

1986

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Recommended Citation

Alan Armstrong, *Pilot Certification Actions and Civil Penalties*, 52 J. Air L. & Com. 77 (1986)
<https://scholar.smu.edu/jalc/vol52/iss1/3>

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PILOT CERTIFICATE ACTIONS AND CIVIL PENALTIES

ALAN ARMSTRONG*

THERE APPEARS TO BE increased concern relating to aviation safety following a series of major air carrier accidents during the past year. It has been suggested that these events are the result of airline deregulation and competitive pressures that force air carriers to compromise safety by hiring less experienced flight crews and overlooking inadequate maintenance practices. Others point to an inadequate number of Federal Aviation Administration (FAA) inspectors to police air safety and the shortage of air traffic controllers to manage the national airspace system. In the wake of media attention focused on this "crisis" it is the author's impression that the FAA is responding by seeking more punitive sanctions against airmen and operators. The FAA can suspend or revoke the certificate of an airman or operator under certain circumstances. The FAA can also impose civil penalties or seize aircraft for alleged violations of the Federal Aviation Regulations (FARs). The purpose of this article is to familiarize lawyers with the legal principles and governmental policy considerations that apply in these proceedings.

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NASA SAFETY REPORTS

The Aviation Safety Reporting System (ASRS) administered by the National Aeronautics and Space Administration (NASA) was established to identify and correct deficiencies in the National Aviation System. The FAA distributes an Advisory Circular to encourage the filing of safety reports. This circular explains the FAA's policy of granting pilots immunity from the imposition of sanctions in certain situations. Provided the violation was inadvertent and not deliberate,¹ did not involve a criminal offense, does not disclose a lack of qualification or competency, the pilot has not committed a violation of the FARs in the preceding five years, and can prove that he filed a Safety Report with NASA within ten days of the violation, a pilot may escape the imposition of sanctions.² While a pilot who satisfies these conditions may escape the imposition of sanctions, the FAA may still bring an action to establish a violation.³

The FAA is also prohibited from using reports submitted to NASA in an enforcement action;⁴ however, information concerning criminal offenses or accidents is excluded from the program.⁵ Accordingly, NASA removes the pilot's identification from the Safety Report and submits criminal matters and information concerning accidents.⁶

THE INVESTIGATION

Flight Standards inspectors investigate all known or reported violations of the FARs.⁷ When an alleged violation

¹ The phrase "inadvertent and not deliberate" has been interpreted by the N.T.S.B. to mean reckless. See *Administrator v. Ferguson*, 3 N.T.S.B. 3068, 3071 (1980), *aff'd* *Ferguson v. N.T.S.B.*, 678 F.2d 821 (9th Cir. 1982).

² Advisory Circular, AC 00-46C (Feb. 4, 1985) [hereinafter cited as Advisory Circular, AC 00-46C].

³ *Id.*

⁴ 14 C.F.R. § 91.57 (1985).

⁵ *Id.*

⁶ Advisory Circular, AC 00-46C, *supra* note 2.

⁷ FAA Order 1000.9B. The FAA has the duty of investigating reported viola-

occurs, an inspector has a duty to investigate to determine whether an enforcement action is warranted. In common practice the inspector sends the pilot a "notice of investigation." The pilot then presents his version of the facts and provides the inspector with any other information he deems important.

A pilot under investigation should realize that such a reply may be used as evidence against him in subsequent legal proceedings. In *Administrator v. Salkind*,⁸ the pilot was charged with two violations, (1) a near collision, and (2) violating VFR weather criteria. Salkind's letters established that he was flying the aircraft on two occasions in question. The NTSB Judge relied on these letters in ordering his certificate revoked.

