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CALL FOR A CONGRESSIONAL INQUIRY INTO THE ARBITRARY AND CAPRICIOUS DECISIONS OF THE NATIONAL TRANSPORTATION SAFETY BOARD

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I. INTRODUCTION

IN RECENT YEARS, the aviation enforcement bar has witnessed repeated and unfounded departures by the National Transportation Safety Board (NTSB or Board) from established precedent in a manner that offends any notion of due process. The beneficiary of this misconduct by the Board has been the Federal Aviation Administration (FAA or Agency). This behavior by the Board has created a climate in which pilots and their lawyers understand that the Board is no longer capable of fulfilling its statutory obligation to adjudicate enforcement actions brought by the FAA against airmen. Rather than acting as an impartial arbiter in FAA enforcement cases, the Board now functions as an ally of the FAA in pilot enforcement actions. The inability of the NTSB to properly function as an impartial appellate tribunal has created a crisis in the aviation enforcement system.

Since the NTSB now administers rogue justice without regard to its own rules or established precedent, any airman who desires to achieve a semblance of due process must have the resources to vigorously and effectively pursue and execute the following steps:

1. Meaningfully participate in a hearing before an NTSB law judge, including setting up and preserving necessary af-

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firmative defenses and perfecting the record so that the NTSB and the FAA cannot maintain during any appeal from the initial decision or during an appeal from an NTSB appellate decision to a U.S. court of appeals that the pilot has “waived” his affirmative defenses;

2. Prosecute an appeal to the NTSB if the pilot is unsuccessful at the hearing or effectively respond to any appeal brought by the FAA if the pilot has prevailed at the hearing before an administrative law judge of the NTSB; and
3. Effectively prosecute an appeal to the U.S. Court of Appeals for the District of Columbia or other appropriate circuit court of appeals in the event the airman receives an adverse decision from the NTSB.

No longer can the airman and his counsel reasonably expect the Board to provide the airman with due process of law under the Fifth Amendment to the U.S. Constitution or even address constitutional challenges to misconduct by the FAA. In fact, in a recent line of Board decisions, the NTSB has declared, quite remarkably, that it will *not consider constitutional challenges* raised by the airman in litigation before the Board.¹ This disturbing trend all but ensures that any airman who challenges the FAA’s decision to ignore its own rules, regulations, or policies will be compelled to seek justice before a U.S. circuit court of appeals.

With all due respect to the NTSB, it is sacrificing the constitutional rights of airmen to due process and fundamental fairness due to a misguided belief that it must ensure “aviation safety” at any cost. The consequence of this behavior is that the aviation community increasingly realizes that the NTSB is not a fair and

¹ See Murphy, N.T.S.B. Order No. EA-5355, 2008 WL 205095 at *3 (Jan. 16, 2008). The Board declared:

Respondents contest the arguments in Administrator’s appeal and urge the Board to affirm the law judge’s decision. They argue that due process of law binds the Administrator to follow the policy adopted in 86.1. . . .

The Board will not review the Administrator’s determination to pursue a matter through legal enforcement action. This is a matter of jurisdiction. Jurisdiction “commences with the filing of a petition for review of an order of the Administrator and does not extend to an evaluation of the procedural steps leading to the issuance of that order.”

Id.; see also Moshea v. NTSB, 570 F.3d 349, 352–53 (D.C. Cir. 2009) (rejecting the Board’s holding that it lacked jurisdiction to consider the airmen’s argument that the FAA had violated its own policy in failing to afford Moshea a waiver of sanction under FAA Advisory Circular 00-58).

impartial arbiter of justice in the United States.² As the Board has lost its capacity to fairly administer justice, it has, in turn, lost the respect of practitioners who appear before it.³

The Board would posture as though *Congress is the villain* in this situation. Consider the following declaration by Robert V. Combs of the Office of General Counsel of the NTSB:

Unless and *until Congress changes the NTSB's statutory charter*, the Board's role is not really to adjudicate controversies between the FAA and airmen, as one writer has recently suggested, but rather it is to "amend, modify, or reverse" an "order of the Administrator" that "amend[s], modif[ies], suspend[s], or revoke[s]" an airman's certificate. In accomplishing that role, the Board is "bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written policy guidance available to the public related to sanctions . . . unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law."⁴

In the same professional journal where the comments of Mr. Combs were published, the author wrote:

In a recent case, the National Transportation Safety Board (NTSB) has declared that the FAA can ignore the unambiguous provisions of its Compliance and Enforcement Program, FAA Order 2150.3A (the "Enforcement Handbook") and take certificate action against pilots even though the Handbook mandates issuing a warning letter. This unfortunate decision issued by the NTSB confirms that the members of the NTSB do not appreciate or fully comprehend their function in dealing with enforcement litigation. The NTSB no longer possesses the resolve to stand up to the FAA when the FAA fails to enforce or follow its own internal policies and procedures. The decision of the NTSB which is

² John Yodice, *NTSB: An Impartial Forum for Pilots?*, AOPA PILOT, Aug. 2009, at 40.

³ See *id.*

Notice that every one of these issues, without exception, went against the pilot and in favor of the FAA, all without granting the pilot the hearing, which the Act contemplates, to put on his side of the case. This would not be so remarkable if it stood alone, and not in the context with the many other cases we have seen, many of which we have reported, in which the NTSB one-sidedly seems to favor the FAA and disfavor pilots.

Id.

⁴ Robert V. Combs, *The Enforcement Docket*, LAWYER-PILOTS BAR ASS'N J., Spring 2008, at 31 (citing 49 U.S.C. § 44709(d) (2006)) (emphasis added).

the topic of this article is evidence that the aviation enforcement system in the United States of America is a *dysfunctional system*.⁵

It is the author's assessment as well as the assessment of U.S. appellate court judges in any number of cases discussed in this article⁶ that the Board fails to grasp elementary legal principles such as following binding precedent,⁷ deferring to the findings of fact made by NTSB administrative law judges,⁸ and requiring the FAA to follow its own rules,⁹ among others. However, to the extent the Board's refusal to dispense justice consistent with basic due process principles is the *fault of Congress*, then an investigation by Congress into the conduct of the NTSB in aviation enforcement proceedings is essential if the problems discussed in this article are to be corrected.

In the remainder of this article, we will review a number of cases that graphically illustrate how the Board increasingly acts in an arbitrary and capricious manner contrary to the constitutional rights of airmen in the context of the scope of review applied by appellate courts pursuant to § 706 of the Administrative Procedure Act (APA).¹⁰ In fact, while the Board will not, in the current climate, reach constitutional issues raised by airmen, the U.S. circuit courts of appeal, in reviewing decisions of the Board, are required to:

[H]old unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

⁵ Alan Armstrong, *NTSB Issues an Order Declaring that the FAA Can Ignore Policies in its Own Enforcement Handbook*, LAWYER-PILOTS BAR ASS'N J., Spring 2008, at 16 (emphasis added).

⁶ See, e.g., *Moshea*, 570 F.3d at 352; *Andrzejewski v. FAA*, 548 F.3d 1257, 1260–61 (9th Cir. 2008); *Ramaprakash v. FAA*, 346 F.3d 1121, 1125–30 (D.C. Cir. 2003); *Wedding v. NTSB*, 96 Fed. App'x 527, 528 (9th Cir. 2004).

⁷ *Ramaprakash*, 346 F.3d at 1125–30; *Andrzejewski*, 548 F.3d at 1260–61.

⁸ *Andrzejewski*, 548 F.3d at 1260–61; *Wedding*, 96 Fed. App'x at 528.

⁹ *Ramaprakash*, 346 F.3d at 1125–30; *Moshea*, 570 F.3d at 352.

¹⁰ See 5 U.S.C. § 706 (2006).

- (F) unwarranted by the facts to the extent that the facts are subject to a trial de novo by the reviewing court.¹¹

II. THE LEGAL LANDSCAPE

A. THE EXPECTATIONS OF AIRMEN THAT THEY WILL RECEIVE DUE PROCESS OF LAW

Certificated airmen in the United States have a reasonable expectation that they will be afforded fairness and due process prior to the suspension or revocation of their certificates in any proceeding before the NTSB. The expectation is based on the fundamental right to due process under the Fifth Amendment to the Constitution of the United States which provides: "No person shall be . . . deprived of life, liberty or property, without due process of law."¹²

When an airman is the focus of an action to suspend or revoke his certificate, he will not be provided a hearing before a jury of his peers. Rather, he will have a hearing conducted by a hearing officer denominated as an administrative law judge (ALJ) employed by the Board.¹³ The ALJ is governed by the provisions of the APA and is required to give consideration to "facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit."¹⁴ Generally, the ALJ is authorized to administer oaths, issue subpoenas, rule on offers of proof, receive relevant evidence, take depositions or have them taken, regulate the course of the hearing, hold conferences for settlement or to simplify the issues in the case, inform the parties of the availability of alternate dispute resolution mechanisms, require attendance at conferences, dispose of procedure requests, and render decisions in accordance with § 557 of the APA.¹⁵

Congress has directed that any airman who takes issue with an action brought by the FAA to suspend or revoke his certificate may appeal the order of to the NTSB.¹⁶ When the Board conducts the appeal, it shall, "[a]fter notice and an opportunity for a hearing, modify, or reverse the order when the Board finds . . .

¹¹ 5 USC § 706 (2)(A)–(F).

¹² U.S. CONST. amend. V.

¹³ 49 C.F.R. § 821.1 (2008) ("*Law judge* means the administrative law judge assigned to hear and preside over the respective proceedings.").

¹⁴ 5 U.S.C. § 554(c)(1) (2006).

¹⁵ 5 U.S.C. § 556(c)(1)–(11) (2006).

¹⁶ 49 U.S.C. § 44709(d)(1) (2006).

that safety in air commerce or air transportation and the public interest do not require affirmation of the order.”¹⁷

One reason airmen are currently unable to receive due process of law from the Board arises from 49 U.S.C. § 44709(d)(3), which provides:

When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.¹⁸

The foregoing deference provision was put in place by Congress as part of the FAA Civil Penalty Administrative Assessment Act of 1992.¹⁹ Unfortunately, the Board has, in recent years, used § 44709(d)(3) as an excuse to refuse due process to pilots on the theory that Congress has tied the Board’s hands.²⁰ As an explicit illustration of this point, the FAA has promulgated the FAA Compliance and Enforcement Program (the Enforcement Handbook).²¹ The Enforcement Handbook has, among other

¹⁷ 49 U.S.C. § 44709(d)(1)(A).

¹⁸ 49 U.S.C. § 44709(d)(3).

¹⁹ Reina, N.T.S.B. Order No. EA-4552, 1997 WL 285022, at *1 (May 23, 1997).

²⁰ The Board’s staff attorneys are clearly of the belief that the Board does not “adjudicate controversies” because that is contrary to the Board’s “statutory charter.” See Combs, *supra* note 4, at 31. The belief that the Board does not adjudicate legal issues between airmen and the FAA is echoed by the language employed by the Board in *Murphy* where, in response to the airmen’s assertion that to allow the FAA to punish pilots in violation of FAA Enforcement Bulletin 86-1 violated their rights to due process, the same argument as that advanced by Combs appeared in the Board’s decision, i.e. “The Board’s charter prevents that.” *Murphy*, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at *3 (Jan. 16, 2008). The author submits that the use of the term “charter” in Combs as well as in *Murphy* is not a coincidence. Clearly, the Board’s counsel maintain that addressing constitutional issues are beyond the “jurisdiction” of the Board. See *id.* However, the District of Columbia Court of Appeals disagreed in *Moshea*, where the court specifically found the Board was in error and did have jurisdiction to decide if the FAA had to abide by its own rules and policies. *Moshea v. NTSB*, 570 F.3d 349, 351 (D.C. Cir. 2009). In fact, the court in *Moshea* declared Board precedent did require the FAA to be bound by its own rules, declaring: “Moreover, in *Montgomery*, the Board stated with regard to a similar FAA policy that ‘regardless of whether [the policy] is characterized as a rule, regulation, or statement of policy, the Administrator is bound by its terms.’ *Id.* at 351 n.2 (citing *Montgomery*, 3 N.T.S.B. 2150, 2154 (1980)).

²¹ See FAA, Order No. 2150.3B, the FAA Compliance and Enforcement Program, at 1 (Oct. 1, 2007).

things, a sanction guidance table.²² The sanction guidance table outlines punishment for various infractions of the FAA regulations. In a matter tried before an NTSB ALJ, the FAA attorney will customarily place into evidence a copy of the sanction guidance table and argue that the ALJ is bound to follow the sanctions prescribed in the table.²³ The FAA argument is that the sanction guidance table is a validly adopted and publicly available document and the NTSB is thereby bound by the FAA's "interpretations of laws and regulations."²⁴ But is a sanction guidance table really an *interpretation* of laws and regulations? Before Congress enacted the deference provision, sanctions were determined by the ALJ in light of Board precedent, but the ALJ could only reduce the sanction from that sought by the FAA based upon a showing of clear and compelling reasons, as required by *Muzquiz*.²⁵

After Congress made deference by the Board to the FAA a statutory obligation, some ALJs persisted in either reducing the sanction from the sanction sought by the FAA²⁶ or changing the sanction from a suspension to a civil penalty.²⁷ The FAA at-

²² The sanction guidance table for air carriers, airmen, mechanics airports, etc. appears in FAA Order 2150.3B, Appendix B, pages B-13 through B-52. The hazardous materials (HAZMAT) sanction guidance table is found in Appendix C of the Order at page C-13.

²³ Lepinski, N.T.S.B. Order No. EA-5019, 2003 WL 328993, at *1-2 (Feb. 6, 2003).

²⁴ See Complainant's Mot. to Uphold Complainant's Sanction of Revocation, Aug. 18, 2008, filed in Frick, N.T.S.B. Docket No. SE-18271. The FAA photocopied excerpts from FAA Order No. 2150.3B, labeled same as exhibits, and argued:

Under 49 U.S.C. § 44709(d)(3): 'the Board . . . is bound by all validly adopted interpretations . . . of written agency guidance available to the public related to sanctions to be imposed under this section unless arbitrary, capricious, or otherwise not according to law.' See also *Garvey v. NTSB*, 190 F.3d 571 (D.C. Cir. 1999). (sic) The NTSB has the authority to modify proposed sanctions only within the constraints imposed by the sanction deference provision.' *Administrator v. Tweto*, NTSB Order No. EA-4164. Accordingly, Complainant requests that deference be given to his choice of sanction in this case.

Id.

²⁵ *Muzquiz*, 2 N.T.S.B. 1474, 1477 (1975).

²⁶ See *Tweto*, N.T.S.B. Order No. EA-4164, 1994 WL 228257, at *1-3 (May 9, 1994) (granting the FAA's appeal and reinstating the sixty day suspension where the ALJ had reduced the period of suspension to forty-five days).

²⁷ See Lepinski, N.T.S.B. Order No. EA-5019, 2003 WL 328993, at *1-2 (Feb. 6, 2003) (reversing ALJ's decision to impose civil penalty rather than thirty day suspension based on sanction deference under 49 U.S.C. § 44709(d)(3)).

tempted to seize the initiative after Congress imposed a statutory mandate for the Board to defer to the FAA's choice of sanction by arguing that, in the sanction analysis, the FAA's choice of sanction was more important than an analysis of case precedent.²⁸ The Board rejected this argument observing:

In any case, we decline the FAA's request in this petition that we reverse the hierarchy they have perceived and consider first the FAA's sanction guidance. We hope we have now explained we intended no hierarchy. Further, we agree with the general principle that, if deference issues are joined, any analysis of case precedent takes place in the deference context. We see no need to go further, and see (perhaps unintended) difficulty with the FAA's approach.²⁹

While the FAA now routinely places the sanction guidance table into evidence when arguing for deference, the Board has intimated this may not be necessary, declaring:

Even when the Administrator has not introduced the Sanction Guidance Table into the record and requested such deference, we have still ordered a serious sanction when the respondent's conduct indicates that the respondent acted in a deliberate manner that demonstrates an unwillingness to comply with the regulations.³⁰

In one case an ALJ declined to accord the FAA deference on sanction because the sanction guidance table had not been amended after Congress enacted the FAA Civil Penalty Administrative Assessment Act of 1992.³¹

Another example of the information typically contained in the FAA Enforcement Handbook is various enforcement bulletins. For example, in *Murphy*,³² the FAA ignored an explicit directive requiring that a warning letter be issued to the airmen and directing that formal enforcement action not be pursued.³³ Despite the fact that the facts in *Murphy* fit all the criteria of the FAA directive, the decision of the ALJ recognizing the affirma-

²⁸ See Reina, N.T.S.B. Order No. EA-4552, 1997 WL 285022, at *1 (May 23, 1997).

²⁹ *Id.*

³⁰ Poland, N.T.S.B. Order No. EA-5449, 2009 WL 1430664, at *3 (May 14, 2009).

³¹ See Schrader, 2003 WL 1957463, at *2 (Apr. 13, 2003).

³² Murphy, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at *2-3 (Jan. 6, 2008).

