified at 49 USC 42121.

The FAA can stop this apparent unfairness right now, or at least change the practice so that the focus remains on the company. Yes, pilots have a responsibility to make sure that the flights they conduct are properly authorized. But, pilots often have no reason to believe their flight does not fall within their company's authorization, and have no reasonable method to independently verify what their employer has told them about the flight. Pilots in that situation, then, should not get caught up in the ensuing enforcement firestorm. A new commercial pilot just starting out in the business ought not be marked for life because that pilot was unlikely enough to be hired by an uncertified company.

Flight Standards should not forward any of the individual pilot cases to the FAA Legal Office until the company case is ready to prosecute. And, Flight Standards should ask that the FAA Legal Office assign any pilot cases to the same attorney handling the company case. Flight Standards management, and the FAA Legal Office, should also look critically at each case before proceeding to make sure that any allegations against pilots are ones for which the individual pilots are liable.²⁰ Finally, while the standard is high, Flight Standards should consider asking the FAA Legal Office for the authority to provide "special enforcement consideration" to the pilots willing to come forward.²¹

Offering the public flight operations without having the proper

20. See, for example, 14 CFR 135.25 (only the "certificate holder", i.e. the company, is liable for non-compliance with this section) and similarly worded sections of Part 135.

21. FAA Order 2150.3B, ch 4., ¶12 (p 4-24)

FAA or DOT certifications constitutes a serious offense, and the FAA should prosecute it vigorously. As I said, it harms the industry and puts passengers at risk. But, as the Administrator stated in his "Compliance Philosophy" Order,²² Flight Standards should put its resources toward the matters that make the most difference, the action against the company, not the actions against the individuals who find themselves pawns in the game.

4. Encourage the Program Offices to respond to and communicate with a pilot's counsel rather than insisting on only dealing with the pilot.

It is axiomatic that attorneys do not contact individuals directly if those individuals are represented by counsel, without the consent of their counsel.²³ Imagine, then, my surprise (or naivety, depending on your perspective) when I learned from Flight Standards Inspectors and Medical Office administrative assistants, that they would not honor my request that they contact me instead of contacting my client directly for future communications on a particular matter. The FAA's response to my inquiry as to why the Program Office followed that policy was that the FAA "deals only with the certificate holder." I was surprised because this policy apparently existed while I was serving as an FAA attorney and I did not know about it, and surprised also because when I asked current senior FAA attorneys about it, they had no idea those Program Offices followed this policy.

There are good reasons for asking the FAA to use counsel for all

22. FAA Order 8000.363, dated June 2015.

23. See, ABA Model Rules of Professional Conduct, Rule 4.2, and similarly worded State rules.

future communications in a matter. Pilots, especially commercial pilots just beginning their careers, often reside at a different location than their “permanent” mailing address.²⁴ Sending communications to that mailing address will sometimes hamper the timeliness of any response. Also, counsel may well have the answer to the FAA’s question, rather than the pilot. For Flight Standards and the Medical Office to refuse to accept a response from an engaged attorney on behalf of a pilot only slows the communications process and, frankly, wastes time on both sides. More importantly, this practice unfairly penalizes pilots who choose to engage counsel to represent them.

The FAA’s Compliance and Enforcement Order does not specifically address this practice of refusing to honor requests by attorneys for the Program Offices to communicate with pilot clients only through counsel. The Order only admonishes Program Offices not to view the engagement of counsel as an “aggravating factor” in determining the proper sanction when referring a matter to the FAA Legal Office.²⁵ To eliminate the apparent unfairness in the process, the Administrator should provide direction to the Program Offices to accept responses from counsel as responses from certificate holders and to view counsel as speaking for the individual certificate holder.

24. See, 14 CFR 61.60, pilots must maintain with the FAA a “permanent mailing address” to continue to exercise the privileges of their certificate, but that address need not be the same as the pilots residential address.

25. 2150.3B, ch. 7, ¶4.d.(1) (pp 7-5 to 7-6) (In evaluating compliance disposition, the FAA does not view an alleged violator as having a poor attitude because the alleged violator fails to respond to a letter of investigation, **chooses to be represented by counsel**, or contests the violation.) (emphasis added)

In conclusion, as I mentioned at the outset, my intent is not to comment on whether Congress should pass the pending Fairness for Pilots Act.²⁶ I offer my observations only to point out that the Administrator can act now, without waiting for Congressional mandate, to address some areas of apparent unfairness for individual certificate holders. The FAA has stated in its Compliance and Enforcement Order that fairness is essential to the effectiveness of the program.²⁷ Therefore, these steps should be a logical application of that policy. And, in adopting these changes, the FAA will not lose any of the investigatory tools it has at its disposal to uncover non-compliance with Federal Aviation Regulations and statutes, and take appropriate action against those who violate them.

26. Although throughout I referred to how pilots of manned aircraft would benefit from these changes in policy and practice, but I do not mean to exclude from those benefits other individual certificate holders (Mechanics, Drone Operators, Flight Engineers, Flight Navigators, Air Traffic Control Tower Operators, Aircraft Dispatchers, Repairmen, and Parachute Riggers).

27. “To be effective, the agency’s compliance and enforcement program must be fair and reasonable and should be perceived as fair by those subject to regulation. This does not and should not imply an unwillingness to apply the full force of statutory sanctions where warranted. It does encompass the right of an apparent violator to be given objective, evenhanded consideration of all circumstances surrounding the allegations before final action is taken. It also requires good faith efforts to understand the apparent violator’s position and take it into account, as well as to apprise the apparent violator of the agency’s position in a timely manner.” FAA Order 2150.3B, ch. 2, ¶3.g. (p 2-3).