When the investigator has gathered sufficient facts to recommend enforcement action, Flight Standards personnel determine whether to take administrative or legal (enforcement) action.⁹ There are two forms of administrative action. First, the FAA may send a Safety Compliance Notice. The notice may include a letter of reprimand, if appropriate. Second, a letter of correction may be sent to the pilot specifying corrective action.¹⁰ These administrative actions are in the nature of warning tickets, and if this approach is taken, the matter should end at this stage. On the other hand, if legal action is deemed appropriate, the matter is forwarded to the FAA's Regional Counsel.¹¹ The investigator recommends that a civil penalty be imposed or a certificate action commenced against the pilot.¹²

Personnel at the Flight Standards District Office make discretionary determinations as to whether administrative or legal action is appropriate. The degree of punishment

tions of the Federal Aviation Act. 49 U.S.C. § 1354 (1982); 14 C.F.R. § 13.1 (1985).

⁸ 1 N.T.S.B. 714, 715 (1970).

⁹ FAA Order 1000.9B.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

to be imposed is discretionary as well. These discretionary determinations are to be made in light of certain guidelines. The personnel should consider whether the violation was inadvertent or deliberate, the experience and responsibility of the pilot, the potential harm to others which was created, and what action, if any, was taken by the employer or any other government authority.¹³

In addition to sanction recommendations, the Flight Standards' report to the Regional Counsel includes a technical analysis of the pilot's alleged actions.¹⁴ If the Regional Counsel does not agree with the recommended sanction, he is to consult with Flight Standards to reach an agreement. The matter is referred to the national director if an agreement is not reached. The director then makes the final determination after consulting with the FAA's Office of General Counsel.¹⁵

SANCTIONS

Certificate Action

Under Section 609 of the Federal Aviation Act of 1958 ("the Act"), the Secretary of Transportation (via the FAA) can issue an order amending, modifying, suspending or revoking an airman's certificate after giving the pilot notice of the proposed action and an opportunity to answer and show why such action should not be taken.¹⁶ After such an order is issued by the FAA, the pilot may appeal the order to the National Transportation Safety Board (NTSB).¹⁷ Except in emergency cases (a small percentage), the pilot's appeal to the NTSB acts as a stay of the FAA order, and the NTSB is authorized to amend, modify or reverse the FAA's order.¹⁸ During this period the pilot

¹³ FAA Agency Handbook, FAA Order 2150.7A.

¹⁴ Enforcement Handbook, FAA Order 2150.2A.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

may continue to exercise the privileges of his certificate. In those cases where the FAA contends an emergency exists, an appeal to the NTSB does not stay the effectiveness of the order, but the appeal must be finally disposed of by the NTSB within sixty days of being so notified,¹⁹ the NTSB having adopted rules providing for an expedited hearing and appeal in emergency proceedings.²⁰ In emergency cases, the pilot may not resume flying until his case has been successfully disposed of.

Whether the FAA will seek a temporary suspension or a permanent revocation of the pilot's certificate depends on the alleged facts giving rise to the enforcement proceedings. If the infraction is operational in nature (flying over gross weight, landing on or departing from the wrong runway, etc.), a suspension would be indicated. Where the pilot's actions demonstrate a deficiency in qualification or an unwillingness to comply with air safety regulations revocation would be indicated.²¹

Civil Actions

Section 901 of the Act empowers the FAA to assess a civil penalty of \$1,000.00 for each violation and \$10,000.000 for each violation that relates to the transportation of hazardous materials.²² Where the violation is continuous, each day it exists constitutes a separate violation.²³ In assessing the amount of the penalty, the FAA is to consider the nature, circumstances, extent and gravity of the violation committed.²⁴

In addition to assessing a civil penalty, the FAA may

¹⁹ *Id.*

²⁰ 49 C.F.R. § 821.54 (1985).

²¹ Jonathan Howe, *Airman's Rights - FAA Enforcement Procedures*, (1977). Mr. Howe formerly served as FAA Regional Counsel for the Northwest Region. He currently serves as FAA Director for the Southern Region. For a complete discussion of Mr. Howe's article, see ROLLO, *AVIATION LAW AN INTRODUCTION* (Maryland Hist. Press, 2nd Ed. 1982).