³³ See FAA, Order No. 2150.3A, FAA Compliance and Enforcement Program, at 260 (Dec. 14, 1998).

tive defense of the pilots based upon the directive was rejected on appeal by the Board on the theory that the Board “does not have jurisdiction to review the Administrator’s discretion in choosing to bring an enforcement action against a respondent.”³⁴ There will be a more expansive discussion about this case later in this article.³⁵

This decision violated a fundamental precept of constitutional law that a government agency may not violate its own rules. While today the NTSB takes the position it cannot reach constitutional issues, it did not take this position in 1981 when the Board decided *Randall*.³⁶ In *Randall*, the FAA declared in its FAA Enforcement Handbook that a flight data recorder tape could not be used as evidence in an FAA enforcement proceeding except as corroborating evidence.³⁷ The declaration in the Enforcement Handbook notwithstanding, the FAA revoked the airman’s certificate based solely on a flight data recorder tape.³⁸ Judge Fowler, who tried the case, found violations of the Federal Aviation Regulations (FAR) but reduced the sanction from a revocation to a nine-month suspension.³⁹ When the pilot appealed to the NTSB, the NTSB reversed the judge and cited *Vitarelli v. Seaton*, declaring that the NTSB would not allow the FAA to violate its own policies.⁴⁰ The holding in *Randall* is important. The Board held that, even in the face of allegations of performing aerobatic maneuvers in a transport jet aircraft, because the sole evidence was based on the flight data recorder and the FAA Enforcement Handbook said that the flight data recorder could not be the sole evidence in an enforcement case, the order revoking the airman’s certificate had to be reversed.⁴¹ However, twenty-seven years later in *Murphy*, the Board said it could not reach constitutional issues and refused to force the FAA to be bound by its own rules.⁴² Because the Board has declared that it will not reach constitutional issues, the Board cannot (according to its self-imposed restrictions) dispense justice in aviation enforcement proceedings. This is true because the

³⁴ *Murphy*, 2008 WL 205095, at *4.

³⁵ See *infra* section III.B.

³⁶ *Randall*, 3 N.T.S.B. 3624, 3625–26 (1981).

³⁷ *Id.* at 3625.

³⁸ *Id.*

³⁹ *Id.* at 3624.

⁴⁰ *Id.* at 3626 (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959)).

⁴¹ *Id.*

⁴² See *Murphy*, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at *3–4 (Jan. 16, 2008).

Board sanctions and allows the FAA to violate its own rules, something no federal district court would ever tolerate.

When one contemplates the level of justice available to litigants in federal district court, where there are strictly enforced rules of evidence and procedure, that arena is a far cry from the rules promulgated by the Board in furtherance of its statutory authority.⁴³ The Board has promulgated material denominated as "Rules of Practice in Air Safety Proceedings."⁴⁴ The Board's Rules of Practice do not adopt the Federal Rules of Evidence. In fact, hearsay is allowed in aviation enforcement proceedings.⁴⁵ To underscore the significance of this problem, an airman may have introduced into evidence against him a letter declaring he violated the Federal Aviation Regulations. The letter cannot be cross-examined. How can a practice like this comport with the due process requirements of the Fifth Amendment to the Constitution? Ostensibly, the burden of proof is on the FAA in aviation enforcement proceedings.⁴⁶ However, armed with the ability to get hearsay into evidence and also armed with the language found in 49 U.S.C. §44709(d)(3), even the weakest cases brought by the FAA may not be susceptible to a motion to dismiss or a motion for summary judgment.

Prior to the hearing, the FAA shall have lodged a complaint, and the airman has the responsibility to file an answer.⁴⁷ The answer of the airman "shall also identify any affirmative defenses that the respondent intends to raise at the hearing."⁴⁸ "Affirmative defenses" is not a defined term in the Board's Rules of Practice.⁴⁹ Consequently, every conceivable argument the airman could raise should be denominated as an affirmative defense and pled as an affirmative defense in his answer, in detail. Failure to do so will result in the defense being waived according to the Board's recent decision in *Blum*.⁵⁰ For example, if the pilot relied upon a bulletin in the FAA Enforcement Handbook or an

⁴³ See 44 USC § 44709(d)(1) (2006) (permitting airmen to appeal an order issued by the FAA to the NTSB).

⁴⁴ See 49 C.F.R. § 821 (2008).

⁴⁵ See 49 C.F.R. § 821.38.

⁴⁶ See 49 C.F.R. § 821.32.

⁴⁷ See 49 C.F.R. § 821.31(a), (b).

⁴⁸ See 49 C.F.R. § 821.31(b).

⁴⁹ See 49 C.F.R. § 821.1.

⁵⁰ *Blum*, N.T.S.B. Order No. EA-5371, 2008 WL 647772, at *4 (Feb. 29, 2008).

advisory circular such as Advisory Circular AC 00-46D⁵¹ (dealing with the timely filing of an Aviation Safety Report with the National Aeronautics and Space Administration), then the pilot must set that out in his answer as an affirmative defense and demonstrate how the facts in his case give rise to such a defense.⁵² The pilot and his counsel must also be aware of the fact that if the court fails to consider the defense, counsel must note an exception in the record in order to preserve this for purposes of appeal. Otherwise, the defense is waived since “the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.”⁵³

There is case authority which stands for the proposition that an airman’s certificate is a protected property or liberty interest that cannot be taken away without providing due process of law.⁵⁴ However, with no rules of evidence, hearsay being admitted, affirmative defenses being undefined, and the fact that the defenses will be waived unless counsel takes exception on the record to the Board’s failure to sustain or even address the same, it takes little imagination to realize that the level of “justice” provided by the Board to airmen is minimal at best. Unfortunately, legal practitioners and judges are constrained by an imperfect, deficient system. The foregoing description is but a sample of the landscape in which the legal practitioner and his client must toil as they undertake to pursue justice before the NTSB.

III. A REVIEW OF CASES ILLUSTRATING THE ARBITRARY AND CAPRICIOUS NATURE OF DECISIONS BY THE BOARD

A. THE *RAMAPRAKASH* CASE

In *Ramaprakash v. FAA*, the airman had been convicted of driving under the influence on February 25, 1997.⁵⁵ He did not report his conviction within sixty days as required by regula-

⁵¹ FAA, Aviation Safety Reporting Program, AC No. 00-46D 1 (Feb. 26, 1997), available at [http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%2000-46D/\\$FILE/AC00-46D.pdf](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/list/AC%2000-46D/$FILE/AC00-46D.pdf).

⁵² *Blum*, 2008 WL 647772, at *4.

⁵³ 49 USC § 1153(b)(4) (2006).

⁵⁴ *Green v. Brantley*, 719 F. Supp. 1570, 1575 (N.D. Ga. 1989); *White v. Franklin*, 637 F. Supp. 601, 610 (N.D. Miss. 1986).

⁵⁵ 346 F.3d 1121, 1122 (D.C. Cir. 2003).

tion.⁵⁶ Fourteen months after his conviction, the FAA initiated proceedings to suspend his certificate.⁵⁷ Ramaprakash moved to dismiss the charges based on the stale complaint rule.⁵⁸ In essence, the stale complaint rule is the functional equivalent of a statute of limitations and provides that the FAA must take action against a pilot within six months of the infraction unless good cause existed for the delay, or the case must go forward in the public interest, or the facts revealed in the case evidence a lack of qualification.⁵⁹ If the FAA cannot satisfy one or more of these criteria, the case is to be dismissed.⁶⁰

When an airman receives his medical certificate, identifying data on his medical application is checked against the National Driver Register (NDR).⁶¹ However, because the NDR data is not sufficiently definitive, an FAA investigator must correlate the NDR data to the National Law Enforcement Telecommunication System (NLETS) to ascertain the nature of any offense that may have been revealed in consulting the NDR.⁶²

In *Ramaprakash*, three separate FAA inspectors were charged with evaluating the data the FAA had at hand but failed to process in a timely manner.⁶³ There was no dispute about the fact that the FAA had been in possession of the source materials evidencing a failure to timely report the driving under the influence conviction substantially more than six months before issuing the Notice of Proposed Certificate Action (NOPCA).⁶⁴

The Board, in a clear departure from precedent, took the position that because of the gravity of the alleged violation, latitude should be given to the FAA to relax the stale complaint rule.⁶⁵ The decision of the Board was directly contrary to two significant cases.⁶⁶ Moreover, the Board's decision in *Ramaprakash* was directly contrary to *Dill*, where charges to revoke an airman's certificate for alleged violations of FAR Part 135 were dismissed based upon application of the stale com-

⁵⁶ *Id.* (referring to 14 C.F.R. § 61.15(e) (2009)).

⁵⁷ *Ramaprakash*, 346 F.3d at 1122.

⁵⁸ *Id.* at 1123.

⁵⁹ See 49 C.F.R. § 821.33 (2008).

⁶⁰ *Id.* at § 821.33(a)(2).

⁶¹ *Ramaprakash*, 346 F.3d at 1123.

⁶² *Id.*

⁶³ *Id.* at 1123–24.

⁶⁴ *Id.* at 1124.

⁶⁵ *Id.*

⁶⁶ *US Jets, Inc.*, 7 N.T.S.B. 246, 246 (1990); *White*, N.T.S.B. Order No. EA-4100, 1994 WL 66062, at *1 (Feb. 20, 1994).

plaint rule, since the FAA could not prove it had good cause for its delay.⁶⁷ After appealing to the five members of the NTSB who voted to affirm the suspension by a vote of 3-2, Ramaprakash took his pleas to the U.S. Court of Appeals for the District of Columbia. Then Circuit Court Judge Roberts,⁶⁸ began the opinion with the following remarks:

Learned Hand once remarked agencies tend to “fall into grooves, . . . and when they get into grooves, then God save you to get them out.” Judge Hand never met the National Transportation Safety Board. In this case, we grant the petition for review because the Board has failed adequately to explain its departure from its own precedent in no fewer than three significant respects.⁶⁹

In a decision which can only be described as an embarrassment to the Board, the District of Columbia Court of Appeals noted that (1) there was no good cause for delay under the stale complaint rule according to the Board’s own line of cases,⁷⁰ (2) the airman did not have to demonstrate prejudice under the stale complaint rule (again according to the Board’s own line of cases),⁷¹ and (3) the Board had ignored its own long-standing line of cases requiring prosecutorial diligence on the part of the FAA.⁷² In short, the U.S. Court of Appeals for the District of Columbia found that the decision of the Board fit the mold described in 5 U.S.C. § 706(2)(a), i.e., “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁷³

Judge Roberts, writing for the court in *Ramaprakash*, made the following observation about the Board’s arbitrary decision to compromise the effectiveness of the stale complaint rule to the benefit of the FAA:

This court has observed that “the core concern underlying the prohibition of arbitrary or capricious agency action” is that agency “ad hocery” is impermissible. *Pacific N.W. Newspaper Guild Local 82 v. NLRB*, 877 F.2d 998, 1003 (D.C. Cir.1989). The statements extracted above indicate that the Board has failed to satisfy this core requirement. They amount to a promise from the

⁶⁷ Dill, N.T.S.B. Order No. EA-4099, 1994 WL 78131, at *3-4 (Feb. 20, 1994).

⁶⁸ Former Circuit Judge Roberts is now Chief Justice of the U.S. Supreme Court.

⁶⁹ *Ramaprakash*, 346 F.3d at 1122.

⁷⁰ *Id.* at 1125.

⁷¹ *Id.* at 1126.

⁷² *Id.* at 1127.

⁷³ *Id.* at 1124, 1130.

Board that at some point in the future, the stale complaint rule may again mean what it once did – depending on “specific facts of future cases.” It is impossible at this point to tell whether the Board, in the next stale complaint case, will assess the seriousness of the violation, or not; will insist on a showing of prejudice, or not; will require FAA diligence in investigating a possible violation as well as in prosecuting a known one, or not. We have it on high authority that “the tendency of the law must always be to narrow the field of uncertainty.” O.W. Holmes, *The Common Law* 127 (1881). The Board’s unexplained departures from precedent do the opposite. “[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.” *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995). For the reasons stated, we vacate the orders and remand to the Board for further proceedings.⁷⁴

One would have hoped the Board would have learned from its mistake in *Ramaprakash* and understood that decisions it renders must be consistent with its body of precedent and binding case law. Unfortunately, as will be apparent from the discussion of later cases, the NTSB failed to learn from its mistakes and continued to compound them.

B. THE MURPHY CASE

Five years after the Board’s actions were reversed in *Ramaprakash*, the case of *Murphy*, came on appeal to the NTSB after the airmen had prevailed before Judge William A. Pope II attendant to the hearing that lasted two days on November 14–15, 2006.⁷⁵ The facts in *Murphy* were quite simple. The case involved a routine altitude deviation of 300 feet.⁷⁶ The aircraft were so far apart laterally that there was no indication that the pilots of the aircraft ever saw the other aircraft.⁷⁷ According to the record before Judge Pope, the vertical separation was 700 feet and the lateral separation was 3.4 nautical miles.⁷⁸ The non-offending aircraft was a Canadair CRJ2 (Regional Jet) at 27,000 feet, while the offending aircraft was a Lear Jet at 26,000 feet that momentarily climbed to an altitude of slightly less than

⁷⁴ *Id.* at 1130.

⁷⁵ *Murphy*, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at *1 (Jan. 16, 2008).

⁷⁶ *Id.* at *1, *6.

⁷⁷ *Id.* at *1.

⁷⁸ *Id.*

26,300 feet.⁷⁹ According to the testimony of the captain of the Lear Jet, he observed the aircraft at 120 feet above its assigned altitude and called this to the attention of his co-pilot, who arrested the ascent of the aircraft and leveled the aircraft at 26,000 feet.⁸⁰ The parties stipulated that this was a “computer-detected altitude deviation.”⁸¹ According to the testimony of the air traffic controller who was working the two aircraft, as the vertical separation was compromised, the data blocks of the two aircraft began to flash.⁸² This, in turn, set off an alarm at the desk of his supervisor.⁸³ There was no dispute about the fact that typically in the en route environment there is 1,000 feet of vertical separation and five miles of lateral separation.⁸⁴ Because the vertical separation was compromised by more than 20%, the data blocks of the aircraft began to flash even though there was no suggestion of a near mid-air collision or any evidence of a near mid-air collision anywhere in the transcript.⁸⁵ The FAA charged both the captain and co-pilot with, *inter alia*, deviating from an air traffic control clearance or instruction contrary to 14 C.F.R. § 91.123(a), (b), and careless or reckless conduct contrary to 14 C.F.R. § 91.13(a).⁸⁶

In their answer, the airmen set up as a defense their entitlement to have the matter resolved by way of an administrative action,⁸⁷ for example, a “warning notice” or a “letter of correction.”⁸⁸ The basis for the defense of the airmen was Compliance Enforcement Bulletin No. 86-1,⁸⁹ which was an appendix to the FAA Enforcement Handbook then in effect.⁹⁰ According to the Bulletin, the FAA was obliged to resolve an altitude deviation administratively by issuing a warning letter if the matter involved (1) a computer-detected altitude deviation, (2) of 500 feet or less, (3) there was no near mid-air collision, (4) there were no

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at *1, *7, *14 n.4.

⁸⁴ *Id.* at *1.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at *2–3.

⁸⁸ Warning notices and letters of correction are administrative remedies employed by the FAA without resorting to legal (enforcement) action. FAA, Order No. 2150.3A, Compliance and Enforcement Program, at 126–37 (Dec. 14, 1988).

⁸⁹ *Murphy*, 2008 WL 205095, at *3.

⁹⁰ See FAA, Order No. 2150.3A, Compliance and Enforcement Program, at 260 (Dec. 14, 1988).

aggravating circumstances, and (5) the pilot did not have a history of committing altitude deviations in the past five years.⁹¹ According to the airmen, all of the criteria set forth in the Bulletin were satisfied, and they were entitled to have the matter resolved administratively by the issuance of a warning letter as opposed to having their licenses suspended.⁹²

Two former FAA employees testified on behalf of the pilots.⁹³ Francis DeJoseph, a former FAA flight standards inspector, indicated that he would have resolved the matter by issuing a warning letter, since there were no aggravating circumstances.⁹⁴ DeJoseph noted there was no urgency in the voice of the controller, and he did not direct either aircraft to turn or alter its course.⁹⁵ That confirmed the conclusion of Mr. DeJoseph that there were no aggravating circumstances. Jack Overman, a former FAA air traffic controller, also testified the matter should have been closed by issuance of a warning letter.⁹⁶ At the conclusion of a two-day hearing, Judge Pope found for the airmen, reasoning that all of the criteria in Bulletin No. 86-1 were satisfied.⁹⁷ In rendering his decision, Judge Pope found that the FAA is bound to follow its own regulations and policies citing a number of cases.⁹⁸ One of the reasons Judge Pope found in favor of the airmen was his conclusion that there were no aggravating circumstances.⁹⁹ He found that the altitude deviation was momentary, inadvertent, and the risk to flight safety was minimal.¹⁰⁰ He also found that the potential for collision was slight and that the pilots in the Lear Jet arrested its ascent before either aircraft was ever placed in actual jeopardy.¹⁰¹

The FAA appealed this adverse ruling to the full Board composed of five members appointed by the President.¹⁰² Rarely do

⁹¹ *Id.*

⁹² *Murphy*, 2008 WL 205095, at *2-3.

⁹³ *Id.* at *2.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.* at *2.