Personal Jurisdiction

by:
Alexandra Maloney

PERSONAL JURISDICTION IN THE POST-DAIMLER WORLD

The Supreme Court's 2014 decision in *Daimler AG v. Bauman*¹ drastically altered the scope of a court's ability to exercise general personal jurisdiction over a defendant. The Court ruled that corporations can only be subject to general jurisdiction in states where they are incorporated, where they have their principal place of business, or where they have contacts so substantial in that they could be deemed "essentially at home[.]"² The court rejected the generally applied test that required only that a corporation maintain "continuous and systematic" contacts or business in the forum state.³ In many aviation and personal injury cases, a plaintiff may be from one jurisdiction, the injury or tort may take place in another jurisdiction, and a defendant may be incorporated or have its principal place of business in a third jurisdiction.

The forum where a plaintiff chooses to bring suit can make a dramatic difference in terms of what choice of law will apply and ultimately the amount of damages that can be recovered, as some states set caps on recovery amounts for certain claims or prohibit awards for emotional and punitive damages. By limiting a plaintiff's choice of forums, *Daimler* makes joining all defendants in one

1. 134 S. Ct. 746 (2014).

2. *Id.* 760-62.

3. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984).

forum even more difficult, leading to multiple actions filed in different states against different defendants for the same accident.

Daimler's restriction on general jurisdiction has increased the importance of specific jurisdiction. While establishing specific personal jurisdiction remains viable, the Supreme Court made clear in its judgement in *Bristol Myers Squibb Co. v. Superior Court of California* that the breadth of specific jurisdiction would not expand to compensate for the narrowing scope of general jurisdiction.⁴

Difficulties in Establishing General Jurisdiction

Daimler's effect on aviation and other multi-jurisdictional cases, often seen in products liability actions, has been pronounced and immediate. In *Martinez v. Aero Caribbean*,⁵ for instance, an airplane designed and manufactured by French company Avions de Transport Régional (ATR) crashed in Cuba, killing all passengers and crew onboard. ATR moved to dismiss the wrongful death claims filed against it in California, arguing that the court lacked general personal jurisdiction over the case. Plaintiffs showed that Aero Caribbean maintained contracts "worth between \$225 and \$450 million" to sell airplanes

4. 137 S. Ct. 1773 (2017).

5. 764 F.3d 1062, 1066 (9th Cir. 2014).



ALEXANDRA MALONEY is a law clerk at Kreindler & Kreindler LLP in its New York office and is student at the University of California, Berkeley.

in California, sent representatives to conferences in California to promote their products, and had a number of their planes fly routes through California.⁶ However, both the district court and the Ninth Circuit found that *Daimler* precluded the exercise of general jurisdiction over ATR in California, as their contacts with California were “minor compared to its worldwide contacts.”⁷ The Second Circuit in *Brown v. Lockheed Martin Corp.*,⁸ and district courts in *Lubin v. Delta Airlines*,⁹ and *Siswanto v. Airbus SAS*¹⁰ similarly ruled that plaintiffs could not establish general jurisdiction in their respective forum states, even when defendants leased business space in multiple locations,¹¹ made significant sales and purchases,¹² or advertised extensively in the forum state.¹³

Daimler was further solidified by the Supreme Court’s recent ruling in *BNSF Railway Co. v. Tyrrell*.¹⁴ In *BNSF*, a railroad employee developed fatal kidney cancer after allegedly being exposed to carcinogens at work. The employee’s estate sued BNSF in Montana after his death for damages under the Federal Employer’s Liability Act (FELA), although the employee was not injured in Montana and was a South Dakota resident. BNSF was not incorporated or headquartered in Montana, although a portion of its railroads and employees were located in Montana. While plaintiffs argued their

claim differed from *Daimler* because it was brought pursuant to FELA, the Supreme Court reaffirmed *Daimler*’s “at home” standard in all general jurisdiction cases, holding that courts that did not abide by this standard impeded due process. The Court found that FELA did not change this analysis, since it addressed only subject matter, not personal jurisdiction.¹⁵

In some unique circumstances, however, courts have exercised general jurisdiction over foreign corporations and established standards for being “at home”. In *Barriere v. Cap Juluca*,¹⁶ a Texas resident, Aimee Barriere, fell and injured herself on wet tile at a Cap Juluca facility, a hotel resort corporation based in Anguilla. Barriere brought suit in Florida and the defendant moved to dismiss for lack of personal jurisdiction. The district court found that based on the allegations in the complaint, Cap Juluca was subject to general jurisdiction, as plaintiffs alleged the company maintained a sales office in Florida and conducted business in Florida. In addition, co-defendants Leading Hotels of the World and Hotel Representative, Inc., which did not object to jurisdiction in Florida, allegedly promoted, managed, inspected, and provided reservation services to Cap Juluca, making it an agent for the resort that provided a Florida connection to the tort and distinguishing it from the *Daimler* case.¹⁷

6. *Id.* at 1070.

7. *Id.*

8. 814 F.3d 619 (2d Cir. 2016).

9. No. 3:14-cv-648-CWR-FKB, 2015 WL 4611759 (S.D. Miss. July 31, 2015).

10. 153 F. Supp. 3d 1024 (N.D. Ill. 2015)

11. *Brown*, 814 F.3d at 622.

12. *Siswanto*, 153 F. Supp. 3d at 1029.

13. *Lubin*, No. 3:14-cv-648-CWR-FKB, 2015 WL 4611759 at *3.

14. 137 S. Ct. 1549 (2017).

15. *Id.* at 1550, 1555.

16. No. 12-23510-CIV, 2014 WL 652831 (S.D. Fl. Feb. 19, 2014).

17. *Id.* at 8-9.