²² 49 U.S.C. § 1471(a)(1) (1982).

²³ *Id.*

²⁴ *Id.*

seize an aircraft being used in violation of the FAR's²⁵ where the operator has been warned to cease the infraction. Such a seizure was upheld in *Aircrane, Inc. v. Butterfield*,²⁶ even though the seizure was initiated *before* the civil penalty action. However, seizing an aircraft without prior notice where no "special need" for the public safety was demonstrated was declared unlawful as violating due process in *U.S. v. Vertol H21C*.²⁷ Finally, the FAA has emergency powers to issue cease and desist orders²⁸ and to initiate proceedings in Federal District Court to secure injunctions forbidding further violations.²⁹

NOTICE OF PROPOSED ACTION

After Flight Standards has referred the case to the Regional Counsel's office for prosecution, the FAA attorney to whom the case is assigned must send the pilot a written notice reciting the pertinent facts of the alleged violation and notifying the pilot of the action the FAA proposes to take. Generally, the pilot is given four options: (1) he may accept the penalty proposed by the FAA by surrendering his license or paying the fine; (2) he may submit additional information to the FAA for its consideration; (3) he may request an informal conference with the FAA attorney; or (4) he may file an appeal with the NTSB. After receiving the notice, if he wishes to request an informal conference, he must make a written request to that effect within the time specified in the notice.

THE INFORMAL CONFERENCE

The informal conference is an opportunity to find out how strong or weak the FAA's case is. Generally, the FAA's attorney will reveal the evidence collected by the Flight Standards investigator. If the pilot wants to per-

²⁵ 49 U.S.C. § 1473 (1982).

²⁶ 369 F. Supp. 598 (E.D.Pa. 1974).

²⁷ 545 F.2d 648 (9th Cir. 1976).

²⁸ 49 U.S.C. § 1485(a) (1982).

²⁹ *Id.*

suade the FAA that a mistake has been made and he is innocent, or to present evidence that his error was not deliberate, he should bring with him to the conference any witnesses, documents or other materials that support his contention.

While the informal conference gives the pilot a chance to engage in some informal discovery and to find out what the FAA does (and, perhaps, does not) know, the pilot who takes all of his evidence to the informal conference affords the FAA attorney discovery, as well. While evidence respecting settlement negotiations is generally inadmissible in a court of law,³⁰ the Federal Rules of Evidence are not strictly followed in NTSB hearings, the NTSB having ruled that information learned at the informal conference and used in asking questions at the hearing does not prejudice the respondent.³¹ Because of these factors, some thought should be given as to how one is going to proceed and what use, if any, either side may make of information learned from the other if the matter cannot be resolved at the conference and proceeds to the NTSB on appeal.

A pilot based in Illinois who flies to Florida during the winter may be surprised to receive a notice of proposed action from the Regional Counsel's office for the Southern Region. If the alleged infraction occurred in the Southern Region, it will handle the enforcement action and would normally be the site of any informal conference. However, the pilot or his counsel may ask that the case be transferred to his region for purposes of conducting the informal conference. If the matter cannot be resolved, the file will be returned to the Southern Region for preparation and trial before the NTSB Administrative Law Judge.

After the pilot and his attorney have discussed the case with the FAA's attorney at the informal conference, there may be considerations which warrant disposal. Disposi-

³⁰ FED. R. EVID. 408.

³¹ Administrator v. Honan, 1982 N.T.S.B. Adv. Sh. 1803.

tion in this manner is similar to plea bargaining in criminal law proceedings. The defense of enforcement actions can be both expensive and time consuming. Moreover, if the alleged violation occurred in a region distant from the pilot's residence, this is another factor weighing on his decision to fight it out or seek a settlement. If for whatever reason a decision is made to explore settlement possibilities, it is not uncommon to find that the FAA is willing to accept a civil penalty to compromise the matter³² in lieu of the suspension of the pilot's license as demanded in the notice of proposed action.