⁹⁸ *Id.* at *14 (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Steenholdt v. FAA*, 314 F.3d 633 (D.C. Cir. 2003); *Lopez v. FAA*, 318 F.3d 242 (D.C. Cir. 2003); *Brasher*, 5 N.T.S.B. 2116 (1987); *Randall*, 3 N.T.S.B. 3624 (1981)).

⁹⁹ *Id.* at *2.

¹⁰⁰ *Id.* at *13.

¹⁰¹ *See id.*

¹⁰² 49 U.S.C. § 1111(b) (2006).

all members of the Board *actually read* the trial transcripts.¹⁰³ Rather, they rely upon staff attorneys to read the transcripts for them and fashion opinions disposing of the issues on appeal.¹⁰⁴

While there were a number of arguments raised by the FAA in its appeal to the Board in *Murphy*, the principal argument advanced by the FAA was that the decision about whether or not the FAA's decision to follow Bulletin 86-1 was a matter of "prosecutorial discretion."¹⁰⁵ In other words, as far as the FAA was concerned, it could choose to *ignore its own policies*, procedures, and rules, and the Board could not overturn that decision.¹⁰⁶ Unfortunately, just as the Board had done in *Ramaprakash*, it chose to take an ad hoc stance in this case and ignore not only Supreme Court authority in terms of *Vitarelli v. Seaton*, but also the Board's own precedent in *Randall*, which held that government agencies must follow their own rules and policies.¹⁰⁷ The following language extracted from the Board's opinion aptly describes the issue the Board had before it in *Murphy*:

Because of our disposition of the appeal, we address only one of the Administrator's arguments. The Administrator argues that his exercise of prosecutorial discretion is not subject to Board review. He contends that the law judge substituted his judgment for that of the Administrator to elect one remedy over another; that it is the Administrator's prerogative to issue an order of suspension when the facts support one; and that the Board has no direct authority over his exercise of prosecutorial discretion.

Respondents contest the arguments in the Administrator's appeal and urge the Board to affirm the law judge's decision. They argue that due process of law binds the Administrator to follow the policy adopted in 86-1. Respondents contest the Administrator's argument that 86-1 applies only to computer-detected altitude violations discovered through the Air Traffic Quality Assurance Program. Finally, respondents dispute the Administrator's argument that their altitude deviation involved aggravating circumstances.¹⁰⁸

¹⁰³ Interview with John Goglia, former member of the NTSB (Sept. 1, 2009) (memorialized by the author's memorandum of Sept. 3, 2009).

¹⁰⁴ *Id.*

¹⁰⁵ *Murphy*, 2008 WL 205095, at *3.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *Id.* (internal citations omitted).

The Board reversed the decision of Judge Pope and reinstated the FAA's suspension of the pilots' certificates making the following extraordinary declaration:

The Board does not have jurisdiction to review the Administrator's discretion in choosing to bring an enforcement action against a respondent. We reject the respondents' arguments that 86-1 precluded the Administrator from pursuing enforcement actions against respondents. In sum, the Board finds that the Law Judge's application of Bulletin No. 86-1 was not consistent with the Board's statutory charter or with Board precedent, and his decision in that regard is reversed.¹⁰⁹

The Board maintained that its statutory charter prevented it from exercising jurisdiction over the claim that the FAA had violated its own rules.¹¹⁰ Murphy and Vernick did not have the resources to pursue an appeal to a U.S. court of appeals. Accordingly, the decision of the Board in *Murphy* stood. However, as the next case demonstrates, the logic of the Board in *Murphy* was flawed.

C. THE MOSHEA CASE

On June 30, 2009, the U.S. Court of Appeals for the District of Columbia decided *Moshea v. NTSB*.¹¹¹ As Murphy and Vernick raised Bulletin No. 86-1 as a defense in their case, Moshea set up as a defense in his case his compliance with the voluntary disclosure program set out in FAA Advisory Circular 00-58.¹¹² Just as the Board had maintained it lacked jurisdiction to question the FAA's decision to apply the Bulletin in *Murphy*, the Board declared in *Moshea* that it lacked jurisdiction to entertain his affirmative defense based on the FAA's Advisory Circular.¹¹³

Moshea worked as a pilot for a commercial air cargo carrier and had difficulty lowering the landing gear of an aircraft on a flight.¹¹⁴ When he discussed the situation with a mechanic of the company for whom he was employed, he was told the difficulties were normal in cold weather.¹¹⁵ Moshea did not enter the problem in the maintenance log of the aircraft in compli-

¹⁰⁹ *Id.* at *4.

¹¹⁰ *See id.* at *4.

¹¹¹ 570 F.3d 349 (D.C. Cir. 2009).

¹¹² *Id.* at 350.

¹¹³ *Id.* at 351.

¹¹⁴ *Id.* at 350.

¹¹⁵ *Id.*

ance with 14 C.F.R. § 135.65(d).¹¹⁶ Several days later, when Moshea was once again flying the aircraft, he still had problems with the landing gear.¹¹⁷ This time, when he passed the information on to a mechanic, the mechanic relayed the information to his supervisor.¹¹⁸ However, once again, Moshea did not make an entry in the maintenance log of the aircraft.¹¹⁹ Rather, the aircraft was scheduled for maintenance two days later.¹²⁰ During that time frame, however, another pilot had difficulty lowering the landing gear of the aircraft, and when the aircraft landed, the landing gear was discovered to be damaged.¹²¹ Moshea's employer, Key Lime Air Corporation, made a voluntary disclosure of the incidents to the FAA in accordance with FAA Advisory Circular 00-58.¹²² The Advisory Circular declared that the FAA would resolve issues of non-compliance by issuing a letter of correction if the airman or other agent immediately took action to report the violation to the employing entity.¹²³ The FAA took no action against other employees of Key Lime other than Moshea.¹²⁴ The FAA sought to suspend Moshea from flying for sixty days.¹²⁵ Moshea appealed the FAA's decision, but the ALJ who heard the case declared he lacked jurisdiction to consider the affirmative defense based on the Advisory Circular.¹²⁶ Further, the ALJ refused to consider evidence bearing on Moshea's compliance with the Advisory Circular.¹²⁷ The ALJ reduced the sanction from sixty to fifty days.¹²⁸ Moshea appealed to the Board and the Board affirmed, declaring that it lacked jurisdiction to hear Moshea's affirmative defense.¹²⁹ The Board suggested (but did not declare) that Moshea may not have satisfied the specific requirements of the Advisory Circular.¹³⁰

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 351.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

The U.S. Court of Appeals for the District of Columbia reversed the Board for two specific reasons.¹³¹ The first was that the Board did have jurisdiction over issues related to sanctions as declared in 49 U.S.C. § 44709(d)(1).¹³² The second reason was that the court concluded that the Board had failed to follow its own binding precedent.¹³³ In fact, the court remarked:

In *Liotta*, the Board thus exercised its jurisdiction to consider an affirmative defense virtually identical to Moshea's. By departing from the *Liotta* precedent without explanation, the Board here acted in an arbitrary and capricious manner. *Cf. Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.") (internal quotation marks omitted). The Board's inconsistent treatment of Moshea's case and *Liotta*'s case supplies an independent basis for vacating the Board's order in this case.¹³⁴

The FAA argued before the court of appeals that the failure of the NTSB to entertain the affirmative defense was harmless.¹³⁵ The court rejected this argument noting:

We cannot assume that the Board would have denied Moshea's affirmative defense had such evidence been introduced; the Board did not definitively analyze the significance (if any) of Moshea's proffered evidence. *Cf. Steenholdt v. FAA*, 314 F.3d 633, 640 (D.C. Cir. 2003) (no substantial prejudice where petitioner "has presented no theory under which the weak record prejudiced" his case). We therefore must decline the FAA's invitation to resolve this case on harmless error grounds.¹³⁶

In order that there is no question left in the mind of the reader about whether the NTSB has jurisdiction to entertain affirmative defenses based on FAA policy such as Advisory Circulars and Enforcement Bulletins, the following quote from the opinion of the Court of Appeals makes clear that the Board does have such jurisdiction: "The Board had jurisdiction to decide whether the FAA's suspension of Moshea comported with the FAA's voluntary disclosure policy set forth in Advisory Circu-

¹³¹ *Id.* at 352.

¹³² *Id.*

¹³³ *Id.* at 352–53 (citing *Liotta*, N.T.S.B. Order No. EA-5297, 2007 WL 1920600, at *6 (2007)).

¹³⁴ *Id.*

¹³⁵ *Id.* at 353.

¹³⁶ *Id.*

lar 00-58. We accordingly grant Moshea's petition for review, vacate the decision of the Board, and remand it to the Board for further proceedings."¹³⁷

As we have now learned from the opinion of the U.S. Court of Appeals for the District of Columbia, the Board *does* have jurisdiction to entertain affirmative defenses based upon FAA policies and procedures. To the extent the Board said it lacked such jurisdiction in *Murphy*, the Board was in error as confirmed by the decision in *Moshea*. Unhappily, Murphy and Vernick lacked the resources to take their case to the U.S. Court of Appeals where a just and reasoned decision could have been achieved. Given the previous position of the Board to ignore binding precedent and make up the rules as it goes along, now more than ever, an airman who would defend himself against charges brought by the FAA must secure the legal talent and possess the economic resources to develop a record and take his case all the way to a U.S. court of appeals. This statement will be reinforced in the discussion that follows in the next section of this article.

D. THE *BLUM* CASE

Another case illustrating the confusion being created by Board decisions is *Blum*.¹³⁸ The *Blum* case presented two substantive questions which should have resolved the case to the benefit of the airman: (1) whether Blum was the pilot-in-command when he was being checked out in an aircraft by his flight instructor who had filed a flight plan, and (2) whether the filing of an Aviation Safety Report with the National Aeronautics and Space Administration (NASA) within ten days of the occurrence entitled him to a waiver of sanction based on Advisory Circular AC 00-46D.¹³⁹ The facts in *Blum* were that this was the pilot's first flight in a Cirrus SR-20 aircraft with the flight originating from Baltimore-Washington National Airport (BWI).¹⁴⁰ Blum's flight instructor had filed the flight plan, and Blum's instructor assisted in taxiing the aircraft for departure.¹⁴¹ Radar plots of the aircraft demonstrated that a transponder code of 1200 (a standard VFR flight code) was being squawked for sixty-five

¹³⁷ *Id.*

¹³⁸ *Blum*, N.T.S.B. Order No. EA-5371, 2008 WL 647772 (2008).

¹³⁹ *Id.* at *2.

¹⁴⁰ *Id.* at *1.

¹⁴¹ *Id.* at *2.

seconds after the aircraft had entered the Washington Air Defense Zone (ADIZ).¹⁴² The pilot being checked out in the Cirrus had been given a discrete transponder code of 4701, and he erroneously selected 4710.¹⁴³ Further compounding the problems of this pilot was the fact that he had entered the Class B Airspace.¹⁴⁴ As a result, it took about three minutes for the pilot to get the correct transponder code selected, and he never received a clearance to enter the Washington Class B Airspace.¹⁴⁵ The pilot was charged with four violations of the Federal Aviation Regulations: (1) violating Emergency Traffic Rules NOTAM (Notice to Airmen) contrary to 14 C.F.R. § 91.139(c); (2) violating special security instructions contrary to 14 C.F.R. § 99.7; (3) operating in Class B Airspace without a clearance from Air Traffic Control contrary to 14 C.F.R. § 91.131(a)(i); and (4) operating an aircraft in a careless or reckless manner contrary to 14 C.F.R. § 91.13(a).¹⁴⁶

The case was tried before Chief Administrative Law Judge Fowler, and an FAA safety inspector testified that Blum was the pilot-in-command during this instructional flight.¹⁴⁷ The author submits that in federal district courts, where the Federal Rules of Evidence are followed, counsel may have objected to the inspector's testimony on the grounds that applying the law to the facts was a legal conclusion for the court to decide, not the inspector.¹⁴⁸ Moreover, to the extent the inspector was permitted to testify with respect to an opinion declaring that Blum was the pilot-in-command, his opinion was contrary to long-standing precedent that, on an instructional flight, the flight instructor is the pilot-in-command.¹⁴⁹ Next, after the inspector testified that

¹⁴² *Id.* at *1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *2.

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at *1, *5 n.2.

¹⁴⁷ *Id.* at *1-2.

¹⁴⁸ FED. R. EVID. 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Since the inspector was testifying as an expert witness about flying but not as a lawyer, he was not qualified to render a legal conclusion.

¹⁴⁹ *See Hamre*, 3 N.T.S.B. 28, 38 (1977).

Blum was the pilot-in-command, the inspector maintained that Blum did not have to be the pilot-in-command to violate NOTAM 6/2550 regarding the Washington ADIZ and Class B Airspace.¹⁵⁰ In a federal district court, counsel could have objected that this too was the application of the law to the facts and therefore a legal conclusion, since Judge Fowler could decide whether or not someone other than the pilot-in-command could have committed a violation by acting contrary to the NOTAM and the restrictions of the Washington Class B Airspace.¹⁵¹

The pilot testified that he had a total of about 250 flying hours and this was his first time to fly a Cirrus aircraft.¹⁵² Also, it was his first time to fly with this particular flight instructor.¹⁵³ Finally, it was his first time to fly from BWI in twenty-five years of flying.¹⁵⁴ One of the purposes of this flight was for the instructor to teach the pilot how to fly in and out of BWI in light of the Air Defense Zone rules and surrounding Washington Class B Airspace.¹⁵⁵

The pilot admitted that the aircraft was operated inside of the Washington Class B Airspace and the Air Defense Zone, but he offered into evidence his Aviation Safety Report filed with NASA.¹⁵⁶ The pilot maintained that he was entitled to a waiver of sanction based upon the timely filing with NASA.¹⁵⁷ Paragraph 7-6-1(a) of the Aeronautical Information Manual provides: "The FAA has established a voluntary Aviation Safety Reporting Program designed to stimulate the free and unrestricted flow of information concerning deficiencies and discrepancies in the aviation system."¹⁵⁸ Paragraph 7-6-1(d) of the Aeronautical Information Manual provides:

To ensure receipt of this information, the program provides for the waiver of certain disciplinary actions against persons, including pilots and air traffic controllers, who file timely written reports concerning potentially unsafe incidents. To be considered

¹⁵⁰ *Blum*, 2008 WL 647772, at *2.

¹⁵¹ While the inspector was competent to render opinions about flying under Federal Rule of Evidence 702, he was not qualified as a lawyer and should not have been allowed to give a legal opinion.

¹⁵² *Blum*, 2008 WL 647772, at *2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *3-4.

¹⁵⁸ See FAA, Aeronautical Information Manual: Official Guide to Basic Flight Information and ATC Procedures, ¶ 7-6-1(a) (2008).

timely, reports must be delivered or postmarked within 10 days of the incident unless that period is extended for good cause.¹⁵⁹

The provisions of the Aeronautical Information Manual did not reference the four elements that are outlined in FAA Advisory Circular 00-46D, to wit: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in an enforcement action to have committed a regulatory violation in the past five years; and (4) the person mails a report of the incident to NASA within ten days.¹⁶⁰

The oral initial decision and order rendered by Chief Administrative Law Judge Fowler did not specifically address Blum's reliance on his Aviation Safety Report filed with NASA.¹⁶¹ However, contrary to established precedent that on an instructional flight the instructor is always the pilot-in-command, the ALJ declared:

Now, the Respondent attempted to make much of the fact that Respondent Blum was not the pilot-in-command on this flight on March 27th, 2006. That, in my estimation, based on the totality of the evidence, has not only been successfully rebutted, but it has been is [sic] shown, by the evidence, and particularly by the aviation expert Eilinger, that not only was Respondent Blum the operator of the aircraft, but that he was, in fact, the pilot-in-command of the aircraft.¹⁶²

Blum appealed the initial decision of Judge Fowler upholding a thirty-day suspension of his certificate to the Board, and in his brief, Blum asserted that the "determinative issue . . . is who was the pilot in command of the aircraft when the individual in the left seat was receiving dual instruction on how to operate the aircraft and the other seat was [] an individual who was holding herself out to be a 're-certified master flight instructor'. . . ."¹⁶³

Despite binding precedent to the contrary, the Board rejected Blum's argument that he was not the pilot-in-command, declaring: "Respondent does not recognize, however, that the decision in this case does not rest on the determination of who was the PIC."¹⁶⁴

¹⁵⁹ *Id.*, at ¶ 7-6-1(d).

¹⁶⁰ See FAA, *supra* note 51.

¹⁶¹ See *Blum*, 2008 WL 647772, at *2.

¹⁶² *Id.* at *7.

¹⁶³ *Id.* at *2.