“While *Daimler* has undoubtedly limited the application of general jurisdiction [over] foreign defendants, this Court does not view *Daimler* as mandating the complete casting off” of previous precedent, the district judge wrote.¹⁸ “Doing so would effectively deprive American citizens from litigating in the United States for virtually all injuries that occur at foreign resorts maintained by foreign defendants even where, as here, the corporations themselves maintain an American sales office in Florida and heavily market in the jurisdiction.”¹⁹ Similarly, some courts have found that having a registered agent to do business in a forum state means they have consented to personal jurisdiction in that state.²⁰ While the results are small victories for plaintiffs in the struggle to establish general personal jurisdiction, only time will tell if similar cases will set the standards for being “at home” in the wake of *Daimler* and *BNSF*.

Specific Jurisdiction Narrowed

Post-*Daimler*, plaintiffs need to rely more on specific jurisdiction. In *Gucci America Inc. v. Weixing Li*,²¹ plaintiffs alleged that defendants sold and manufactured counterfeits of their products on a Chinese website. A New York district court granted the plaintiff’s motion to compel the defendant’s non-party bank, Bank of China (BOC), to comply with a document subpoena and issued an asset freeze on the defendant’s account, which the bank appealed. The bank was

not headquartered or incorporated anywhere in the United States and conducted business principally in China, although it maintained two branches in New York. In light of *Daimler*, the Second Circuit ruled that the district court erred in asserting general jurisdiction over the bank, but remanded the question of whether the bank could be subject to specific jurisdiction.²² The district court then ruled that because “Gucci’s Subpoenas [were] premised on the fact that Defendants’ proceeds from the sale of counterfeit goods were transferred through BOC’s correspondent account in New York” and was thus key to the counterfeit operation, the court could establish specific jurisdiction over the bank.²³

In *Broadus v. Delta Airlines*,²⁴ the plaintiff purchased a round-trip ticket from Greensboro, North Carolina to Pensacola, Florida with a layover in Atlanta, Georgia. The plaintiff required wheelchair assistance for the flights, which Delta provided. Plaintiff flew from North Carolina to Georgia without incident, but when boarding her flight from Georgia to Florida, the Delta employee assisting her allegedly caused the plaintiff’s knee and back to sustain injuries which required surgery. Plaintiff brought suit in North Carolina and defendants moved to dismiss for lack of personal jurisdiction.

The court employed a “but for” test to determine that the plaintiff’s claims were indeed related to the defendant’s contacts with the forum state: “But for Delta operating its airline business in North Carolina and picking

18. *Id.* at 9.

19. *Id.*

20. See *The Rockefeller Univ. v. Ligand Pharm.*, 581 F. Supp. 2d 461, 466 (S.D.N.Y. 2008) and *Otsuka Pharmaceutical Co., Ltd. v. Mylan Inc.*, 106 F. Supp. 3d 456 (D.N.J. 2015).

21. 768 F.3d 122 (2d Cir. 2014).

22. *Id.* at 125-126, 129.

23. 135 F. Supp. 3d 87, 99 (S.D.N.Y. 2015).

24. 101 F. Supp. 3d 554 (M.D.N.C. 2015).

up Broadus in Greensboro, Broadus would not have been injured during her layover in Atlanta. Therefore, Delta should have anticipated that, as a common carrier promising to pick Broadus up in North Carolina and return her there, it could be hailed into a court in North Carolina, the state of her initial departure and final arrival, for injuries it inflicted on her during the trip.”²⁵ Therefore, the court could properly exercise specific jurisdiction over the defendants and the court denied the motion to dismiss.

In *Spanier v. American Pop Corn Company*,²⁶ plaintiffs sued a number of different popcorn companies along with their butter flavoring suppliers in an Iowa court, alleging that they developed “popcorn lung” (bronchiolitis obliterans) after the daily consumption of multiple bags of the companies’ microwavable popcorn products. Four of the butter flavoring suppliers filed a motion to dismiss the case for lack of personal jurisdiction. None of the companies were located in Iowa, although all supplied butter flavoring to companies with manufacturing plants in Iowa and two had registered agents in Iowa.

The court ruled that the two corporations with registered agents already consented to general personal jurisdiction in Iowa, but cited *Daimler* when ruling it lacked general jurisdiction over the other two companies. All of the defendants, however, were still subject to specific jurisdiction, as “the Spaniers’ cause of action directly arose from or relates to the moving

defendants’ purposeful contacts with Iowa.”²⁷ The court held that although the butter flavoring was manufactured elsewhere, the flavoring was used to manufacture the popcorn products in Iowa and affirmed that the lack of a physical presence in a state does not preclude a corporation from being subject to specific personal jurisdiction there.²⁸

In *Helicopter Transport Services v. Sikorsky Aircraft Corporation*,²⁹ Helicopter Transport Services sued Sikorsky in Oregon for alleged breach of contract and implied warranties. The defendant, a New York corporation with its principal place of business in Connecticut, moved to dismiss the suit for lack of personal jurisdiction. Sikorsky’s wholly owned subsidiary sold replacement parts, and the subsidiary’s Oregon field service agent, based in Canada, offered advice for maintaining and installing new parts for a helicopter that plaintiffs owned, which plaintiffs alleged led to the FAA grounding the helicopter. The court ruled that because Sikorsky purposefully availed itself of the forum by having an agent take action in Oregon, plaintiff’s claims sufficiently “arose or related to” Sikorsky’s action directed at Oregon and was subject to specific jurisdiction.³⁰

27. *Id.* at * 8.

28. *Id.*

29. No. 3:16-cv-2078-SI, 2017 WL 2260068 (D. Or. May. 23, 2017).

30. *Id.* at 1, 12.

25. *Id.* at 559.