If the case is compromised and settled after the informal conference by the pilot's agreeing to pay a civil penalty, his attorney should offer a check to the FAA in the amount agreed upon with a cover letter stating very clearly that the offer is not an admission of the charges made, but is merely being made to avoid the expense and trouble of litigation.

THE STALE COMPLAINT RULE

Prior to attending the informal conference, the pilot and his attorney should compare the date of the alleged violation to the date on the FAA's notice of proposed action. If more than six months passed from the date of alleged violation until the date the pilot received a notice from the FAA's counsel, the charges brought by the FAA could be dismissed based on the stale complaint rule.³³ However, a delay of more than six months by the FAA will not result in an automatic dismissal.

If efforts to resolve the case at the formal conference fail and the matter is appealed to the NTSB for trial, a pilot who is not alleged to be unqualified by the FAA can make a motion to dismiss the charges relying on the stale complaint rule. The FAA must then prove to the NTSB judge either (1) that the FAA had good cause for the de-

³² 49 U.S.C. § 1471(a)(2) (1982); 14 C.F.R. § 13.15(b) (1985) ("the Administrator may compromise any civil penalty").

³³ 49 C.F.R. § 821.33 (1985).

lay, or (2) that imposing a sanction is in the public interest even though there was delay of more than six months.³⁴ If the judge is not persuaded by the FAA's showing in response to the pilot's motion to dismiss, the charges that occurred more than six months prior to the pilot's receiving the notice of proposed action are dismissed.³⁵

If the FAA charges lack of qualification of the pilot, the result may be different. If the NTSB judge finds that lack of qualification is not really an issue, the charges are ruled on as discussed above.³⁶ If the NTSB judge finds it is an issue, the case proceeds to trial on the issue of lack of qualification, and the parties are notified that the issue at trial is not merely a remedial sanction.³⁷ Since the possibility of dismissal on appeal weighs heavily in the pilot's favor, both sides should consider this in their efforts to resolve the matter.

A HEARING BEFORE THE NTSB JUDGE

The sanction most frequently sought by the FAA's attorney is a certificate action for either a suspension or revocation under Section 609 of the Act. If the case could not be resolved after the informal conference, the FAA will serve an order on the pilot suspending or revoking his certificate, and the pilot has twenty days from the time of service of the order to file an appeal to the NTSB.³⁸ As discussed above, the filing of an appeal by the pilot stays the effective date of the order until the final disposition before the NTSB, except in emergency proceedings.³⁹

The order of the FAA from which the pilot appeals serves as a complaint, and it is filed with the NTSB within five days after the pilot files his notice of appeal.⁴⁰ Then the pilot must file an answer to the complaint within

³⁴ *Id.* § 321.83(a)(1).

³⁵ *Id.* § 821.33(a)(2).

³⁶ *Id.* § 821.33(b)(1).

³⁷ *Id.* § 821.33(b)(2).

³⁸ *Id.* § 821.30(a).

³⁹ *Id.* § 821.30(c).

⁴⁰ *Id.* § 821.31(a).

twenty days of service on him by the FAA.⁴¹ After the initial pleadings have been filed, the parties are permitted to engage in formal discovery, the Federal Rules of Civil Procedure being "instructive rather than controlling" in this phase of the litigation.⁴² The NTSB judge to whom the case is assigned sets the date, time and place for the hearing, giving the parties at least 30 days prior notice.⁴³ With regard to where the hearing is held, "[t]he location of a majority of the witnesses and the suitability of a site served by a scheduled air carrier are factors to be considered in setting the place for the hearing."⁴⁴

When the hearing before the NTSB judge is convened, the FAA bears the burden of proof in certificate actions under Section 609 of the Act.⁴⁵ In satisfying the burden of proof requirements, the FAA is only required to prove its case by a "preponderance of the evidence" and not "beyond a reasonable doubt." If the FAA makes a *prima facie* case, the burden of going forward with the evidence then shifts to the pilot. The FAA can make out a *prima facie* case of carelessness by circumstantial evidence. The pilot must then prove: (1) that carelessness is not the only reasonable inference to be drawn from the circumstances, and (2) the evidence supports an alternate theory as to the cause of the incident.⁴⁶ The burden then shifts back to the FAA.