¹⁶⁴ *Id.*

Blum's lawyer had recently defended a flight instructor who was found to be the pilot-in-command on an instructional flight, and noted the inconsistency of the Board's position.¹⁶⁵ The Board made this comment about that argument:

In that case, the respondent was a certified flight instructor (CFI) on an instructional flight and respondent's counsel argued that respondent was not the PIC. Although we found that respondent was the PIC, and we discussed the issue at some length, we must point out that the PIC issue was not the determinative issue in that case because, regardless of whether the respondent was the PIC, he committed a violation by his operation of the aircraft, without regard to whether he was "in command." For the same reason, the PIC issue is also not determinative in our decision here.¹⁶⁶

The Board, contrary to its holding in *Hamre*, adopted the legal conclusion of FAA Inspector Eilinger in finding that all the FAA had to prove was that Blum operated the aircraft in the Class B Airspace and in the Air Defense Zone, declaring:

As Mr. Eilinger testified, and as the Administrator points out in his reply, in order to establish violations in this case, all need be shown is that respondent operated or flew the aircraft in the Class B and ADIZ airspace. The Administrator has done that, and respondent does not contest the fact that he so operated the aircraft. Further discussion on this issue, therefore, is unnecessary. We find that respondent violated the regulations as alleged. Although the Administrator undertook to show also that respondent was the PIC, the Administrator has not been able to do so, primarily because this was an instructional flight and an instructor was on board. We conclude that respondent was not the PIC; the law judge's initial decision should be modified accordingly.¹⁶⁷

To the seasoned practitioner, the Board's decision is a comedy of errors. First, an FAA inspector with apparently no legal training was allowed to sponsor a legal opinion about the ultimate issue in the case.¹⁶⁸ Second, if the Board and the FAA had not been asleep at the switch, they would have realized the

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *3.

¹⁶⁷ *Id.*

¹⁶⁸ See FED. R. EVID. 701, 702. While the inspector could sponsor opinion testimony about flying, rendering a legal opinion on the ultimate legal issue was beyond the scope of his expertise. However, since the Board has failed to adopt the Federal Rules of Evidence or any other meaningful rules of evidence, laymen are allowed to sponsor legal opinions into the record. See 49 C.F.R. § 821.38.

proper person to pursue in relation to an enforcement action was Blum's instructor.¹⁶⁹

If the Board's opinion had not already created sufficient confusion in maintaining that Blum committed a violation without being the pilot-in-command, it further chose to articulate a meaningless legal standard about the circumstances under which an Aviation Safety Report filed with NASA would afford the pilot a waiver of sanction. First of all, the Board maintained that the filing of an Aviation Safety Report was an affirmative defense that the pilot should have raised in his answer.¹⁷⁰ Because the filing of the report was not raised by the pilot as a defense, the defense was arguably waived, but the Board decided to address the issue anyway.¹⁷¹ In doing so, the Board declared:

We do not normally entertain, however, arguments that are not presented to us. Although respondent has not raised this as a defense, to avoid a later assertion that it was raised based on the evidence and the appeal brief, we address it only to the extent of noting that, as the record stands, respondent did not meet the conditions of the defense.¹⁷²

The troubling thing, however, is the fact that the Board went on to engage in the following discussion:

Respondent argues that the law judge erred when he did not accept respondent's ASRP defense, and contends that the violations were inadvertent. We note that respondent did not raise this defense in his answer to the complaint. We treat the respondent's assertion that he was eligible for a waiver of sanction under ASRP as an affirmative defense. In asserting an affirmative defense, respondent must fulfill the burden of proving both the factual basis for the defense and the legal justification. He must satisfy the burden of establishing that he meets all criteria of the ASRP, and is therefore eligible for a waiver of sanction. Respondent has not done so. He argues only that his violation was inadvertent and, at the hearing, presented evidence only that his report was timely, but no evidence to show that he fulfilled the remaining criteria.¹⁷³

With regard to whether a pilot has acted inadvertently in order to avail himself of the waiver of sanction provisions of Advi-

¹⁶⁹ Hamre, 3 N.T.S.B. 28, 28 (1997).

¹⁷⁰ *Blum*, 2008 WL 647772, at *4.

¹⁷¹ *Id.* at *3.

¹⁷² *Id.*

¹⁷³ *Id.* at *4.

sory Circular 00-46D, the Board made the following remarkable pronouncement:

A person who turns suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a table has engaged in purposeful behavior. Even though the person may not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts—placing the cup on the edge of the table or balancing it so that it will not spill. Likewise, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments or to verify his altitude.¹⁷⁴

Since the Board concluded that the airman had waived his right to a waiver of sanction under Advisory Circular 00-46D, its exposition in the order about deliberate versus inadvertent actions was completely unnecessary to the decision. Of greater concern to the seasoned practitioner, however, is the fact that the Board has articulated a standard that is *meaningless*. No one can tell what is going on in the mind of a pilot in terms of whether he misread his instruments or deliberately chose not to read them. As demonstrated previously in this article by the appellate court's declaration in *Ramaprakash*,¹⁷⁵ an essential requirement of due process of law is predictability, for example, that there is *a uniform body of law* that the practitioner can consult and predict the outcome of a case given the facts readily at hand or which the seasoned advocate reasonably believes he can establish at trial. The current climate of the NTSB in which *existing case law is ignored and meaningless standards are substituted* is a climate in which due process of law is being eliminated.

E. THE DILLMON CASE

The *Dillmon* case illustrates the extent to which the Board will engage in revisionism and ignore a trial court record in order to affirm a decision of the FAA to revoke, on an emergency basis, an airman's medical certificate based upon an alleged falsification.¹⁷⁶ In *Dillmon*, the airman was charged with falsifying three medical application forms, the alleged falsifications arising out

¹⁷⁴ *Id.*

¹⁷⁵ See *supra*, section III.A.

¹⁷⁶ See *Dillmon*, N.T.S.B. Order No. EA-5413, 2008 WL 4771937 (Oct. 28, 2008).

of his being convicted of ten counts of bribery.¹⁷⁷ The FAA revoked his medical certificate on an emergency basis, and the case was tried before Chief Administrative Law Judge Fowler on October 2, 2008.¹⁷⁸

At the outset, it is important to note that in order for a pilot to have his medical certificate revoked for falsification, the operative regulation is 14 C.F.R. § 67.403(a)(1), which prohibits a person from making, or causing to be made, a fraudulent or intentionally false statement on his application for a medical certificate.¹⁷⁹ To the extent the regulation requires proof of a fraudulent or intentionally false statement, then, by definition, the FAA bears the burden of proving that the airman acted with the intent to defraud.¹⁸⁰

In terms of the medical application form, *Dillmon* presented extensive documentary evidence that the FAA had been aware of the fact that the medical application form was vague and ambiguous and, in fact, too ambiguous to satisfy due process of law.¹⁸¹ Moreover, the question on the form that was under consideration was question 18W dealing with: "History of nontraffic conviction(s) (misdemeanors or felonies)."¹⁸² In the same area of the medical application form under the caption denominated as "conviction and/or Administrative Action History" was question 18V asking about:

History of (1) any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or rehabilitation program.¹⁸³

Dillmon testified that he had no intent to defraud the FAA, and placed into evidence two exhibits: respondent's exhibit 1 and respondent's exhibit 2.¹⁸⁴ Both of the exhibits were letters

¹⁷⁷ *Id.* at *2.

¹⁷⁸ *Id.*

¹⁷⁹ 14 C.F.R. § 67.403(a)(1) (2009).

¹⁸⁰ 49 C.F.R. § 821.32 (2008).

¹⁸¹ See *Dillmon*, 2008 WL 4771937, at *4; see also Tr. of Proceedings at 104–11, *Dillmon*, N.T.S.B. Docket No. SE-18349, 2008 WL 4685542 (Oct. 2, 2008) [hereinafter *Dillmon Transcript*].

¹⁸² See FAA, Form 8500-8, <http://www.faa.gov/forms/index.cfm/go/document.information/documentID/185786>.

¹⁸³ *Id.*

¹⁸⁴ *Dillmon Transcript*, *supra* note 181, at 58–63.

from his aviation medical examiner, the first letter indicating the FAA “was only interested in events like drug or alcohol related.”¹⁸⁵ The second letter indicated that while the physician did not recall specifically discussing question 18V or 18W on the medical application form, had such a discussion taken place, he likely would have told the airman that the questions were only related to drug or alcohol offenses.¹⁸⁶ In fact, the doctor wrote: “It is quite possible that he generalized my comment to both 18V and 18W,” and that, “a no answer to 18W may have been based upon a misunderstanding created by our discussion.”¹⁸⁷ Judge Fowler found that the airman did not act with the intent to defraud and overturned the FAA’s emergency order of revocation.¹⁸⁸

The FAA appealed Judge Fowler’s decision to the Board.¹⁸⁹ The Board employed several unfortunate techniques to overturn the decision of Judge Fowler. First of all, the Board ignored binding precedent and ignored the fact that the FAA had to prove the airman acted with the intent to deceive.¹⁹⁰ The Board took the position that all the FAA had to prove was that the statement was false, that it was material, and that the airman knew it was false.¹⁹¹ The Board then maintained that there was no argument about the materiality of the answer on the form.¹⁹² In fact, the Board in a less than candid statement declared as follows: “Moreover, respondent did not provide any case law or arguments to indicate that the conviction was not material for purposes of the intentional falsification standard”¹⁹³

The foregoing statement by the Board is false. Consider the following exchange that is in the record of the hearing:

MR. ARMSTRONG: Question 18W asks about convictions. And question 18W asks about convictions to the extent that it might reveal that you have a personality disorder, that you have psychosis, that you’re bipolar or that you’re substance dependent. That’s why they ask specifically about cocaine and marijuana. And if you have a conviction that deals with a medical issue, it is

¹⁸⁵ Dillmon, N.T.S.B. Order No. EA-5413, 2008 WL 4771937, at *6 (Oct. 28, 2008).

¹⁸⁶ *Id.* at *6–7.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *9.

¹⁸⁹ *Id.* at *1.

¹⁹⁰ *Id.* at *3–4.

¹⁹¹ *Id.* at *3.

¹⁹² *Id.*

¹⁹³ *Id.*

material. If you have a conviction that is not, it is immaterial. If it is immaterial, you fail to satisfy one of the five elements of the prima facie case.

ADMINISTRATIVE LAW JUDGE FOWLER: What is your authority that you're quoting now?

MR. ARMSTRONG: My authority is *United States vs. Petullo*, 709 F.2d 1178, Seventh Circuit, 1983. That's my authority. Those are the five elements.

ADMINISTRATIVE LAW JUDGE FOWLER: All right.

MR. ARMSTRONG: And they can't satisfy the third one because whether this gentleman does or does not have a bribery conviction is immaterial. It doesn't matter. It would not influence their decision whether to issue or not issue a medical certificate. If he had a conviction of DUI, they got a point. [sic] If he had a conviction of possession of marijuana or cocaine, they've got a point.

But a bribery conviction is not material under 67.303 of Part 67. It's not material. And they can't win because they can't make out the third element of a prima facie case of fraud.¹⁹⁴

It is ironic that in a case charging an airman with giving an intentionally false statement on a medical application form the Board would falsely state that Dillmon's counsel failed to argue that the *materiality* of the false statement had not been raised at the hearing in view of the foregoing excerpts from the hearing transcript. Contrary to longstanding case law that the FAA must prove the airman acted with the intent to deceive,¹⁹⁵ the Board declared: "We find that the law judge erred in concluding that respondent's failure to include his conviction on his medical applications due to his confusion concerning question 18W did not constitute intentional falsification."¹⁹⁶

Even though there is extensive case law which the Board has adopted declaring that it will not interfere with the findings of fact made by the Administrative Law Judge unless they are clearly erroneous,¹⁹⁷ the Board substituted its assessment of the

¹⁹⁴ Dillmon Transcript, *supra* note 181, at 29.

¹⁹⁵ See *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

¹⁹⁶ Dillmon, N.T.S.B. Order No. EA-5413, 2008 WL 4771937, at *4 (Oct. 28, 2008).

¹⁹⁷ See *Taylor*, N.T.S.B. Order No. EA-4509, 1996 WL 738720, at *3 (Dec. 11, 1996) ("Absent some compelling reason that persuades us that a law judge's credibility determination is inconsistent with the overwhelming weight of the evidence, we will not disturb his findings."); *Rivera*, N.T.S.B. Order No. EA-4419, 1996 WL 41224, at *2 (Jan. 19, 1996) (finding that in order to overturn the credibility findings of a law judge, they must be arbitrary, inherently incredible, or

evidence for that of Judge Fowler.¹⁹⁸ By ignoring the record challenging the materiality of the questions on the form, by substituting its assessment of the evidence for the assessment made by Judge Fowler, and by eliminating the need of the FAA to prove that the airman acted with the intent to deceive, the Board overturned the decision of Judge Fowler and affirmed the emergency order of revocation.¹⁹⁹

F. THE WEDDING CASE

The U.S. Court of Appeals for the Ninth Circuit found the Board had acted in an arbitrary and capricious manner by failing to give deference to a credibility determination made by Administrative Law Judge Mullins in the case of *Wedding v. NTSB*.²⁰⁰ The facts are that Mr. Wedding was hired to install a new global positioning satellite (GPS) system into a Beech Bonanza.²⁰¹ The matter was tried before Judge Mullins and there was evidence that the FAA inspector who would have approved the installation by issuing an FAA Form 337 made a statement before trial in which he declared that *he did not know* whether or not he had given such approval.²⁰² However, during the hearing, the Agency inspector maintained that *he was certain* he did not give approval for this particular aircraft.²⁰³ The FAA called a document examiner who testified that the inspector's signature on the FAA Form 337 was a forgery.²⁰⁴ There was testimony in the record to the effect that these kinds of matters were routinely handled by facsimile transmissions between the inspector and the airman.²⁰⁵ Given the state of the evidence in the record, Judge Mullins made a credibility assessment that the FAA had failed to carry its burden of proof, noting:

clearly erroneous); Stewart, N.T.S.B. Order No. EA-4387, 1995 WL 461591, at * 3 (July 28, 1995) (holding that law judge's findings not reversed unless clearly erroneous); Blossom, 7 N.T.S.B. 76, 77 (1990) (requiring Board to give deference to law judge's findings of fact unless "inherently incredible or inconsistent with the overwhelming weight of the evidence").

¹⁹⁸ *Dillmon*, 2008 WL 4771937, at *3.

¹⁹⁹ *Id.* at *3-5.

²⁰⁰ No. 02-73893, 2004 WL 958049 (9th Cir. May 3, 2004).

²⁰¹ *Wedding*, N.T.S.B. Order No. EA-4994, 2002 WL 31051232, at *1 (Sept. 11, 2002).

²⁰² *Id.* at *1-2.

²⁰³ *Id.* at *2.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *9.

Let me talk about first a preponderance of the evidence. In this case the Administrator is required under rule, NTSB rule to establish the evidence of these violations by a preponderance of the evidence. And in that regard the central case on intentional falsification is the *Hart vs. McLucas* case. And in *Hart vs. McLucas* for intentional falsification it is required 1) that the evidence establish that there was a false representation and 2) that this false representation related to a material fact and that 3) it was made by the person alleged to have made intentional falsification with knowledge that it was false. And that knowledge, or as the *Hart vs. McLucas* case said, referred to it as scienter, but in very specific lay terms the Administrator is required to show that the person alleged to have made the statement lied, that that person is a liar, that they lied when they signed this document, they knew it was a lie and they deliberately lied to cover up a material fact.

Now, in this regard in the Circuit Court in *Hart vs. McLucas* and then the Board on remand stated that on the question of circumstantial evidence that circumstantial evidence in these cases must be so compelling that no other determination is reasonably possible. That's the burden of proof that I am looking at.²⁰⁶

Judge Mullins then noted that fifteen days prior to the issuance of the emergency order of revocation revoking the airman's certificates of Mr. Wedding, the FAA inspector who brought the charges admitted that he might have approved the installation of the GPS in this aircraft, but "he just didn't remember."²⁰⁷ Judge Mullins had before him a very serious case in which an airman had been stripped of his certificates by the FAA on an emergency basis, but the inspector who brought the charges did not remember whether he approved the installation in the aircraft or not. Because of the heavy burden of proof borne by the FAA, Judge Mullins reversed the emergency order of revocation noting: "So Mr. Lutz's testimony because of these variations down through the testimony has simply not convinced me that the Administrator has established by a preponderance of the evidence today a regulatory violation."²⁰⁸ The FAA appealed the initial decision of Judge Mullins to the Board, and the Board maintained that Judge Mullins had failed to consider the testimony of an expert witness, a document examiner named Mr. Flynn.²⁰⁹ The Board went on to declare that the

²⁰⁶ *Id.* at *8-9.

²⁰⁷ *Id.* at *9.

²⁰⁸ *Id.* at *10.