26. No. C15-4071-MWB, 2016 WL 1465400 (N.D. Iowa April, 14 2016).

In *Selke v. Germanwings GmbH*,³¹ plaintiffs filed suit in Virginia for negligence claims against United Airlines, Deutsche Lufthansa AG, and Germanwings GmbH and Eurowings GmbH, two wholly owned subsidiaries of Lufthansa. In Virginia, decedents purchased tickets from United for five different flights: a United flight from Virginia's Washington Dulles Airport to Munich, Germany, a Lufthansa flight from Munich to Barcelona, Spain, a Germanwings flight from Barcelona to Düsseldorf, Germany, a Germanwings flight from Düsseldorf to Manchester, England, and finally a United flight from Manchester to Dulles. On the flight from Barcelona to Düsseldorf, Flight 9525, one of the two co-pilots locked himself in the cockpit, resulting in a crash that killed all passengers and crewmembers onboard. Defendants Lufthansa, Germanwings, and Eurowings maintained separate codeshare agreements with United which "wherein United may sell under its own authority passage on one of the other carriers".³²

Defendants Lufthansa, Germanwings, and Eurowings filed motions to dismiss for lack of personal jurisdiction. The court ruled that Eurowings was not subject to personal jurisdiction even though it maintained a contractual agreement with United, as it was not a party to United's ticket sales to the decedents nor did it have any physical presence in Virginia. Lufthansa and Germanwings, however, were ruled to both be subject to personal jurisdiction. Germanwings purposefully availed itself of the forum

by doing business through a registered agent (United) despite having no physical presence in Virginia; similarly, Lufthansa authorized United to sell tickets for its flights in Virginia and also operates numerous flights out of Virginia and employs Virginia citizens. The ticket sales United made were ruled to be the "genesis of the dispute": "if Germanwings had not expressly authorized United to sell tickets on its behalf, the Selke decedents would not have been able to book the 'conjunction tickets' United provided that included passage on Germanwings Flight 9525",³³ making the defendants subject to personal jurisdiction.

Despite these promising trends, it is clear that specific jurisdiction is not going to expand to offset the toll *Daimler* has taken on general jurisdiction. In *Bristol-Myers Squibb Co. v. Superior Court of California*,³⁴ 86 California residents and 575 nonresidents sued Bristol-Myers Squibb (BMS) and pharmaceutical distributor McKesson Corporation in California state court for individual product defect claims related to the blood clot preventative drug Plavix. Plaintiffs suffered serious side effects from the drug and alleged that BMS misrepresented the safety of the drug. BMS advertised and sold Plavix in California, had multiple offices, research facilities, and a government affairs office in California, and based 250 sales representatives in California.

33. *Id.* at *15.

34. 137 S. Ct. 1773 (2017).

31. 1:17-cv-00121-GBL-TCB (E.D. Va. July 20, 2017), available at <https://docs.justia.com/cases/federal/district-courts/virginia/vaedce/1:2017cv00121/358423/52>.

32. *Id.* at *5.

After successfully arguing that no general jurisdiction existed over BMS in California due to *Daimler*, BMS moved to dismiss the claims of non-California resident plaintiffs for lack of specific personal jurisdiction, as they did not manufacture Plavix at its California facilities, and the nonresident plaintiffs were not prescribed Plavix in California, nor were they affected by Plavix in California. The California Supreme Court held that there was specific jurisdiction over BMS for the non-resident defendants, ruling that plaintiffs' claims were "based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product" as part of a "common nationwide course of distribution".³⁵

The U.S. Supreme Court, however, agreed with BMS and reversed. The Court held that "for a court to exercise specific jurisdiction over a claim there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'"³⁶ This meant that there was no specific jurisdiction in California over the defendants for the non-California plaintiffs' claims, as nonresident plaintiffs did not claim they received or took the drug in California nor was the drug marketed

to them in California.³⁷ While the long-lasting effect of this ruling has yet to be seen, the *Bristol-Myers* decision demonstrates that plaintiffs will not be able to extend the breadth of specific jurisdiction to atone for new restrictions *Daimler* set on general jurisdiction.

Conclusion

Daimler and *BNSF* reflect growing trends towards court decisions sympathetic to corporate defendants, making a plaintiff's already onerous task of litigating a multi-jurisdictional lawsuit more difficult. As courts have rejected general jurisdiction claims, plaintiffs have responded by turning towards establishing specific jurisdiction, maintaining that a defendant's physical presence in a forum state is not necessary to establish specific jurisdiction if they direct acts at the forum that forms part of the alleged tort. Of course, specific jurisdiction may only be applicable in a state that does not favor a plaintiff and will not be extended to compensate for general jurisdictional losses, further adding to the uphill battle plaintiffs will face to obtain personal jurisdiction in the forum of their choice.

37. *Id.* at 1175.

35. *Bristol-Myers Squibb Co. v. Superior Court*, 1 Cal.5th 783, 804 (2016).

36. 137 S. Ct. 1773, 1776 (2017), quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918 (2011).

IATSBA Luncheon March 24, 2017



The March 24, 2017 IATSBA luncheon in New York was well attended. Members heard from NTSB ALJ Montaño and FAA enforcement division attorney Brendan Kelly.

The Danger of Bird Strikes

by:
Scott Brooksby

THE DANGER OF BIRD & ANIMAL STRIKES IN AVIATION: WHAT CAN BE DONE?



SCOTT BROOKSBY

is a partner at Olson Brooksby PC in Portland, OR. He represents a broad spectrum of clients throughout the aviation industry, including airlines; aircraft owners; component manufacturers; insurers; and helicopter owners and operators. Scott also represents other industry manufacturers in a broad range of product liability, personal injury and commercial litigation matters. He is counsel to many corporations in various other industries, including transportation, retail, food, toy, steel, heavy equipment, machine manufacturing, and others. Scott is primarily a trial lawyer, and he has tried cases throughout Oregon's state and federal courts. Scott is active in numerous aviation and product liability professional organizations.

Bird strikes pose an increasing danger to commercial, military and general aviation and have resulted in hundreds of deaths and serious injuries to passengers and crew, and hundreds of millions of dollars in damage to aircraft. Bird strikes are the second leading cause of death in aviation accidents.