The rules of evidence are relaxed in proceedings before the NTSB Administrative Law judge. Hearsay is admissible but double hearsay is not.⁴⁷ However, a finding cannot be based on uncorroborated hearsay.⁴⁸ Re-recordings of Air Traffic Control (ATC) tapes are admissible, even though the original tape is not available for

⁴¹ *Id.* § 821.31(c).

⁴² *Id.* § 821.19(a), (c).

⁴³ *Id.* § 821.37(a).

⁴⁴ *Id.*

⁴⁵ *Id.* § 821.32.

⁴⁶ *Administrator v. Sanders*, 1983 N.T.S.B. Adv. Sh. 1937.

⁴⁷ *Administrator v. Smith*, 2 N.T.S.B. 2527, 2528 (1976).

⁴⁸ *See id.*

inspection.⁴⁹ However, recordings made on cockpit voice recorders in air carrier aircraft are inadmissible in civil penalty or certificate actions under Section 121.359(e) of the FAR's.⁵⁰ Similarly, flight data recorder information is generally inadmissible in enforcement actions, but the NTSB may consider this information solely to corroborate other evidence or to resolve conflicting evidence.⁵¹

There is no Fifth Amendment protection afforded the pilot. He may be called by the FAA for cross-examination to testify against himself during the presentation of its case.⁵² Concerning Fourth Amendment rights, evidence seized in an unlawful search by Federal agents has been held inadmissible in a subsequent NTSB hearing.⁵³ However, evidence obtained during an FAA inspection of an aircraft has been held admissible based on its reinspection authority under Section 609 of the Act.⁵⁴ Finally, the pilot has no Sixth Amendment right to counsel nor to effective assistance of counsel, since the NTSB takes the view that it is the pilot's responsibility to obtain proper counsel.⁵⁵

The NTSB judge acts as the trier of fact, being in a position to best observe and assess the demeanor of witnesses. Following the presentation of evidence, the parties are afforded a reasonable opportunity to submit proposed findings and conclusions to the judge before he renders an initial decision.⁵⁶ Most often, the judge renders his initial decision orally in the presence of the parties and counsel.

While the judge has the authority to affirm the finding of a violation and reduce the sanction, the judge must have clear and compelling reasons for doing so.⁵⁷ The

⁴⁹ Administrator v. Ivie, 2 N.T.S.B. 1248, 1249 (1975).

⁵⁰ 14 C.F.R. § 121.359(e). See also Administrator v. Rapattoni, 1 N.T.S.B. 241, 242-45 (1968).

⁵¹ Administrator v. Moore, 1982 N.T.S.B. Adv. Sh. 1760.

⁵² Administrator v. Roach, 1983 N.T.S.B. Adv. Sh. 1886.

⁵³ Administrator v. Danielson, 3 N.T.S.B. 161, 162-64 (1977).

⁵⁴ Administrator v. Fisher, 1984 N.T.S.B. Adv. Sh. 2009.

⁵⁵ Administrator v. Jones, 3 N.T.S.B. 3649, 3650 (1981).

⁵⁶ 49 C.F.R. § 821.39.