²⁰⁹ *Id.* at *2.

findings of Judge Mullins “could not be reconciled with the evidence.”²¹⁰

Because the Board had reversed Judge Mullins and upheld the FAA’s emergency order of revocation, Mr. Wedding appealed to the U.S. Court of Appeals for the Ninth Circuit, which granted Mr. Wedding’s petition for review, and noted that the Board failed to follow a body of case law indicating that it had the obligation to defer to the credibility determinations made by the ALJ unless they were proven to be “arbitrary, inherently incredible, or clearly erroneous, which is the applicable standard.”²¹¹ The Ninth Circuit went on to declare:

The Board did not apply this deferential standard of review to the ALJ’s adverse credibility determination regarding Inspector Lutz. To reverse the ALJ’s determination, the Board would have to find that the “great weight of the evidence” established that Wedding, not Lutz, falsified the Form 337. It is not possible from this record to say that the great weight of the evidence points to either man, as it is at best inconclusive. Because the Board abused its discretion in overturning the ALJ’s credibility finding, we grant the petition for review, reverse the Board’s decision, and remand the case for further proceedings consistent with this opinion.²¹²

After the Ninth Circuit reversed the Board, the case was remanded for further proceedings, and the Board declared in its opinion and order on remand as follows:

There seems to be little doubt that someone falsified official FAA documents in this case. Although in our decision we had no difficulty determining who had done so, the court found that it is impossible to determine on this record whether Inspector Lutz or respondent made those alterations. In light of its holding, and the lack of any argument from the FAA that further proceedings would produce any different result, we see no alternative but to set aside the Administrator’s order.²¹³

G. THE *ANDRZEJEWSKI* CASE

A variation on a common theme of the NTSB abusing its discretion by failing to defer to the credibility assessments made by

²¹⁰ *Id.*

²¹¹ *Wedding v. NTSB*, No. 02-73839, 2004 WL 958049, at *1 (9th Cir. May 3, 2004) (quoting *Rivera, N.T.S.B. Order No. EA-4419*, 1996 WL 41224, at *2 (Jan. 19, 1996)).

²¹² *Id.*

²¹³ *Wedding, N.T.S.B. Order No. EA-5130*, 2004 WL 3015188 (Dec. 21, 2004).

an ALJ is found in the case of *Andrzejewski v. FAA*.²¹⁴ Andrzejewski was a female aerobatic pilot who was showing her new aircraft to her family at the Butler County Airport in Butler, Pennsylvania.²¹⁵ She was observed by an FAA safety inspector and also the chief pilot of an aircraft operator.²¹⁶ According to their testimony, Andrzejewski departed the airport in a steep angle of climb, they then saw the aircraft do a wing wag, make a steep bank returning to the runway, and then pitch up before departing the airport.²¹⁷ The FAA concluded that Andrzejewski had performed aerobatic maneuvers during takeoff in violation of the FAR,²¹⁸ and the FAA brought an emergency order of revocation of Andrzejewski's certificate.²¹⁹

In contrast to the FAA inspector and the other airman, Andrzejewski presented three expert witnesses who testified that while the FAA inspector and his companion saw what they saw, the fact is that these operations for this kind of aircraft were quite normal in light of its extraordinary performance capabilities.²²⁰ They further maintained there was nothing aerobatic about the flight, since Andrzejewski declared that her low pass was intended to be a landing but she went around due to a tailwind.²²¹

The ALJ who tried the case found that the testimony of Andrzejewski's witnesses was more credible than those of the FAA and reversed the emergency order of revocation.²²² The FAA appealed to the NTSB, which reversed the ALJ, reinstating the emergency order of revocation.²²³

The Ninth Circuit Court of Appeals, in noting the applicable standard of review, declared it would set aside the NTSB's decision if it was found to be arbitrary or capricious or an abuse of discretion noting that if the NTSB fails to follow its own precedent, then the decision is arbitrary and capricious.²²⁴ The Ninth Circuit went on to observe:

²¹⁴ 548 F.3d. 1257 (9th Cir. 2008).

²¹⁵ *Id.* at 1258.

²¹⁶ *Id.*

²¹⁷ *Id.* at 1259–60.

²¹⁸ 14 C.F.R. § 91.303(e) (2009).

²¹⁹ *Andrzejewski*, 548 F.3d at 1259.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1258–59.

²²³ *Id.*

²²⁴ *Id.* at 1260 (citing 5 U.S.C. § 706 (2)(a); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–08 (1973)).

Where an ALJ chooses to credit one set of witnesses' version of events over another, he has made an implicit credibility determination to which the NTSB must defer "in the absence of any arbitrariness, capriciousness or other compelling reasons." The NTSB must leave undisturbed an ALJ's credibility finding "unless there is a compelling reason or the finding was clearly erroneous."²²⁵

The Ninth Circuit noted that the Board had substituted its opinion of the evidence for the evidentiary findings and credibility assessments made by the ALJ and remanded the case for further proceedings to allow the Board to decide whether the ALJ's credibility finding was "clearly erroneous."²²⁶ As was the case in *Wedding*, the Ninth Circuit in *Andrzejewski* declared that the Board may not, without legitimate reason, refuse to defer to the factual findings and credibility determinations made by the ALJ.²²⁷

H. THE *RICE* DECISIONS

There are two Board decisions concerning an airman named Rice, the first being an NTSB decision granting the airman's appeal as to sanction,²²⁸ and the second being a Board decision denying the application of Rice for an award of attorney's fees under the Equal Access to Justice Act.²²⁹ The FAA's interests in Mr. Rice began with an order suspending his airline transport pilot certificate for ninety days following an off-airport landing due to fuel exhaustion.²³⁰ Initially, the FAA alleged four separate violations: (1) flying an aircraft without a current medical certificate contrary to 14 C.F.R. § 61.3; (2) operating an aircraft in a careless or reckless manner contrary to 14 C.F.R. § 91.13(a); (3) operating an aircraft without the required reserve fuel for a flight in VFR conditions contrary to 14 C.F.R. § 91.151(b); and (4) operating an aircraft contrary to the limitations contained in the Aircraft Flight Manual in violation of 14 C.F.R. § 91.9(a).²³¹ The Administrator then issued an amended order withdrawing the charge of a violation of operating the aircraft contrary to the flight manual limitations but without making any reduction in

²²⁵ *Id.* at 1260 (internal citations omitted).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Rice, N.T.S.B. Order No. EA-5408, 2008 WL 4452143 (Sept. 29, 2008).

²²⁹ *In re* Rice, N.T.S.B. Order No. EA-5474, 2009 WL 2844146 (Aug. 26, 2009).

²³⁰ Rice, 2008 WL 4452143, at *1.

²³¹ *Id.* at *4 nn.2-3.

the proposed sanction.²³² Following an evidentiary hearing, Judge Mullins reduced the sanction to a seventy-five day suspension from which the airman appealed.²³³

The FAA did not attempt to introduce into evidence the sanction guidance table,²³⁴ and the Board, in addressing the airman's assertion that the seventy-five day suspension was arbitrary and not in accordance with Board precedent²³⁵ and the Board in addressing this issue declared:

First, we note that the Administrator did not introduce the sanction guidance table into evidence at the hearing, or otherwise provide convincing evidence of the rationale for the choice of sanction. Moreover, we note that the range of sanction appears to be between 30 and 60 days for fuel exhaustion cases, where there are no aggravating circumstances such as an unfavorable compliance disposition or a history of prior violations.²³⁶

The Board went on to declare:

The law judge's sanction determination is owed no deference, for it provides no substantive explanation for how it was calculated. Finally, even on appeal, the Administrator provides no meaningful explanation of what range his sanction guidance table specifies for the violations at issue in this case, or, importantly, an explanation about how the facts of this case should be analyzed within the range of possible sanctions.²³⁷

Next, the Board made a remark that can only be interpreted as exhibiting a bias in favor of the FAA, and certainly not the kind of remark one would read in an appellate decision of a court, when the Board wrote:

In future cases, we *encourage* the Administrator to present evidence of the sanction guidance table, and evidence or argument addressed to the validity of choice of sanctions in the context of the specific facts of each case. In the absence of such a record, we cannot defer to the Administrator's sanction for we have no way to assess its validity.²³⁸

²³² *Id.* at *4 n.3.

²³³ *Id.* at *1.

²³⁴ *Id.* at *3.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at *4 n.11 (emphasis added).

The Board then granted the airman's appeal, imposed a sixty day suspension, and modified the initial decision of Judge Mullins accordingly.²³⁹

Rice then made claim for attorney's fees on the basis that the actions of the FAA were not substantially justified.²⁴⁰ Rice asserted that the FAA had waited one hundred and twenty-seven days after issuing the original order of suspension and twelve days after counsel for Rice had deposed two FAA inspectors before the FAA withdrew the alleged violation of 14 C.F.R. § 91.9(a) and that the FAA did not make a concomitant reduction in the suspension sought.²⁴¹ Not only did Rice argue that the FAA had abandoned one of the charges, but also that the ultimate suspension imposed was sixty days as opposed to the ninety days sought by the FAA.²⁴² By virtue of the foregoing, Rice maintained that he was the prevailing party in a discrete portion of the case.²⁴³ Rice went on to argue:

It is respectfully submitted that when, as here, the Board reduces a sanction based upon the failure of the Administrator to provide any analysis or evidence of the rationale for the choice of sanction, at both the hearing and on appeal to the Full Board, due process and public policy dictate that the Applicant is the prevailing party for purposes of EAJA.²⁴⁴

The statute which governed the petition of Rice to recover his attorney's fees provided:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not that position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.²⁴⁵

²³⁹ *Id.* at *4.

²⁴⁰ See Appeal Brief of Applicant Patrick Sean Rice, *In re* Rice, N.T.S.B. Order No. EA-5474, 2009 WL 2844146 (Aug. 26, 2009).

²⁴¹ *Id.* at 3.

²⁴² *Id.* at 4.

²⁴³ *Id.* at 5.

²⁴⁴ *Id.* at 9, 10.

²⁴⁵ 5 U.S.C. § 504(a)(1) (2006).

Rice went on to argue in his appeal brief to the Board from denial of his application for attorney's fees²⁴⁶ as follows:

To establish "substantial justification" the Administrator must show (1) that there is a reasonable basis in truth for the facts alleged in the pleadings; (2) that there exists a reasonable basis in law for the theory it propounds; and (3) that the facts alleged will reasonably support the legal theory advanced. *McCrary v. Administrator*, 5 NTSB 1235 (1986). The relevant inquiry is whether the Administrator's case is "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 87 U.S. 552 (1988). The court in *Pierce v. Underwood* phrased this test as requiring a "reasonable basis in both fact and law. *Id.*

Addressing the steps set forth above, it is clear the Administrator was not substantially justified in issuing an order of suspension based on a violation of FAR 91.9 (a) (sic), because in pre-hearing depositions, the Administrator's investigating Inspectors did not articulate any reasonable basis in law and fact for the violation. Then, and only then, did the Administrator withdraw the violation.

Addressing the steps set forth above, it is clear the Administrator was not substantially justified in imposing a ninety day suspension. There is no reasonable basis in law or fact for the Administrator to have reasonably believed that a ninety day suspension for the violations alleged was appropriate. Indeed, as found by the Board, a ninety-day suspension is not supported by precedent, is not supported by the sanction guidelines, and the Administrator did not introduce anything into the record at any stage of the proceedings which would justify a ninety day suspension."²⁴⁷

The Board, which had declared on no less than three occasions that the FAA had failed to introduce the sanction guidance table into evidence and which had "encouraged" the FAA "to present evidence of the sanction guidance table" in its order of September 29, 2008,²⁴⁸ then did an about face in its order affirming the denial of an award of attorney's fees to Rice.²⁴⁹ With

²⁴⁶ See *In re Rice*, N.T.S.B. Order No. EA-5474, 2009 WL 2844146, at *4–7 (Aug. 26, 2009) (including the Order Denying Application for an Award of Attorneys Fees).

²⁴⁷ Appeal Brief of Applicant Patrick Sean Rice at 10, *In re Rice*, N.T.S.B. Order No. EA-5474, 2009 WL 2844146 (Aug. 26, 2009).

²⁴⁸ *Rice*, N.T.S.B. Order No. EA-5408, 2008 WL 4452143, at *4 n.11 (Sept. 29, 2008).

²⁴⁹ *In re Rice*, N.T.S.B. Order EA-5474, 2009 WL 2844146, at *3 (Aug. 26, 2009).

regard to the argument of Rice that he had prevailed in a discrete portion of the case by virtue of the FAA's abandoning one of the charges before trial, the Board rejected this argument claiming that Rice had not prevailed "on a significant and substantive portion of the proceeding."²⁵⁰ The Board even went so far as to declare it was abandoning a body of law to the contrary, by stating:

We expressly abandon our statement in *Application of Whittington*, NTSB Order No. EA-5063 at 5 (2003), suggesting that a withdrawn charge is, a *fortiori*, dispositive evidence that an applicant prevailed as to that withdrawn charge. This assertion in *Whittington*, which did not affect the resolution of that case, was incorrect in light of the relevant EAJA case law.²⁵¹

The Board, rather than engage in a meaningful analysis or explain why the FAA's abandonment of charges did not render the airman the prevailing party, simply chose to abandon its previous declaration on the issue.²⁵²

Next, with regard to the argument that the reduction in sanction would authorize an award of attorney's fees, the Board, in direct contradiction to its earlier pronouncement that the FAA should have tendered the sanction guidance table into evidence, maintained: "we find that the Administrator was reasonable in both fact and law in pursuing a 90-day suspension."²⁵³

Respectfully, it is impossible to reconcile the Board's pronouncement of September 29, 2008, in *Rice* to the effect that the FAA had not offered any evidence as to sanction and encouraging the FAA in future litigation to place the sanction guidance table into evidence,²⁵⁴ with its decision denying Rice an award of attorney's fees of August 26, 2009, in which it maintained that the actions of the FAA, in pursuing a ninety day suspension without any sanction guidance table to support that position, "was reasonable in both fact and law."²⁵⁵

I. THE MAGRUDER DECISIONS

Our inquiry into the conduct of the Board once again entails examining two distinct Board decisions, the first being an initial

²⁵⁰ *Id.* at *3.

²⁵¹ *Id.* at *3 n.9.

²⁵² *Id.*

²⁵³ *Id.* at *3.

²⁵⁴ *Rice*, N.T.S.B. Order No. EA-5408, 2008 WL 4452143, at *4 n.11 (Sept. 29, 2008).

²⁵⁵ *In re Rice*, 2009 WL 2844146, at *3.

decision where the airman prevailed in charges arising from an off-airport landing of an aircraft due to fuel exhaustion because the airman was not the pilot-in-command of the aircraft,²⁵⁶ and the second being the Board's opinion and order affirming a denial of an award of attorney's fees to Magruder.²⁵⁷ Magruder was a member of the Albert Whitted Flying Club.²⁵⁸ Members of the flying club paid an initiation fee, and the flying club was open to both pilots and non-pilots.²⁵⁹ Members of the club who were qualified pilots could rent aircraft and those who were not pilots could rent an aircraft if a flight instructor was on board.²⁶⁰ Edwin Good was another member of the club who held a private pilot's certificate but did not have a medical certificate.²⁶¹ Bay Area Flying Service, which ran the flying club, offered a Florida Keys day trip involving three aircraft that would depart in the morning of July 10, 2004, fly to Key West, and return in the afternoon.²⁶² Magruder signed up for the flying club event as did Mr. Good.²⁶³ According to the testimony of Mr. Good, he was assigned to the same aircraft as Magruder and Magruder's wife.²⁶⁴ According to Good, he told Magruder he would like to fly the first leg and that Magruder would handle the radios, but they did not discuss who would be the pilot-in-command, and Good maintained he did not even know what that term meant.²⁶⁵ Good testified he never considered who would be in charge of the flight.²⁶⁶ Good further maintained that he told Magruder before they left that he (Good) did not have a medical certificate because he had diabetes.²⁶⁷

After departing from the Albert Whitted Airport, Good testified that Magruder operated the radios and was navigating.²⁶⁸ Good testified that he heard someone over the radio say they were cleared to land, and the aircraft landed at Homestead Air

²⁵⁶ Magruder, N.T.S.B. Docket No. SE-17273, 2005 WL 3688604 (Nov. 7, 2005).

²⁵⁷ *In re* Magruder, N.T.S.B. Order No. EA-5278, 2007 WL 1233535 (Apr. 10, 2007).

²⁵⁸ *Magruder*, 2005 WL 3688604, at *2.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at *2-3.

²⁶³ *Id.* at *2.

²⁶⁴ *Id.* at *4.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

Reserve Base.²⁶⁹ The aircraft was met by armed military personnel and Good and Mr. and Mrs. Magruder were taken to a building to complete some forms.²⁷⁰ Good executed a military R-10 flight plan form declaring the aircraft was departing Homestead Air Reserve Base en route to Marathon, Florida.²⁷¹ Good further testified he did not know who had crossed out Marathon as the destination and entered Key West as the destination on the military flight plan.²⁷²

Prior to departing Homestead, Good asked about fuel, but was told there was none, and he did not measure the fuel aboard the aircraft.²⁷³ On the departure from Homestead, Good sat in the left seat while Magruder sat in the right seat with Mrs. Magruder in the rear seat.²⁷⁴ Good testified that after they departed Homestead, he did everything and did not ask Magruder to do anything.²⁷⁵ After Good departed Homestead, he received directions from the control tower to Highway 1.²⁷⁶ During the flight, the engine began to run rough and then stopped, and the aircraft landed on a highway. When the aircraft was met by the Sheriff, Mr. Good told the Sheriff that he was the pilot.²⁷⁷

The FAA issued an order revoking Good's airman's certificate in which it was asserted that Good was the pilot-in-command of the aircraft in question for the flight from the Albert Whitted Airport to Homestead Air Reserve Base.²⁷⁸ The FAA then issued an order suspending the airman's certificate of Magruder for one hundred eighty days maintaining he was the pilot-in-command of the aircraft on the date in question and charging him with careless or reckless conduct, inadequate pre-flight planning, and failing to ensure the aircraft had adequate fuel for a VFR flight.²⁷⁹

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at *5.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at *2; *see also* 14 C.F.R. § 91.13(a) (2009) (dealing with careless or reckless conduct), 14 C.F.R. § 91.103(a) (2009) (dealing with preflight planning obligations of the pilot-in-command), 14 C.F.R. § 91.151(a)(1) (2009) (dealing with the fuel requirements for a VFR flight).