According to Boeing, the first bird strike was recorded by the Wright Brothers in 1905. Now, aircraft-wildlife strikes are the second leading cause of aviation-related fatalities. Globally these strikes have killed over 400 people and destroyed more than 420 aircraft.

The greatest loss of life directly linked to a bird strike was on October 4, 1960, when a Lockheed L-188 flying from Boston as Eastern Air Lines Flight 375, flew through a flock of common starlings during take-off, damaging all four engines. The aircraft crashed into Boston harbor shortly after takeoff, with 62 fatalities out of 72 passengers. Subsequently, minimum bird ingestion standards for jet engines were developed by the FAA.¹

Other notable bird strike incidents include:

- A 1988 Ethiopian Airlines Flight 604 incident which sucked pigeons into both engines during takeoff and then crashed, killing 35 passengers.
- In 1995, a Dassault Falcon 20

crashed at a Paris airport during an emergency landing attempt after sucking lapwings into an engine, which caused an engine failure and a fire in the airplane's fuselage; all 10 people on board were killed.

- On September 22, 1995, a U.S. Air Force Boeing E-3 AWACS aircraft (Call sign Yukla 27, serial number 77-0354), crashed shortly after takeoff from Elmendorf AFB. The aircraft lost power in both port side engines after these engines ingested several Canada geese during takeoff. It crashed about two miles (3 km) from the runway, killing all 24 crew members on board.

In addition to nearly 500 bird species, the last decade included reported wildlife strikes involving a multitude of animals including mongoose, bears, badgers, moose, pigs, burros, horses, and even camels, in addition to 137 reptile strikes.

For one of the most comprehensive scientific reports on the factual and regulatory issues associated with animal strikes, see, "Wildlife Strikes to Civil Aircraft in the United States, 1990-2001", United States Department of Agriculture, Federal Aviation Administration, United States Department of Agriculture, July, 2012. Report published for the Federal Aviation Administration Office of Airport Safety and Standards.²³

2. [Wildlife Strikes to Civil Aircraft in the United States 1990-2011](#)

3. [Memorandum of Agreement Between the Federal](#)

1. [Strategies for Prevention of Bird-Strike Events](#)

Potential Liability for Airport Operators

The USDA's Airport Wildlife Hazards Program plays a leading role in the supervision and management of wildlife strikes with aircraft. While a complete analysis of the wildlife management issues facing airports is beyond the scope of this presentation, the management challenges are by no means limited to birds. Airports across the country are struggling with wildlife management.⁴

The USDA notes that airport managers must exercise due diligence in managing wildlife hazards to avoid serious liability issues. The U.S. Code of Federal Regulations requires that Part 139-certificated airports experiencing hazardous wildlife conditions as defined in 14 C.F.R. Section 139.337 to conduct formal Wildlife Hazard Assessments.

The certificated airports must develop Wildlife Hazard Management Plans as part of the certification standards. Airports are required to employ professional biologists trained in wildlife hazard management. (14 C.F.R. Section 139.337 and FAA Advisory Circular 150/5200-36). Failure to comply with the regulations can give rise to liability for airport operators.

The U.S. Department of Agriculture prepared a comprehensive overview of the applicable statutory and regulatory scheme, methods of airport management wildlife, special circumstances management, type-certification codes triggering particular

[Aviation Administration and, the U.S. Air Force, the U.S. Army, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture to Address Aircraft-Wildlife Strikes](#)

4. "Keeping Wildlife Off Tarmac is Big Job at Pittsburgh International Airport", John Hayes, Pittsburgh Post-Gazette, January 17, 2016

aspects of USDA wildlife management plans and factual data on strikes.⁵

Data Sampling

According to Boeing, the relevant wildlife strike facts include:

- More than 219 people have been killed as a result of bird strikes since 1988.
- Between 1990 and 2009, bird and small and large mammal strikes have cost U.S. civil aviation \$650 million per year.
- The Air Force sustains approximately \$333 million dollars in damage per year due to bird strikes.
- About 5,000 bird strikes were reported by the Air Force in 2012.
- About 9,000 bird and other wildlife strikes were reported for U.S. civil aircraft in 2009.
- The FAA has identified 482 species of birds involved in strikes from 1990-2012.
- Between 2001 and 2011, 4066 engines were damaged in 3,935 bird strikes. This resulted in a wide range of outcomes including aborted takeoffs, engine shutdowns, and crashes.

Factors Contributing to the Rise in Bird Strikes

1. The North American non-migratory Canada goose population increased from 1 million birds in 1990 to 4 million birds in 2009. Concentrations are particularly high at JFK airport and surrounding regions, with the ample grass and wetlands, but populations of various sizes are found near airports across the country.
2. A 12 pound Canada goose struck by an airplane moving at 150 miles per hour during takeoff generates the kinetic energy of a 1000 pound weight dropped from a height of ten feet.

5. [Protecting the Flying Public and Minimizing Economic Losses within the Aviation Industry](#)

3. Nesting populations of bald eagles increased from 400 pairs in 1970 to 13,000 pairs in 2010. Between 1990 and 2009, 125 bald eagle strikes were reported. The body mass of a bald eagle is 9.1 pounds for males and 11.8 pounds for females.

4. Finally the population of European starlings is now the second most prevalent bird in America, numbering over 150 million. Often called “silver bullets,” they fly at high speed and have a body density that is 27 percent greater than gulls.

Prevention

In January 2009, U.S. Airways Flight 1549 landed on the Hudson after multiple Canada goose strikes in flight. As a result, New York City Mayor Michael Bloomberg declared war on geese.⁶ A mayoral steering committee gave the go ahead to the USDA to cull geese in a 450 mile area encompassing JFK, LaGuardia and Newark airports.