⁵⁷ Administrator v. Muzquiz, 2 N.T.S.B. 1474, 1477 (1975).

cost to the pilot of his defense is not a factor to be considered by the judge in mitigation of punishment.⁵⁸ Factors which are relevant to the matter of punishment are, inter alia, (1) the pilot's level of experience, (2) his attitude, (3) the action taken by his employer, (4) whether the act was deliberate or inadvertent, and (5) the pilot's use of his certificate.⁵⁹

APPEAL TO FULL NTSB

A party dissatisfied with the NTSB judge's initial decision may file an appeal to the case considered by all of the NTSB judges, provided his notice of appeal is filed and served upon the other parties within ten days of the decision.⁶⁰ The pilot must then file five copies of his appellate brief within fifty days after an oral initial decision or thirty days after a written initial decision.⁶¹ The issues the pilot may argue on appeal are limited to the following:

- a. Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?
- b. Are conclusions made in accordance with precedent and policy?
- c. Are the questions on appeal substantial?
- d. Have any prejudicial errors occurred?⁶²

In considering the pilot's appeal, the board may make new findings and issue an order, or may remand the case for such purposes as it deems necessary.⁶³ On its own initiative, the Board may raise any issue during the appeal which it deems important to a proper disposition of the case, in which the parties are afforded a reasonable opportunity to submit argument on the issue.⁶⁴ Finally, within thirty days of the Board's order on his appeal, any party

⁵⁸ Administrator v. Robinson, 2 N.T.S.B. 1051, 1053 n.10 (1984).

⁵⁹ Administrator v. Whitaker, 1 N.T.S.B. 1983 (1972).

⁶⁰ 49 C.F.R. § 821.47.

⁶¹ *Id.* § 821.48(a), (b), (f).

⁶² *Id.* § 821.49.

⁶³ *Id.*

⁶⁴ *Id.*

may file a petition⁶⁵ for rehearing, reargument, reconsideration or modification of the order, a reply from the other party being due within ten days of the petition.⁶⁶ Filing a petition for rehearing stays the effective date of the Board's order, unless otherwise ordered by the Board.⁶⁷

APPEAL TO THE CIRCUIT COURTS OF APPEAL

If an appeal to the full NTSB proves unsuccessful, the pilot may file a petition for review with an appropriate United States Circuit Court of Appeals within sixty days of the NTSB order.⁶⁸ After his petition has been filed, the clerk of court transmits a copy to the NTSB, which, in turn, files a copy of its record with the court.⁶⁹ The petition must be filed in the circuit where the pilot resides, or has his principal place of business, or with the United States Court of Appeals for the District of Columbia.⁷⁰ Upon a showing of good cause by the pilot, the court may stay the NTSB order while the appeal is pending.⁷¹ Also, the NTSB will frequently sustain a petition to stay its order if an appeal has been filed to a Circuit Court of Appeal.

In reviewing the NTSB record, the court is required to accept the NTSB's findings of fact as conclusive if they are supported by substantial evidence.⁷² Objections not raised before the NTSB may not be raised on appeal to the court, unless reasonable grounds existed for failing to raise the issue below.⁷³ Finally, if the appeal to the Court of Appeals should fail, the pilot may seek an appeal to the

⁶⁵ Five copies of the petition must be filed. 49 C.F.R. § 821.50(b).

⁶⁶ *Id.* § 821.50(a),(e)(1985).

⁶⁷ *Id.* § 821.50(f) (1985).

⁶⁸ 49 U.S.C. §§ 1486(a), 1903(d) (1981).

⁶⁹ *Id.* § 1486(c) (1981).

⁷⁰ *Id.* § 1486(b) (1981).

⁷¹ *Id.* § 1486(d) (1981).

⁷² *Id.* § 1486(e) (1981); *Sorenson v. N.T.S.B.*, 684 F.2d 683, 685 (10th Cir. 1982); *Ferguson v. N.T.S.B.*, 678 F.2d 821, 825 (9th Cir. 1982).

⁷³ 49 U.S.C. § 1486(e)(1981).