The FAA allegations were tried before Judge Pope, who admitted into evidence the order revoking Good's airman's certificate.²⁸⁰ The FAA attempted to place into evidence a letter on the letterhead of Magruder that was unsigned, but the letter was not received into evidence because no adequate foundation was laid for its admission.²⁸¹

The FAA's investigative file was placed into evidence and Agency Inspector Frank testified there was nothing in the file showing an explicit designation of Magruder as the pilot-in-command.²⁸² FAA Inspector Frank admitted that there was only an implicit designation of Magruder as pilot-in-command when Good told Magruder that Good did not have a valid medical certificate.²⁸³ On cross-examination, Inspector Frank authenticated an exhibit, which was an interpretation by the Assistant Chief Counsel of the FAA, which said that "anyone can act as pilot-in-command without being qualified."²⁸⁴ The same FAA interpretation said that who is pilot-in-command is a question of fact and must be determined in light of all the circumstances in a particular situation, not just the ratings of the pilots involved.²⁸⁵ Inspector Frank maintained that if Mr. Good acted as pilot-in-command, it would be a violation of the Federal Aviation Regulations, since he was not medically qualified.²⁸⁶

After considering the evidence, Judge Pope rendered his findings of fact and conclusions of law noting that the FAR defined the "pilot-in-command as the person who: (1) has the final authority and responsibility for the operation of a flight, (2) has been designated as pilot-in-command before or during the flight, and (3) holds the appropriate category, class and type rating, if appropriate for the conduct of the flight."²⁸⁷ Taking note of NTSB precedent, Judge Pope observed that the mere fact that an unlicensed airman ascertains that someone else on the flight possesses a valid certificate does not render the licensed person the pilot-in-command.²⁸⁸

²⁸⁰ Magruder, 2005 WL 3688604, at *1, *5.

²⁸¹ *Id.* at *5.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at *6.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* (referencing 14 C.F.R. § 1.1 and the definition of pilot-in-command).

²⁸⁸ *Id.* at 7 (citing Cooper, N.T.S.B. Order No. EA-4433 (Feb. 22, 1996)).

Judge Pope found that Mr. Good told Air Force security personnel he was the pilot of the aircraft and put his name on a form as the pilot-in-command.²⁸⁹ Further, Judge Pope noted that after the emergency landing, Mr. Good told deputy sheriffs he was the pilot of the aircraft.²⁹⁰ In reaching his combined legal and factual conclusion about whether Magruder was the pilot-in-command, the only concern of Judge Pope was whether the status of Magruder changed after the aircraft departed Homestead Air Reserve Base.²⁹¹

With regard to the concern of Judge Pope, he declared: "The plain fact is that nothing happened at Homestead Air Reserve Base after Mr. Good made his unauthorized landing there to change Mr. Good's status from pilot-in-command to something less, and to elevate respondent to pilot-in-command."²⁹² Judge Pope reasoned that upon the aircraft being landed at Homestead Air Reserve Base, Mr. Magruder "made every effort to make himself as inconspicuous as possible, and not attract attention to himself . . . and was perfectly content to let Mr. Good deal with the problem of getting [the aircraft] released from police custody so [the flight] could continue"²⁹³

In describing the conduct of Magruder, Judge Pope observed: "In short, it appears to be a fair inference that he played the role of an air passenger, in no way responsible for the operation of the aircraft."²⁹⁴

In finding for Magruder and against the FAA, Judge Pope made the following declarations:

The mere presence on board the flight of someone who could lawfully exercise the privileges and responsibility of a pilot-in-command does not make that person the pilot-in-command. Someone cannot be considered the pilot-in-command by default. It is not an involuntary act.

To be considered to be a pilot-in-command, and therefore, responsible for the safe operation of a flight, a very weighty responsibility, there must be actual or at least implied acceptance of that responsibility.

In other words, to be pilot-in-command, an otherwise qualified pilot must at least, by his actions, if not by explicit agreement or

²⁸⁹ *Id.* at *7.

²⁹⁰ *Id.* at *8.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at *9.

designation, demonstrate that he is accepting overall responsibility for and control of the flight.

Nowhere in the evidence in this case is there any evidence that the Respondent was ever designated to be pilot-in-command, or that he agreed to, or by his actions demonstrated that he was stepping into accepting the role of pilot-in-command and taking over all responsibility for and control of the flight.

I find, therefore, that the Administrator has not proven by a preponderance of the evidence that the Respondent was the pilot-in-command of the flight charged in the Complaint. The evidence clearly indicates Mr. Good was the pilot-in-command with ultimate responsibility and in full control of the flight, and at no time showed an inclination, desire, or intention in relinquishing that control.

Since the Respondent was not the pilot-in-command and was not operating the controls of the aircraft, he had no responsibility for complying with the requirements imposed by section 91.103(a) and section 91.151 (a)(1) of the FARs.

Further, there is no evidence showing that he violated Section 91.13(a) of the FARs by operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.²⁹⁵

In light of the remarkably forceful pronouncements by Judge Pope, one would anticipate that Magruder could recover attorney's fees from the FAA on the basis that the claims against him were not substantially justified in both law and fact.²⁹⁶ In fact, Magruder did make application for attorney's fees in the amount of \$23,559.50,²⁹⁷ arguing in essence that the legal premise of the FAA's case was flawed in that merely because Magruder was aboard the aircraft and discovered that Good did not have a medical certificate did not, as a matter of law, render Magruder the pilot-in-command.²⁹⁸

In Judge Pope's initial decision, which is appended to the Board's opinion and order, Judge Pope relied upon hearsay sponsored by the FAA as to what an asterisk by Magruder's name meant when the court noted: "There was at least hearsay evidence that the asterisk designated the pilot-in-command."²⁹⁹ In

²⁹⁵ *Id.*

²⁹⁶ See 5 U.S.C. § 504(a)(1) (2006); see also *Pierce v. Underwood*, 487 U.S. 552, 552-53 (1988); *McCrary*, 5 N.T.S.B. 1235, 1237 (1986).

²⁹⁷ *In re Magruder*, N.T.S.B. Order No. EA-5278, 2007 WL 123535, at *6 (Apr. 10, 2007).

²⁹⁸ *Id.* at *3-4.

²⁹⁹ *Id.* at *11.

denying Magruder's application for attorney's fees, Judge Pope wrote:

The issue is not whether the Administrator was able to prove the meaning of the asterisk at the hearing, which she was not, but whether the Administrator had enough evidence to justify proceeding with the case to a hearing. The meaning of the asterisk and the denials by both the Applicant and Mr. Good that they were the pilot-in-command created factual and credibility issues that could only be resolved at a hearing.³⁰⁰

Besides relying upon hearsay about what the asterisk by Magruder's name meant on a document, Judge Pope also considered the letter he had excluded from evidence, noting:

Although the letter was offered into evidence by the Administrator at the hearing, but was not accepted, the Administrator argues that she was entitled to use the letter as a basis for her conclusion that the Applicant was the pilot-in-command of the flight when it left Homestead Air Reserve Base, because he knew that Mr. Good could not serve as the pilot-in-command.³⁰¹

While Judge Pope maintained that these credibility issues made the conduct of the FAA substantially justified, Magruder noted that "the case was decided solely on the evidence and testimony presented during the Administrator's case-in-chief, and, therefore, there were no issues of credibility. Therefore, the Administrator's position was not justified."³⁰²

The Board affirmed the denial of an application for attorney's fees noting that the asterisk on an exhibit and the unauthenticated letter that was not received into evidence were bases for finding that the actions of the FAA were substantially justified.³⁰³ To the extent the Board was relying upon evidence that was not received upon the trial in chief, the Board declared:

The law judge did not allow the letter to be admitted into evidence, however, due to its questionable authenticity. We acknowledge that the authenticity of this evidence is debatable, but, although applicant argues it was error for the law judge to use the letter as a basis for denial of EAJA fees because it was not in evidence, we have considered it as part of the entire administrative record in order to determine whether the Administrator was substantially justified in pursuing the enforcement action.³⁰⁴

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at *10.

³⁰³ *Id.* at *3, *5.

³⁰⁴ *Id.* at *5.

The conduct of the Board in *Magruder* is disturbing for at least two reasons. First and foremost, in the initial decision, the pronouncement was unambiguous that the mere fact that Magruder was aboard the aircraft did not render him pilot-in-command even if he discovered that Mr. Good did not have a current medical certificate since assuming the authority of pilot-in-command "is not an involuntary act."³⁰⁵ Moreover, a finding had been made in the initial decision "that nothing happened at Homestead Air Reserve Base after Mr. Good made his unauthorized landing there to change Mr. Good's status from pilot-in-command to something less, and to elevate the Respondent to pilot-in-command."³⁰⁶ Respectfully, the finding that Magruder was not the pilot-in-command in light of this unambiguous language appears to be inconsistent with the denial of his application for attorney's fees under the Equal Access to Justice Act. Secondly, the fact that hearsay sponsored by the FAA, as to what the asterisk meant by Magruder's name, coupled with the letter attributed to Magruder, which was never admitted into evidence, were employed to make a finding that the actions of the FAA were substantially justified is disturbing and demonstrates the need for rules of evidence and rules of procedure so that materials that are not admissible into evidence cannot come in through the back door to deny an airman an award of attorney's fees.

IV. DISCOVERY BEFORE THE BOARD – AN EXERCISE IN FUTILITY

In *Murphy*, the matter came on for hearing on November 14, 2006.³⁰⁷ Counsel for respondents filed a motion in limine to preclude the FAA from entering evidence into the record inconsistent with its admissions in *judicio* and argued, "If those admissions are admitted, there is no case. The case is over."³⁰⁸ Respondents' counsel requested that he be permitted to read the thirty-five paragraphs of the requests for admissions into the record.³⁰⁹

³⁰⁵ *Magruder*, N.T.S.B. Docket No. SE-17273, 2005 WL 3688604, at *9 (Nov. 7, 2005).

³⁰⁶ *Id.* at *8.

³⁰⁷ *Murphy*, N.T.S.B. Order No. 5355, 2008 WL 205095 (Jan. 16, 2008).

³⁰⁸ Tr. of Evidentiary Hearing at 23, *Murphy*, N.T.S.B. Order No. 5355, 2008 WL 205095 (Jan. 16, 2008) [hereinafter *Murphy Transcript*].

³⁰⁹ *Id.*

Agency counsel admitted that no response or objection to the requests for admissions had ever been served.³¹⁰ The following exchange between the court and Agency counsel then ensued:

JUDGE POPE: Obviously they wanted you to answer them. Otherwise, they wouldn't have filed them.

MR. ELLIS: Obviously, your Honor, but there are rules when it comes to discovery. When it comes to the other side not doing something you want to do, you have to file a motion to compel. We would have happily done that. This was done back in March, and there's been no mention of it since Monday (sic). We move that they be deemed waived for failure to prosecute these, and the rules in the NTSB proceedings aren't like the Federal Rules. They don't mandate that admissions have to be admitted after a certain number of time (sic).

JUDGE POPE: Well, we're not playing games here. The motion was filed, a request for admissions. Apparently, the Administrator, for whatever reason, decided not to answer it, or if they did object to it, they never directly answered the questions, so –

MR. ELLIS: This is a surprise to us, your Honor –

JUDGE POPE: —my ruling at the moment is, sir, we will go off the record, and you will answer each of the request for admissions.

MR. ELLIS: Okay.³¹¹

The effect of the FAA's failure to respond to the requests for admission under the Federal Rules of Civil Procedure was such that the factual content of the requests were conclusively deemed admitted.³¹²

When the court instructed Agency counsel to respond in the courtroom to the requests for admission, respondent's counsel took exception noting:

MR. ARMSTRONG: I want to make a record, your Honor. I think the Court's ruling is in violation of the Fifth Amendment to the U.S. Constitution. I think it violates 5 U.S.C. § 556. I think it's contrary to Rule 36 (b) of the Federal Rules of Civil Procedure. I think that ruling is erroneous, and I want the record to reflect that, your Honor. He is bound by the admissions in *judicio*. The case is over.

JUDGE POPE: Well, you can certainly take that up with the Board, however –

MR. ARMSTRONG: I will.

. . . .

³¹⁰ *Id.* at 25.

³¹¹ *Id.* at 26, 27.

³¹² See FED. R. CIV. P. 36(a)(3).

MR. ARMSTRONG: Respectfully, the morning of trial is not the time for the Agency to be responding to requests for admissions. That's not fair. It violates the Fifth Amendment.³¹³

To the extent the Board's Rules of Practice make reference to the concept of discovery, Board Rule 19(c) provides:

Use of the Federal Rules of Civil Procedure. Those provisions of the Federal Rules of Civil Procedure that pertain to depositions and discovery may be used as a general guide for discovery practice in proceedings before the Board where appropriate. The Federal Rules and the case law that constitutes them shall be considered by the Board and its law judges as instructive rather than controlling.³¹⁴

The notion that the Federal Rules of Civil Procedure "may be used as a general guide for discovery practice"³¹⁵ does not comport with the directive of Justice Oliver Wendell Holmes: "[T]he tendency of the law must always be to narrow the field of uncertainty."³¹⁶ The Board's Rules of Practice do just the opposite, since rules understood by practitioners along with the body of case law are merely "instructive, rather than controlling."³¹⁷

In *Dillmon*, the Administrator brought an emergency action to revoke the airman's certificate on the theory that he had given a false response to question 18W on the medical application form to the extent that he had not disclosed a bribery conviction.³¹⁸ Among the defenses set up by Dillmon in his answer³¹⁹ was the assertion that "the convictions about which the FAA complains are immaterial. Whether or not respondent had a conviction of bribery is immaterial to his physical fitness to operate an aircraft."³²⁰ As his third defense, Dillmon maintained: "Question 18W on the FAA medical application form which appears in the context of questions about health and medical history is void for vagueness, constitutionally infirm and violates respondent's right to substantive due process of law guaranteed by the Fifth Amendment to the United States Constitution."³²¹

³¹³ Murphy Transcript, *supra* note 308, at 28–29.

³¹⁴ 49 C.F.R. § 821.19(c) (2008).

³¹⁵ *Id.*

³¹⁶ O.W. HOLMES, THE COMMON LAW 127 (1881).

³¹⁷ 49 C.F.R. § 821.19(c) (2008).

³¹⁸ See Dillmon, N.T.S.B. Order No. EA-5413, 2008 WL 4771937, at *1 (Oct. 28, 2008).

³¹⁹ See Answer of Resp't at 2, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 5, 2008).

³²⁰ *Id.* at 2.

³²¹ *Id.*

In light of his defenses, Dillmon propounded discovery requests to the Administrator,³²² in which respondent requested that the Administrator produce, among other things: “[a] Memorandum from Anthony J. Broderick, Associate Administrator for Aviation Standards (AVS-1) to Assistant Inspector General (JI-1) February 17, 1987. . . .”³²³ The Administrator objected to producing the Broderick Memorandum, asserting: “Objection. The information sought is irrelevant, and unlikely to lead to the discovery of admissible evidence.”³²⁴

Dillmon moved to compel discovery, or in the alternative, for sanctions based upon the Administrator’s refusal to produce the Broderick Memorandum.³²⁵ The court entered an order denying Dillmon’s efforts to secure the Broderick Memorandum and other materials of an exculpatory nature.³²⁶ Among the comments made in the Broderick Memorandum were as follows:

We also need to think about changing the form and substance of the questions asked on the Form 8500-8 as we discussed. It has not generally been possible to successfully prosecute people in the past in part because of the vague, qualitative, and evaluative nature of these questions. As you know, dozens of such cases were returned to us as declined for prosecution a few years ago. We would be pleased to receive any suggestions you have for improvement in this area.³²⁷

The efforts of the respondent to secure discovery did not end with pursuit of the Broderick Memorandum but also included efforts to secure all FAA memoranda concerning placing any questions on the medical application form about criminal convictions;³²⁸ memoranda, hand written notations, emails, and internal correspondence discussing inserting question 18w on the

³²² Respondent’s Disc. to the FAA, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 5, 2008) [hereinafter Respondent’s Discovery Requests].

³²³ *Id.* at 4.

³²⁴ Acting Administrator’s Resp. to Respondent’s First Req. for Disc. at 4, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 15, 2008).

³²⁵ Mot. to Compel, or in the Alternative, Mot. for Sanctions, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 17, 2008).

³²⁶ Order Den. Respondent’s Mot. to Compel, or in the Alternative, Mot. for Sanctions, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 23, 2008).

³²⁷ Mem. from Anthony J. Broderick, Associate Administrator for Aviation Standards (AVS-1) to Assistant Inspector General for Investigations (JI-1) (Feb. 17, 1987); see also Alan Armstrong, *Defending False Statement Charges Relating to the FAA’s Medical Application Form*, 57 J. AIR L. & COM., 357, 360 (1991).