Other means of wildlife control include:

- Each summer teams of USDA goose catchers capture geese which, in the molting condition cannot fly, including offspring which are then take to slaughterhouses and dispatched. Between 2009 and 2010, 2911 geese were killed.
- The USDA reports that 80% of Canada geese are resident, and remain in place, rather than migrate. The government and airport operators strongly advocate for the culling of non-migratory birds.
- Discouraging nesting and grazing.
- Letting grass grow taller, planting

unpalatable grasses, reducing standing rainwater, and oiling eggs to prevent hatching.

- Firing pyrotechnics and propane cannons.
- Culling.
- Chemical repellants.
- Population exclusion.
- Visual repellants.
- Tactile repellants.
- Relocation.

Preventative Regulations for Manufacturers

In response to the Eastern Airlines crash in Boston in 1960 mentioned above, The FAA issued Advisory Circular 33-1 “Turbine Engine Foreign Object Ingestion and Rotor Blade Containment Type Certification Procedures,” which provided guidance for compliance with FAA regulations §3313 and §3319 requiring that engine design minimize unsafe condition.

While the discussion of required fan and engine construction related to bird and animal strikes is beyond the scope of this material, Christopher Demers’ article from the 2009 Bird Air Strike North America Conference is an excellent resource.⁷

Conclusion

Given the rapid growth of non-migratory birds at some of the busiest airports, and the dramatic increase in flights, it may only be a matter of time before a catastrophic bird or wildlife strike will happen again, with more disastrous results than the extraordinary landing of Flight 1549 on the Hudson.⁸

⁶ [Suzanne Goldenberg, “New York Declares War on Geese to Prevent Airport Bird Strikes, The Guardian \(June 12, 2009\).](#)

⁷ [Christopher Demers, “Large Air Transport Jet Engine Design Considerations for Large and Flocking Bird Encounters”. DigitalCommons @ University of Nebraska-Lincoln \(2009\).](#)

⁸ [NTSB Accident Report Executive Summary.](#)

Russian Space Program Investigations

by
Joseph Richard Gutheinz, Jr.

The Russian Space Program and Mir Space Station Investigations:

Truth with Consequences// Правда с последствиями

Russian Space Program Investigations

I met him in a dive of a restaurant that he liked to frequent and he had an appetite that bested my own, which was hard to do. I walked in and he had already started eating. I took out my badge and discretely identified myself as Joe Gutheinz, a Senior Special Agent with NASA Office of Inspector General (OIG). He already knew I was investigating the double standard that existed between how American Astronauts were treated in Star City, Russia's version of Johnson Space Center, and how Russian Cosmonauts were treated at Johnson Space Center (JSC), but my new highly placed informant had a story that would trump that. He told me how a NASA contractor was threatened in Building 3 at Johnson Space Center, and how that threat was reported to NASA and nothing happened. The contractor reportedly knew of the existence of million dollar homes at Star City, and when he made the mistake of going public about those homes, a Russian official, possibly tied to the Russian mob, gave him a not too subtle warning, right under the noses of NASA security, a warning that basically said, back off!"

I began looking into the mansions and found that they were a badly kept secret at Star City, as such million dollar mansions stood out in sharp contrast to the decaying buildings of Star City. I

learned of Cosmonauts, Generals and Russian bureaucrats, by name, who owned the mansions and other luxuries such as one General who had a Lincoln Town Car, central heating and modern appliances. The question everyone had, but failed to raise officially, was how could bankrupt, space agency bureaucrats live in such luxury, in some cases in three story mansions with elevators. The suspicion was that either NASA or European Space Agency (ESA) funds were being diverted from contributions to the Mir or other joint projects with Russia's Space Program to support the lavish lifestyle of a few. I was quickly getting an introduction to Russian Capitalism 101.

My investigation started to gravitate towards allegations of the presence of the Russian mob at Star City; to include the theft of NASA vehicles, the theft of a washer and dryer when in route to a NASA astronaut's cottage; the theft of building materials and parts of the astronaut's cottages; bribes solicited, and paid for the privilege of having a passport pass scrutiny when astronauts and others tried to leave Russia; allegations that former KGB agents were assigned to drive astronauts to track their activities, etc. I already knew that Russian Space Program Cosmonauts and Ukrainian Payload Specialists were unilaterally being paid NASA salaries by NASA, in violation of international agreements



JOE GUTHEINZ has been labeled the Moon Rock Hunter by the New York Times, Irish Times and by the History Channel, for his, and his students, successful efforts to find and recover missing Apollo era moon rocks. He is a lawyer and college instructor and a retired NASA OIG Senior Special Agent. He holds six college degrees, eight teaching credentials and eleven law licenses. He has received awards from six Federal agencies, one state and one county, to include the NASA Exceptional Service Medal and the President's Council on Integrity and Efficiency Career Achievement Award.

that called for reciprocity in the treatment of Cosmonauts and Astronauts by the host countries.

Further, NASA was not withholding taxes from these Cosmonauts and Ukrainian Payload Specialists. There was also talk that some of these Cosmonauts' salaries were being paid, in part, to top people back in Russia. American Astronauts and other personnel at Star City and the TsUP (Russia's Mission Control) were not only not being paid by Russia but were subject to real dangers. For example, equipment in the TsUP was not properly grounded, resulting in electrical shocks. The Astronauts' cottages would not meet basic American safety standards, such as the guard rails on their steep stairs.

At NASA, you have two types of attitudes towards Russia, those that worry about Russia and Russians, and those that do not. The first type, I suppose, you could categorize as cold warriors, who I see as pragmatists. The latter may be categorized as visionaries, who I see as naïve. With notable exceptions, the closer you climb to the top at NASA, the more likely you were going to be dealing with a visionary, and the closer you were to those protecting NASA's secrets, the more likely you would be a cold warrior. Visionaries and cold warriors were often at odds and as the visionaries controlled the reins of power at NASA, so too did they seek to control and muzzle the cold warriors.