United States Supreme Court.⁷⁴

THE EQUAL ACCESS TO JUSTICE ACT

Under the Equal Access to Justice Act (EAJA), a party who prevails in an adversary proceeding with an administrative agency may be awarded fees and expenses incurred in defending himself, unless the agency's position was substantially justified or special circumstances make an award unjust.⁷⁵ However, individuals whose net worth exceeds two million dollars, owners of businesses, corporations and partnerships with a net worth of over seven million dollars, and others may not recover their fees and expenses under EAJA.⁷⁶

The NTSB has promulgated rules to be followed by those seeking to recover expenses incurred in defending their interests where the FAA's actions were not substantially justified.⁷⁷ Under the NTSB rules, the prevailing party must submit a written application to the Board within thirty days after its final disposition of the case,⁷⁸ and the agency (FAA) has thirty days following service of the application in which to file its answer.⁷⁹ The prevailing party may file a reply to the FAA's answer within fifteen days.⁸⁰ An initial decision is due from the Administrative Law judge within sixty days after completion of proceedings on the application,⁸¹ and either party may appeal the judge's initial decision to the full NTSB.⁸² Finally, a dissatisfied party may seek judicial review of the NTSB's order.⁸³

⁷⁴ *Id.* § 1486(f)(1981).

⁷⁵ 5 U.S.C. § 504(a)(1)(1984).

⁷⁶ *Id.* § 504(b)(1)(B). EAJA was recently amended to increase the individual's net worth from \$1,000,000 to \$2,000,000 and a business owner's net worth from \$5,000,000 to \$7,000,000. See 54 U.S.L.W. § 1(c)(1)(B)(1985).

⁷⁷ 49 C.F.R. § 826(1985).

⁷⁸ *Id.* § 826.24(a)(1985).

⁷⁹ *Id.* § 826.32(a)(1985).

⁸⁰ *Id.* § 826.33(1985).

⁸¹ *Id.* § 826.37(1985).

⁸² *Id.* § 826.38(1985).

⁸³ *Id.* § 826.39(1985).

In *Sottile v. Administrator*,⁸⁴ Sottile was charged with making false and fraudulent entries into a student pilot's log-book. The accusing student eventually withdrew his accusations under oath while the investigation was underway, admitting that he, not Sottile, made the entries. The student initially misrepresented the facts to FAA inspector Mastro in an attempt to recover money paid by the student for flight instruction. Even though Sottile denied the charges and the student later admitted the truth, the FAA persisted in taking the case to trial. "[T]he FAA attorney. . . spent her entire *direct* examination of her chief complaining witness cross-examining him to show what a liar he was. . . ."⁸⁵

In awarding Sottile expenses in excess of \$6,900.00, Judge Reilly concluded in his initial decision that the mere fact that the FAA survived Sottile's motion to dismiss and made out a *prima facie* case, did not prohibit him from awarding Sottile expenses under EAJA. He concluded that just making out a *prima facie* case did not "automatically dictate that the reasonableness of the government's prosecution is no longer open to question or that its action has now been 'substantially justified.'"⁸⁶

The full NTSB affirmed Judge Reilly's initial decision and awarded Sottile additional expenses for responding to the FAA's appeal. They also awarded damages for the appearance of his attorney at oral argument, the total award exceeded \$11,000.00.⁸⁷ The NTSB reasoned that although the granting of a motion to dismiss raises the possibility that the government has been unreasonable, the converse is not automatically true, i.e. that a denial of such motion amounts to substantial justification. The NTSB observed that the Administrative Law judge hearing enforcement actions has an obligation to ensure the development of a complete record, and that was Judge

⁸⁴ 608 F. Supp. 1040 (D.C. Cir. 1985).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Reilly's motivation in denying Sottile's motion to dismiss at the close of the FAA's case.⁸⁸

CONCLUSION

The lawyers and/or pilots involved in one or more of the many facets of aviation should have some familiarity with devices at the FAA's disposal where violations of the FAR's have occurred or are suspected. It is the author's hope that the reader has obtained information from this article that will serve them as they utilize the National Air-space System. Further, for those pilots and lawyers who find themselves participating in proceedings before the NTSB and/or appellate courts, perhaps this material will be of some assistance.

⁸⁸ *Id.*