³²⁸ Respondent’s Second Disc. to the FAA at 2, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 9, 2008).

medical application form;³²⁹ the identity of all FAA employees who participated in the formulation and creation of the medical application form and any previous versions of the form;³³⁰ the names of all FAA personnel who decided to include question 18w on the medical application form;³³¹ and the identity of each medical treatise authorizing the placement of question 18W on the medical application form.³³²

The Administrator refused to produce any materials in response to the respondent's expanded discovery requests intoning "that the information sought is irrelevant and not likely to lead to the discovery of admissible evidence."³³³ Respondent filed a second motion to compel discovery,³³⁴ to which the FAA responded,³³⁵ and at the time of the hearing in the matter, respondent's counsel complained on the record to Judge Fowler about the fact that the FAA had not produced any material in response to the respondent's second discovery requests.³³⁶ Counsel argued that the proceedings before the court presented a constitutional issue that could not be avoided,³³⁷ and when the court refused to grant the respondent's second motion to compel discovery, Dillmon's counsel took exception to that rule.³³⁸ Curiously, even though the discussion above demonstrates that the Administrator refused to produce the Broderick Memorandum in response to discovery,³³⁹ the court admitted the Broderick Memorandum into evidence over objection by the Administrator.³⁴⁰ Similarly, even though the FAA had not produced any materials in response to Dillmon's discovery requests, the court admitted, over objection, a host of materials demonstrating that question 18W on the medical

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 3.

³³² *Id.*

³³³ Administrator's Resp. to Respondent's Second Req. for Disc., at 1-3, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 19, 2008).

³³⁴ Respondent's Second Mot. to Compel, or in the Alternative, Mot. for Sanctions, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 24, 2008).

³³⁵ Administrator's Resp. to Respondent's Second Mot. to Compel, or in the Alternative, Mot. for Sanctions, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 25, 2008).

³³⁶ Dillmon Transcript, *supra* note 181, at 12.

³³⁷ *Id.* at 8.

³³⁸ *Id.* at 14.

³³⁹ Acting Administrator's Resp. to Respondent's First Req. for Disc. at 4, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 15, 2008).

³⁴⁰ Dillmon Transcript, *supra* note 181, at 99.

application form was ambiguous and constitutionally infirm.³⁴¹ If, as the Administrator maintained, these and other documents were not “relevant” for purposes of discovery,³⁴² and if the court ruled properly in denying production of these materials,³⁴³ then why were they admitted into evidence over the Administrator’s objection?³⁴⁴ It is axiomatic that had these materials been sought in federal court, where the Federal Rules of Civil Procedure are *enforced*, they would have been produced, or the Administrator would have been sanctioned for refusing to produce the materials.³⁴⁵

The exchange between counsel and the court in *Shaffer*³⁴⁶ underscores the difficulty imposed upon counsel for the airman in the event the FAA is not fully compliant with discovery requests in an emergency proceeding. Shaffer had sought “all radar data showing the location of N3050H on 30 May 2006,”³⁴⁷ but the radar data produced by the FAA terminated before the time the aircraft was on its return leg to Homestead, Florida.³⁴⁸ Shaffer’s counsel objected to the non-production because, according to

³⁴¹ *Id.* at 111, 112, 113, 114, 115 (admitting into evidence Indictment, United States v. Pamela M. Manapat, U.S. District Court for the Middle District of Florida, Tampa Division, Case No. 88-325-CR-T-13(A)); Respondent’s exhibit 10, Motion to Dismiss of Defendant, United States v. Pamela M. Manapat, U.S. District Court for the Middle District of Florida, Tampa Division, Case No. 88-325-CR-T-13 (A); Respondent’s exhibit 11, Transcript of Proceedings before Judge George C. Carr, United States v. Pamela M. Manapat, U.S. District Court for the Middle District of Florida, Tampa Division, Case No. 88-325-CR-T-13 (A) (December 8, 1998); Respondent’s exhibit 12, Order by Judge George C. Carr, United States District Judge, United States v. Pamela M. Manapat, U.S. District Court for the Middle District of Florida, Tampa Division, Case No. 88-325-CR-T-13 (A); Respondent’s exhibit 13, letter from Michael J. Pangia, Esq., President, National Transportation Safety Board Bar Association to John Jordan, M.D., Federal Air Surgeon, Federal Aviation Administration, AAM-1, October 3, 1989; Respondent’s exhibit 14, letter from Bernard A. Geier, Executive Director, National Association of Flight Instructors, February 16, 1990; and Respondent’s exhibit 15, letter from Federal Air Surgeon, Robert R. McMeekin, M.D. to Bernard A. Geier, March 1, 1990.

³⁴² Acting Administrator’s Resp. to Respondent’s First Req. for Disc. at 5–6, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 15, 2008).

³⁴³ Order Den. Respondent’s Mot. to Compel, or in the Alternative, Mot. for Sanctions, Dillmon, N.T.S.B. Docket No. SE-18349 (Sept. 23, 2008).

³⁴⁴ Dillmon Transcript, *supra* note 181, at 111–15.

³⁴⁵ See FED. R. CIV. P. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense. . .”).

³⁴⁶ Tr. of Proceedings in Shaffer, N.T.S.B. Docket No. SE-17764 (July 21, 2006), [hereinafter Shaffer Transcript].

³⁴⁷ *Id.* at 723.

³⁴⁸ *Id.* at 699.

the airman's counsel, an FAA air traffic controller was allowed to testify that he observed the aircraft of the airman on radar for the entire flight, up to the point that it landed.³⁴⁹ The airman's lawyer maintained that, since he had requested the radar data and it had not been produced before trial, the testimony of the air traffic controller be suppressed and stricken "for anything which occurred after the point at which the radar data supplied to us ended."³⁵⁰

In an effort to mitigate the non-production of the requested radar data, the court ordered the FAA to produce the material before the close of proceedings on Friday, July 21, 2006, in order that counsel for the airman would have the weekend to evaluate the data and prepare his defense.³⁵¹ In issuing this directive, the court noted that there are "a lot of problems with discovery in emergency cases."³⁵² However, the problem with the court's solution to the non-production of the requested material was that the airman's expert witness in air traffic control matters would not be available to testify on the following Monday, when the trial would recommence.³⁵³ The ALJ would not consider dismissing the charges brought by the FAA on grounds that the radar data had not timely been produced, noting: "I just don't see any other way that I can deal with this, other than to dismiss the case summarily and I don't think that the public interest and safety in air operation is served by doing that."³⁵⁴

V. WHY HAS THE BOARD CEASED TO FUNCTION FAIRLY?

Some insight into the functions of the Board has been secured from John Goglia, a former member of the NTSB.³⁵⁵ In interviewing Mr. Goglia, it is his assessment that the erosion in the quality of Board decisions began before he assumed his duties as a member of the Board in 1995.³⁵⁶ Presently, staff attorneys do not even give members of the Board the trial transcripts or exhibits when the opinion and order are generated.³⁵⁷ If a

³⁴⁹ *Id.* at 697.

³⁵⁰ *Id.* at 698.

³⁵¹ *Id.* at 711.

³⁵² *Id.*

³⁵³ *Id.* at 720, 721.

³⁵⁴ *Id.* at 714.

³⁵⁵ See Interview with John Goglia, *supra* note 103.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

member of the Board wants to see a trial transcript or view exhibits, he or she must ask for them.³⁵⁸ When Mr. Goglia was on the Board and he requested transcripts or exhibits, he felt that he was troubling the staff in making those requests.³⁵⁹ When Mr. Goglia served on the NTSB, he wanted all of the data to evaluate the merits of the relative positions of the parties.³⁶⁰

According to the understanding of Mr. Goglia, before he assumed his duties at the NTSB, there were two opinions written by the staff attorneys, one affirming the decision of the administrative law judge and one reversing the decision.³⁶¹ Presently, according to Mr. Goglia's understanding, the staff attorneys at the NTSB write only one opinion.³⁶² The members of the Board then decide by vote whether to accept or reject this drafted opinion.³⁶³

Mr. Goglia is aware of the obligations of the Board to defer to the FAA's policies, rules, and procedures as relates to sanction, and he believes this position is incorrect.³⁶⁴ He believes it was a mistake for Congress to hamstring the NTSB with a statutory provision that requires the Board to defer to the FAA on the choice of sanction.³⁶⁵ Mr. Goglia believes that oral argument before the NTSB could be of benefit to Board members, but Mr. Goglia noted that when he was on the Board, it appeared to be the impression of the Board's chief counsel that he made the decision as to whether to grant oral argument.³⁶⁶ It is the assessment of Mr. Goglia that one of the reasons the Board decisions have deteriorated is because the staff has assumed the decision making functions of the Board, and the Board has not acted to prevent such action.³⁶⁷

In addition to the cases discussed in this article, additional insight into the mindset of the staff attorneys who write the Board decisions may be found in *Roarty*.³⁶⁸ *Roarty* involved an airman who suffered a suspension of his driver's license following a driver under the influence citation in 1996, which he ne-

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Roarty*, N.T.S.B. Order No. EA-5261, 2006 WL 3472333 (Nov. 27, 2006).

glected to report on his third class medical application in 1998.³⁶⁹ In 2000, his medical certificate was revoked for failing to timely report the 1996 driving under the influence conviction,³⁷⁰ and in his March 7, 2000 medical application he disclosed the fact that his medical certificate had been revoked previously in giving a response to question 13 on the form.³⁷¹ In completing his medical application on April 24, 2003, he gave a negative response to question 13 regarding whether his medical certificate had ever been denied or suspended or revoked.³⁷² The FAA brought an action to revoke his medical certificate³⁷³ and also to revoke on an emergency basis his airman's certificate on the theory that he had given an intentionally false statement on the medical application form.³⁷⁴

When the case was tried, the Administrator called no witnesses and merely relied upon the documentation in the FAA's Airman, Medical, and Enforcement files.³⁷⁵ The airman testified in his defense, and he was the only witness at the hearing.³⁷⁶ The airman testified he did not purposely answer question 13 incorrectly in completing his 2003 medical application and claimed there was no reason for him to falsify the application.³⁷⁷ Judge Mullins found that the airman did not intentionally falsify his medical application form with the result that, while the airman's medical certificate was revoked, his airman's certificate was not.³⁷⁸

The FAA appealed the findings of Judge Mullins, arguing that the airman was not merely negligent in completing the form but had acted intentionally.³⁷⁹ The airman repeated the arguments

³⁶⁹ *Id.* at *1.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*; see also 14 C.F.R. § 67.413(a) (2008) (authorizing the Agency to suspend or revoke a medical certificate if all the requisite data has not been provided).

³⁷⁴ *Roarty*, 2006 WL 3472333, at *1; see also 14 C.F.R. § 67.403(a)(1) (2009) (prohibiting making fraudulent or intentionally false statements on an application for a medical certificate).

³⁷⁵ *Roarty*, 2006 WL 3472333, at *1.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* The incomplete data provided by the airman authorized the revocation of his medical certificate under 14 C.F.R. § 67.413(a), allowing him to complete a new medical application form and disclose the requested information, but by prevailing on the charge under 14 C.F.R. § 67.403 (a)(1), the airman was spared having his airman's certificate revoked.

³⁷⁹ *Id.* at *2.

he made at trial and adopted the findings of Judge Mullins.³⁸⁰ The Board reluctantly affirmed the decision of Judge Mullins and revealed its orientation towards airmen's cases with the following revealing language: "After careful review of the record, we are *constrained* to affirm the law judge."³⁸¹

The Board continued, writing:

Unfortunately, the Administrator did not call any witnesses, and, we think, did not aggressively cross-examine respondent regarding his exculpatory claims. It may well be that respondent had a motive to intentionally falsify his airman application in order to timely obtain a medical application without delay, which, if demonstrated, would have been relevant to the credibility assessment of his claim to have made an inadvertent error; the Administrator, however, did not *vigorously pursue such evidence*. Therefore, upon review of the record and the Administrator's arguments on appeal, *we are constrained* to conclude that we have no basis to characterize the law judge's credibility determination in favor of respondent arbitrary or capricious.³⁸²

The Board, in using the word "constrained" twice in the opinion, clearly evidenced a preference that the Administrator do a better job and criticized the Administrator for not cross-examining the airman aggressively and not vigorously pursuing evidence.³⁸³ The word "constrained" is a verb and means "to force, compel, or oblige; bring about by compulsion," "to confine forcibly, as by hands," "to repress or restrain."³⁸⁴ One cannot imagine an appellate court in the United States using language like this to explain to one of the parties that it had no choice but to render a decision for the adversary. Using words like "constrained" and "unfortunately" signals that the personnel who fashion the opinions for the NTSB would *prefer* to rule in favor of the FAA.

VI. CONCLUSION

The author has devoted many years to representing airmen and aircraft operators in litigation before the NTSB and also before the FAA. During thirty-two years of practicing law, the author has observed substantial erosions in the rights of airmen

³⁸⁰ *Id.*

³⁸¹ *Id.* (emphasis added).

³⁸² *Id.* (emphasis added).

³⁸³ *Id.*

³⁸⁴ WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, 314 (1994).

to receive due process of law. Over the past few years, there has been an acute departure by the Board from binding precedent in a climate where ad hoc decisions are increasingly the rule, not the exception.

While the Board's Rules of Practice declare that the FAA bears the burden of proof in aviation enforcement proceedings,³⁸⁵ in recent years, the NTSB has declared it has no jurisdiction to entertain legal defenses based on the FAA's refusal to follow its own rules.³⁸⁶ This is clearly an incorrect legal doctrine contrary to the decisions in *Vitarelli v. Seaton*³⁸⁷ and *Randall*.³⁸⁸ As the Board abstains from reaching constitutional questions, litigation before the Board descends into a kind of Darwinian jungle in which only the fittest (the pilots employing the talented lawyers with adequate economic resources) survive. For the fittest, challenges to decisions of the NTSB as arbitrary and capricious and a departure from binding precedent are not infrequently unsuccessful, as demonstrated by *Ramaprakash*³⁸⁹ and *Moshea*.³⁹⁰ However, airmen with equally meritorious positions but lacking economic resources to fully pursue their appellate options must suffer a suspension or revocation unjustly.

Increasingly, litigation before the NTSB has become a kind of charade where everyone pretends the FAA carries the burden of proof, but seasoned legal practitioners realize the game is not played that way at all. The way the game is really played is that the Board allows the FAA to violate its own rules, to tell the Board what the rules mean, and then the Board "defers" to the FAA, ignores binding precedent, and renders arbitrary and capricious decisions. Further, the Board is not above writing an opinion revising the record and ignoring the fact that proper arguments were made in order to justify the desired outcome as evidenced in *Dillmon*.³⁹¹ In cases where the airman prevails, the Board feels compelled to apologize to the FAA for finding in favor of the airman, describing the outcome as "unfortunate" and declaring it is "constrained" to rule on the airman's be-

³⁸⁵ 49 C.F.R. § 821.32 (2009) ("In proceedings under 49 U.S.C. 44709, the burden of proof shall be upon the Administrator.").

³⁸⁶

³⁸⁷ See *Vitarelli v. Seaton*, 359 U.S. 535, 545-46 (1959).

³⁸⁸ See *Randall*, 3 N.T.S.B. 3624, 3625 (1981).

³⁸⁹ See *Ramaprakash v. FAA*, 346 F.3d 1121, 1129 (D.C. Cir. 2003).

³⁹⁰ See *Moshea v. NTSB*, 570 F.3d 349, 353 (D.C. Cir. 2009).

³⁹¹ See *Dillmon*, N.T.S.B. Order No. EA-5413, 2008 WL 4771937, at *7 (Oct. 28, 2008).

half.³⁹² Besides allowing the FAA to run rampant, ignoring facts in the record, and altering the record, the Board has persistently demonstrated it is incapable of conducting its responsibility of “adjudicating” charges brought by the FAA. It is naïve to believe that people with absolutely no legal training or experience can instantly transform into “adjudicators” merely because the President of the United States has appointed them to the Board. That being said, is it any wonder that the Board fails to understand its duty to “defer” to the credibility determinations of its administrative law judges as demonstrated by the appellate court decisions in *Wedding v. NTSB*³⁹³ and *Andrzejewski v. FAA*?³⁹⁴ Justice Sonia Sotomayor was carefully and exhaustively vetted by the Senate Judiciary Committee prior to her confirmation to the Supreme Court.³⁹⁵ While Board nominees are no doubt vetted, what steps are being taken in the halls of Congress to ensure that people appointed to the Board understand how to follow basic legal principles in the adjudication of aviation enforcement actions initiated by the FAA? How many times do members of the Board review the transcripts and the exhibits in cases before them? What internal policies and procedures are in place at the Board to ensure decisions are thoroughly reviewed, analyzed and critically evaluated to ensure they follow existing precedent and will not be reversed by an appellate court as arbitrary and capricious?

The Board’s attention to evidence admissible in aviation enforcement proceedings is akin to the kind of rules one would see in a high school student body court system, for example, “Each party shall have the right to present a case-in-chief, or defense, by oral or documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”³⁹⁶

If there are no teeth in the rules of discovery, then discovery becomes a farce. It bears repeating that the Board’s rules concerning discovery merely declare:

³⁹² See Roarty, N.T.S.B. Order No. EA-5261, 2006 WL 3472333, at *2 (Nov. 27, 2006).