Mir Space Station Fire

On February 24th, 1997, at a time I was already scrutinizing the Mir, something happened that triggered a hyper-political war between the cold warriors and visionaries at NASA, and between NASA visionaries/management and Congress, and that was the fact that a fire broke out on the Mir endangering the life of Astronaut Jerry

Linenger as well as the Cosmonauts on board. In an instant, my mission changed from investigating the Russian Space Program to investigating the Mir, to the exclusion of all else. While the NASA visionaries were telling Congress and the press that the fire was no big problem, and great training for the future International Space Station, I was being told the truth by people who were in direct contact with the facts. The truth was that the Cosmonauts and Astronauts could have died on the Mir; that the fire lasted longer than reported; that safety equipment did not work; that Russia engaged in a cover-up, and that Jerry Linenger's report detailing the risks associated with the fire were held up for nearly a week. These are the facts about the Mir fire.

What my fire investigation revealed was that the fire broke out due to a defect with the Solid Fuel Oxygen System, a backup system that had to be used as two crews were onboard totaling six Cosmonauts and Astronauts, rather than the standard 3. The defect in the Solid Fuel Oxygen System caused a stream of fire to reach out over 6 feet, putting the bulkheads in jeopardy. Linenger and the Cosmonauts were unable to put the fire out and ended up spraying the bulkheads to prevent a rupture. Because of a lack of gravity in space, the smoke fanned out throughout the Mir, and it was impossible to get above or below it. Visibility was near zero and when Linenger reached a fire extinguisher to fight the fire he was shocked to find it was bolted down.

Adding literal injury to insult, a portable breathing apparatus he tried to use was not operational. Linenger had conflicting feedback from the Cosmonauts with the Commander saying they would not abandon the Mir and another playing double duty fighting the fire with one hand while calculating a deorbit with the other. This

was almost an academic drill as one of the escape Soyuz was blocked by a flame of fire and easy access to the other was blocked by debris and clutter, but regardless, could only transport 3 crew members, leaving 3 behind. It was impossible to limit the spread of smoke throughout the Mir, as clutter, cables and wires, winding throughout the Mir prevented hatch doors from timely being closed.

On the ground was a problem of a different kind. NASA was in the dark about the fire initially, as Russia, which depended on an influx of NASA dollars, was not giving NASA the bad news about the fire. NASA personnel, who worked at the TsUP, to include Linenger's ground support team, had to demand information after it became obvious that something was going on. Further, a report Linenger wrote accurately describing the fire was held up by Russian personnel at the TsUP for almost a week until the false narrative Russia put out on the fire took hold in the press. The Russians said the fire lasted for 90 seconds and was no big deal, and the truth was it lasted for 14 minutes could have suffocated the crew or burned a hole in the Mir's bulkhead, venting atmosphere.

Investigating the Mir fire had its own challenges. Personnel who I interviewed were briefed and debriefed after I interviewed them by NASA personnel. The word had been put out that NASA personnel did not have to cooperate with the OIG. I was told by some that they feared talking to the OIG, as NASA and Russian management would be quick to punish perceived disloyalty. There were also complaints about a NASA Special Agent, me, investigating this case, as NASA Management said this was not a criminal investigation. Of course, the fact that I was discerning information at odds with what NASA was telling

Congress did not help.

At some point, NASA OIG Inspections, an administrative investigative arm of NASA OIG took the lead and I was assigned to support that investigation. The Inspectors had their own issues with NASA and were denied access to an "independent" Stafford Committee review of the Mir.

Mir Space Station Collision

As I was finishing up my investigation of the Mir fire, on June 25, 1997, the unmanned resupply ship Progress crashed in the American made Spektr module of the Mir. What I discerned from my investigation was that because the crew could not timely severe the tubes, wires and cables linking the Spektr to the rest of the Mir, and as the oxygen was venting out of the Mir, the crew was required to abandon ship but didn't. For both the fire and collision, NASA was telling Congress, which was also investigating the Mir, that everything was under control and it was great training, but it wasn't, what it was, was a life and death struggle.

The investigation further disclosed that Russia used a remote-control docking procedure to dock the Progress into the Mir to save money and do away with their long reliance on Ukrainian technology to dock the Progress. The technique used almost resulted in disaster in a previous mission, and numerous simulated practice runs on the ground resulted in one simulated disaster after the next, a fact not shared with NASA. This time it was British born Astronaut, Michael Foale, who was onboard; as a Cosmonaut had to eyeball the accuracy and speed on the incoming Progress as he tried to dock it with the Mir and missed causing the collision with the Spektr module.

PAR Tapes Theft

On July 18, 1997, I learned that 37 Prelaunch Assessment and Review

(PAR) tapes, requested from by the James Sensenbrenner House Science Committee, had turned up missing from room 2150, in building 9NW of Johnson Space Center (JSC). I learned that the theft had been uncovered 4 days earlier, but not timely reported to the OIG. My investigation discerned that the only people known to have gained unauthorized access to the room were a group of unidentified Russians stationed at JSC. One key listed for that room was unaccounted and was reported to have been inadvertently thrown away, but NASA Security also had a master key to the room.

After I conducted my investigation of the theft, I learned that on two of these tapes individuals from various NASA Center's voiced their concerns that were highly critical of Mir safety and categorically opposite of the rosy story Congress was being told. As this was a theft at NASA, it clearly fell exclusively within the purview of Investigations and therefore Inspections was benched on this case. I opted to reconstruct these tapes by interviewing each person that was in on the meetings. My goal was to defeat the apparent intent of the theft by putting a spotlight on the Mir safety issues that were apparently being hidden from Congress.