³⁹³ See *Wedding v. NTSB*, No. 02-73893, 2004 WL 958049 (9th Cir. May 3, 2004).

³⁹⁴ *Andrzejewski v. FAA*, 548 F.3d 1257, 1259–60 (9th Cir. 2008).

³⁹⁵ See Robert Barnes, Amy Goldstein & Paul Kane, *Sotomayor Pledges ‘Fidelity to the Law’*, WASH. POST, July 14, 2009.

³⁹⁶ See 49 C.F.R. § 821.38 (2009).

Those portions of the Federal Rules of Civil Procedure that pertain to depositions and discovery may be used as a general guide for discovery practice in proceedings before the Board, where appropriate. The Federal Rules and the case law that construes them shall be considered by the Board and its law judges as instructive, rather than controlling.³⁹⁷

It has already been established in this article that the Board is prone to rendering decisions on an ad hoc basis without regard to legal precedent or regulatory requirements.³⁹⁸ If litigating before the Board is fraught with ambiguity and uncertainty, this is even more so in the area of discovery where the Federal Rules of Civil Procedure may be used as a general guide.³⁹⁹

While the closest thing a pilot may ever see to a statute of limitations is Rule 33 of the Board's Rules of Practice,⁴⁰⁰ as illustrated by the discussion above concerning *Ramaprakash*, the Board is not above ignoring its own case law and finding that the severity of the offense authorizes a *relaxation* of the stale complaint rule even though the U.S. Court of Appeals for the District of Columbia had to instruct the Board that the rule provided *just the opposite*.⁴⁰¹

Moreover, the recent Board decision in *Manin*⁴⁰² demonstrates that *the Board fails to appreciate the distinction* between the stale complaint rule, where prejudice to the airman is presumed,⁴⁰³ and the equitable doctrine of laches, which may require that the case be dismissed based on actual prejudice suffered by the airman as a result of the passage of time from the underlying event.⁴⁰⁴ The Board's confusing laches with the stale complaint rule is evident in that it declared the case could not be dismissed because "falsification amounts to a lack of qualifications to hold a certificate."⁴⁰⁵ The problem with the Board's decision is that while "lack of qualification" may be a basis for

³⁹⁷ See 49 C.F.R. § 821.19(c).

³⁹⁸ See *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003).

³⁹⁹ See *id.* at 1125.

⁴⁰⁰ See 49 C.F.R. § 821.33.

⁴⁰¹ See *Ramaprakash*, 346 F.3d at 1129–30.

⁴⁰² *Manin*, N.T.S.B. Order No. EA-5439, 2008 WL 5972912, at *3 (Apr. 13, 2008).

⁴⁰³ *Ramaprakash*, 346 F.3d at 1126.

⁴⁰⁴ *Stewart*, N.T.S.B. Order No. EA-4479, 1996 WL519903, at *2 (Aug. 30, 1996).

⁴⁰⁵ *Manin*, 2008 WL 5972912, at *3.

denying a motion to dismiss based on the stale complaint rule,⁴⁰⁶ *it has nothing at all to do with the doctrine of laches.*

The Board's refusal to require the FAA to abide by its own rules and declarations by the Board that it does not have jurisdiction to decide such questions requires that the legal practitioner at every turn perfect the record and prepare the case for an appeal to a U.S. court of appeals because legal issues the Board should reach are being ignored as evidenced by *Murphy*⁴⁰⁷ and *Moshea*.⁴⁰⁸ If in the past, it was difficult for an airman to prevail in an action before the NTSB, today it is even more challenging.

From a public policy standpoint of encouraging airmen to report unsafe or ominous events in the national airspace system, the Board's decisions in *Blum*⁴⁰⁹ and *Moshea*⁴¹⁰ will have the opposite effect. After all, if the Board decisions deprive the airman of the right to obtain a waiver of sanction in exchange for making an Aviation Safety Report to NASA, why bother with submitting the report?

It is hard to imagine that when Congress authorized the NTSB to act as the adjudicatory body in aviation enforcement proceedings, it had the slightest notion the Board would administer "justice" as has been illustrated by the cases discussed in this article. The time has come for Congress to recognize that a person accused of criminal misconduct enjoys far greater rights to due process than an airman. As the Board continues to disrespect airmen with ad hoc decisions that ignore binding precedent and eliminate the necessity of the FAA to make it a prima facie case, the aviation community will, in turn, disrespect the Board. This is a toxic environment in need of a massive overhaul. To that end, the author suggests the following remedies to the situation:

1. Congress should delete from 49 U.S.C. § 44709(d)(3) language that requires the Board to be "bound by all validly adopted interpretations of laws and regulations the Administrator carries out of written agency policy guidance

⁴⁰⁶ See 49 C.F.R. § 821.33(a) (2009).

⁴⁰⁷ See *Murphy*, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at *14 (Jan. 16, 2008).

⁴⁰⁸ See *Moshea v. NTSB*, 570 F.3d 349, 353 (D.C. Cir. 2003).

⁴⁰⁹ *Blum*, N.T.S.B. Order No. EA-5371, 2008 WL 647772, at *2 (Feb. 29, 2008).

⁴¹⁰ *Moshea*, 570 F.3d at 351-52.

available to the public related to sanctions to be imposed under this section . . . ”⁴¹¹

The reason this language should be deleted from the statute is because in the current climate, this language is being employed to relax or even eliminate the FAA’s burden of proof in terms of essential elements of a *prima facie* case. This is confirmed by the Board’s decision in *Dillmon* revoking his airman’s certificate when his bribery conviction was “not material” to his qualifications under Part 67 of the FAR.⁴¹² It was also employed incorrectly in *Murphy*⁴¹³ and *Moshea*,⁴¹⁴ when airmen sought to defend themselves using FAA policy in the form of an enforcement bulletin or advisory circular, and the Board maintained it lacked the jurisdiction to require that the FAA adhere to its own rules and policies. Regrettably, the Board has employed the language found in 49 U.S.C. § 44709(d)(3) as an excuse to avoid providing airmen due process of law under the Fifth Amendment.

In a legal system where the FAA makes the rules (the FAR, enforcement bulletins, advisory circulars, the Aeronautical Information Manual, the Air Traffic Control Handbook, and a host of other regulatory materials), publishes interpretations of the rules that the Board is bound to follow, posturing that the FAA bears the burden of proof in a case to strip an airman of his certificates elevates form over substance. Even if one gives credence to the notion that the NTSB imposes the burden of proof in an aviation enforcement action on the FAA, the regulatory landscape and the Board’s servility to the FAA places the airman at a distinct disadvantage in this arena. One way to level the playing field and restore fairness to the process is to delete the language referenced above from 49 U.S.C. § 44709(d)(3).

2. Congress should specifically declare that the NTSB is not only authorized but *required* to address and rule on constitutional issues, including due process of law challenges under the Fifth Amendment to the U.S. Constitution.

⁴¹¹ 49 U.S.C. § 44709 (d)(3) (2006).

⁴¹² See *Dillmon*, N.T.S.B. Order No. EA-5413, 2008 WL 4771937, at *3 (Oct. 7, 2008).

⁴¹³ *Murphy*, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at *2–3 (Jan. 6, 2008).

⁴¹⁴ *Moshea*, 570 F.3d at 350–51.

Congress could never have reasonably anticipated or believed that a federal agency would declare that it will not reach constitutional issues. The Board's declaration that it will not reach constitutional issues is exacerbated by the fact that it will allow the FAA to violate its own rules and policies, as demonstrated in *Murphy* and *Moshea*. In *Randall*, the Board recognized that it was required to follow due process requirements of the Fifth Amendment and not allow the FAA to disregard its own enforcement handbook.⁴¹⁵ In fact, the Board in *Randall* specifically cited *Vitarelli v. Seaton* in declaring that the FAA would not be allowed to violate its own procedural rules.⁴¹⁶ The Congress, in telling the Board that it must address constitutional issues, will merely be reacquainting the Board with its holding in *Randall*. An American citizen should not be deprived of his livelihood or his right to operate an aircraft or maintain an aircraft by a federal agency such as the NTSB that allows the FAA to violate its own rules and policies. The current situation in which this practice is condoned is a disgrace. Congress must correct this problem if airmen are to have any faith in the procedures to be employed in the event the FAA desires to suspend or revoke their certificates.

3. Congress should revise the language found in 49 U.S.C. § 44709(d)(3) to declare that the Board is not bound by the FAA's interpretation of its laws and regulations and/or of any written policy sanction guidance (*i.e.*, the sanction guidance table in the FAA Enforcement Handbook), but that the FAA is allowed to argue any position it cares to argue about the meaning of its rules and regulations or the application of its sanction guidance table, and that the airman is allowed to do so as well. It is obvious that the effect of the language found in 49 U.S.C. § 44709(d)(3), requiring the Board to be bound by the FAA's interpretations of its rules and regulations and its policy guidance on sanctions, has created no shortage of mischief at the NTSB. *This pernicious language has been employed as a device to avoid the application of constitutional principles*, to deprive airmen of their due process rights, and to deprive airmen of defenses which are based on the FAA's

⁴¹⁵ *Randall*, 3 N.T.S.B. 3624, 3625–26 (1981).

⁴¹⁶ *Id.* at 3626 (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959)).

own rules and policies.⁴¹⁷ This state of affairs, as discussed above, is unacceptable. The system may be rehabilitated by having the offending language in the statute deleted and replaced with a more balanced and reasoned interpretation of the law as opposed to one which binds the NTSB in lockstep with the FAA. Respectfully, Congress could never have anticipated that the offending language found in the statute could have been employed by the Board to poison due process and fundamental fairness in aviation enforcement proceedings. Nevertheless, that has, in fact, been the case, as illustrated by the cases discussed above. Neither the FAA nor the airman should have a competitive advantage when it comes to the application or interpretation of the law or FAA policies or rules or regulations.

4. Congress should require the Board to adopt the Federal Rules of Evidence as applying in aviation enforcement proceedings. While Rule 38 of the Board's Rules of Practice allows the parties to submit evidence and conduct cross-examination,⁴¹⁸ the fact is that this same rule permits the admission of hearsay, and a written statement cannot be cross-examined. The pernicious effects of allowing inadmissible hearsay to have an influence in the outcome of Board decisions has been illustrated in *Magruder*, where the FAA was permitted to sponsor hearsay into the record and to rely on an unauthenticated exhibit in order to defeat the airman's claim for attorney's fees.⁴¹⁹ The present rules of the NTSB do not fulfill due process obligations that should be satisfied by a tribunal, albeit administrative, that purports to dispense justice. The only way to ensure the proceedings are just is to have rules of evidence which have a body of case law that has been developed and accepted over time. Ad hoc rules (or no rules) which allow a person out of court not under oath to effectively testify against an airman are inconsistent with the fundamental due process of law. Accordingly, Congress should mandate that the Board adopt the Fed-

⁴¹⁷ See, e.g., Murphy, N.T.S.B. Order No. EA-5355, 2008 WL 205095 (Jan. 16, 2008); Moshea, N.T.S.B. Order No. EA-5328, 2007 WL 3088248 (Oct. 17, 2007); *Moshea v. NTSB*, 570 F.3d 349 (D.C. Cir. 2009).

⁴¹⁸ See 49 CFR § 821.38 (2009).

⁴¹⁹ *In re Magruder*, N.T.S.B. Order No. EA-5278, 2007 WL 1233535, at *2-3 (Apr. 10, 2007).

eral Rules of Evidence as applying in aviation enforcement proceedings.

5. Congress should mandate that the Board adopt as applicable in aviation enforcement proceedings the Federal Rules of Civil Procedure. The law is well settled that the airman's certificate is a protected property or liberty interest.⁴²⁰ Because of the constitutional protections that do apply to an airman's certificate, airmen should expect that they can obtain legitimate discovery from the FAA, and if the FAA fails in that regard, then the administrative law judge will have the discretion and legal authority to impose sanctions, including dismissing the FAA's complaint and awarding attorney's fees to the airman. As part and parcel of the application of the Federal Rules of Civil Procedure, any FAA employee who destroys evidence or falsifies or conceals evidence should be chargeable in a U.S. district court with a felony for obstruction of justice. If any FAA attorney is involved or knows of this conduct, then the attorney should be chargeable as well. In order to ensure that we have a balanced and fair system to be employed in disciplining airmen, we must have rules of procedure, and the Federal Rules of Civil Procedure are well developed and accepted, with a body of case law that will strengthen and empower the administrative law judge in dispensing justice consistent with fundamental principles of due process.
6. Congress should require that, in the event the FAA pursues an action that was not substantially justified in fact and in law, the FAA should be required to pay the *actual* legal fees and case expenses incurred by the pilot. Under the existing Board rules implementing the Equal Access to Justice Act,⁴²¹ an airman who has prevailed in an unjustified enforcement action brought by the FAA is limited to attorney's fees capped at seventy-five dollars per hour (according to the 1981 Consumer Price Index) and then adjusted for inflation to the current Consumer Price Index, or currently about one hundred and fifty-six dollars per hour.⁴²² The attorney's fees permitted by the Board's

⁴²⁰ See *Green v. Brantley*, 719 F. Supp. 1570 (N.D. Ga. 1989); *White v. Franklin*, 637 F. Supp. 601 (N.D. Miss. 1986).

⁴²¹ 49 C.F.R. § 826 (2009).

⁴²² See 49 C.F.R. § 826.6.

rules are less than one-half the billing rate of any seasoned or experienced aviation attorney.⁴²³ Under the current rules, even if the airman prevails and is awarded legal fees, he will not be fully compensated. Congressional action in this regard will require revision of the attorney billing rates presently permitted in the Equal Access to Justice Act.⁴²⁴

Moreover, as further evidence of the Board's inability to adhere to its own rules as relates to airmen's efforts to recover attorney fees, the reader is requested to consider *In re Turner*, in which the Board reversed an award of attorney's fees by Chief Administrative Law Judge Fowler in favor of the airmen in the amount of \$12,475.00.⁴²⁵ In an opinion that defies logic, the Board declared that, where the FAA issued orders of suspension for allegedly flying an unairworthy Learjet 60, withdrew a civil penalty action against the aircraft's owner on the condition it would not seek attorney's fees, and withdrew certificate action against the airmen *after* Judge Fowler set the matter down for hearing, the airmen were not the "prevailing parties" because the FAA dismissed the charges and there never was a "hearing" at which the airmen could "prevail."⁴²⁶ The Board reversed the attorneys' fees award even though its own rules provided the airmen would be the prevailing parties upon "issuance of a final order or any other final resolution of a proceeding, such as a settlement or *voluntary dismissal*."⁴²⁷

7. Congress should, by resolution, declare that obstruction of justice by the FAA will not be tolerated and require the Board to report suspected criminal acts by any Agency employee to the Department of Justice for investigation and/or prosecution. Such action by Congress should act as a deterrent to rogue inspectors who destroy and/or conceal exculpatory evidence, such as eye witness state-

⁴²³ Based on the author's experience, seasoned aviation lawyers typically bill at or above a billing rate of four hundred dollars per hour.

⁴²⁴ See 5 U.S.C. § 504(b)(1)(A) (2006); see also 28 U.S.C. § 2412(d)(1)(D)(2) (2006) (capping attorney's fees at the rate of \$125.00 per hour). It simply is not possible to retain the services of competent counsel at this hourly rate.

⁴²⁵ *In re Turner*, N.T.S.B. Order No. EA-5467, 2009 WL 2419616, at *14 (July 29, 2009).

⁴²⁶ *Id.* at *2.

⁴²⁷ 49 C.F.R. § 826.24(c) (emphasis added).

ments given to the Agency inspector which exonerate the airman but mysteriously fail to find their way into the enforcement investigative report. Currently, it is unlawful "to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States."⁴²⁸ Deliberate spoliation of evidence by any FAA employee should be criminally sanctioned in addition to any sanctions imposed by the ALJ hearing the case.

8. Congress should direct an investigation into the manner in which the Board's legal staff fashions opinions. As part of this investigation, Congress should hear from, among others, former NTSB member Goglia to have the benefit of his insight and perspective on the inner workings of the Board. If Congress finds the Board's legal staff is not receiving adequate supervision, procedural and institutional changes should be implemented by the NTSB.
9. Congress should, by resolution or other appropriate procedure, recommend to the Board that oral argument be provided on appeals in every case where the FAA revokes the airman's certificate on an emergency basis as well as in cases presenting factually complex issues.

The author hopes this article will stimulate debate in Congress about the lack of due process being afforded airmen in the aviation enforcement system. The foregoing discussion has been a critical analysis of the performance of the Board with the expectation and hope that *Congress will ask itself if the system described in this article is the kind of system Congress had in mind when it made the NTSB the arbiter in FAA enforcement actions against pilots*. If after reading this article, Congress concludes the aviation enforcement system in America is seriously in need of repair, one can only hope that a Congressional investigation into the practices of the Board with respect to aviation enforcement proceedings will result in the system being overhauled, rehabilitated, and made more rational and fair. Until and unless that takes place, the level of justice dispensed to airmen will fall below any standard of which this great nation can be proud.

⁴²⁸ See 18 U.S.C. § 1505 (2006).