My interviews of key NASA personnel who participated in the PAR meetings revealed a consensus that the Mir was a disaster waiting to happen. The experts reiterated what I already knew about the fire and collision but gave me new insights about both. For example, I learned that when a loss of atmosphere in the Mir would become critical within 45 minutes the astronaut and Cosmonauts had a duty to abandon the Mir. The Cosmonauts calculated after the collision that the critical point would be reached in 28 minutes and disregarded flight safety rules by staying, stranding Michael

Foale, with them. It took 20 minutes and not the required 3 minutes for the crew to close the hatch on the Spektr module, leaving a bare 8 minutes before impending death. One expert opined that the Oxygen Generation System was inherently dangerous and should not have been used.

The Mir was described as crumbling, operating well beyond its projected usable life and subject to computer and power outages that would leave it, from time to time hurdling through space, out of control. The coolant system leaked non-stop and was in the lungs and eyes and even drinking water of the Astronauts and Cosmonauts. There was even one time when the contaminated water had to be smuggled off the Mir to be tested, as Russia could not be trusted to tell the truth.

The clutter alone on the Mir was dangerous and made the constant repairs on the Mir time consuming and hazardous. The clutter also had an adverse impact on the Mir's cooling system. Cosmonauts would make unnecessary and dangerous space walks as way of securing bonuses and to remain in good favor with ground operations.

In the end, it all came down to money. Without the influx of NASA dollars, the Russian Space Program would collapse and Congress did not permit us to directly give the Russian Space Program money. So, we put Astronauts lives in danger to justify paying Russia for the privilege of flying on a possible death trap. Our goal was to transfer enough money to Russia so that they could meet their obligations to the construction of the International Space Station. The Visionaries won out and the International Space Station was constructed, but the question is, next time will their luck hold?

2018 Conference

SPRINGTIME IN WASHINGTON, D.C. 2018

“Latest Developments at the FAA, NTSB, DOT, and Around the Country in Aviation and Transportation Law”

The International Air and Transportation Safety Bar Air & Transportation Law Conference is now set for May 16-19, 2018 in Washington, D.C. We are pleased to be able to return to the Capitol Holiday Inn, located at the corner of “D” and “C” Streets. The hotel is located only four blocks from the FAA, only five blocks from the NTSB, and is conveniently located to the Smithsonian museums including the National Air & Space Museum, only blocks away from the National Museum of the American Indian, the U.S. Capitol, and many more D.C. opportunities. Reserving your room at the Holiday Inn now will insure that you will be staying in the most convenient location to explore the sights while also being located directly onsite for the IATSBA conference.

[Click here](#) to book your room now at the specially negotiated conference rate of \$229 per night, a savings of over \$200 compared to the rack rate.¹ A limited number of rooms is being held at this low rate. Booking must occur before April 16, 2018 to

1. Holiday Inn Capitol (550 C Street, SW Washington, DC 20024). IATSBA group for check-in beginning Wednesday, May 16, 2018, check-out Sunday, May 20, 2018. Please note, this rate does not include 14.8% DC tax. You may also make reservations by calling 1 877-572-6951 and referencing group name and booking code T8S. Credit card information is needed at time of reservation. Individual cancellation policy is 72 hours prior to date of arrival to avoid one night's room plus tax cancellation charge on credit card provided. Please call 1-877-572-6951 and reference your confirmation number. Please obtain a cancellation number when cancelling a reservation. Deadline date to make reservation is Monday, April 16, 2018.

obtain this rate. The Holiday Inn has graciously extended this rate through the weekend, May 21, 2018, so that conference attendees can stay over to enjoy the Washington, D.C. springtime. All members and non-member attendees are encouraged to make their reservation today. Reservations may be cancelled within 72 hours of arrival at no charge.

For all of you who book your Capitol Holiday Inn room early, you will be entitled to a discounted registration rate when registration opens shortly. The full agenda of conference speakers, panels, and networking activities will be posted at that time for your review. You can visit our website for further up-to-minute details, <https://iatsba.org/save-the-date-may-16-19-2018-washington-dc/>.

You will also be assured of a place at the Gala Dinner on Friday night, May 18, 2018. This year's Gala Dinner will take place at the historic Army Navy Club on Farragut Square. The Club's beautiful Main Dining Room will host what is sure to be a lovely dinner, as well as the presentation of this 2018's Joseph T. Nall Award.

We look forward to seeing all of you in Washington, D.C. to catch up on all of the latest developments on Capitol Hill and across the country. If you have any questions, please do not hesitate to contact [Jim Waldon](#) or [Vincent Lesch](#).

SPECIAL THANKS TO OUR SPONSORS:

Holland & Knight

MICHAEL L. DWORKIN & ASSOCIATES

KREINDLER

THE LAW OFFICE OF TONY B. JOBE

P L G
Paramount Law Group



THE ARMY NAVY CLUB



IATSBA Membership

Name: _____

Firm/Company/Affiliation: _____

Address: _____

City: _____ State: _____ Zip: _____

Work Phone: _____ Fax Number: _____

Email: _____ Website: _____

Membership Directory Listing/Area of Practice:

PLEASE CIRCLE MEMBERSHIP TYPE

Checks are to be made payable to "IATSBA" and sent to the mailing address below.
Online application and payment by credit card at www.IATSBA.org.

Regular/Full Annual Membership: ----- \$119.00

Federal Government Annual Membership: ----- \$59.00

Recent Law School Graduate Annual Membership:

(Within two years of graduation from law school) ----- \$49.00

Law School Student Annual Membership: ----- NO CHARGE

Associate Annual Membership

(Associate Membership is for those not eligible for a Regular/Full Membership.)

Associate Membership is non-voting. There are two types of Associate Membership.)

Associate with listing: ----- \$129.00

(May list credentials in Membership Directory - use the lines provided above.)

Associate without listing: ----- \$119.00



International Air & Transportation Safety Bar Association

PO Box 5035 • Frederick, MD • 21705-3035 • Tel: 757-777-8769 • Fax: 800-886-4685