

1981

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Recommended Citation

J. Scott Hamilton, *Administrative Practice before the FAA and NTSB: Problems, Trends and Developments*, 46 J. AIR L. & COM. 615 (1981)
<https://scholar.smu.edu/jalc/vol46/iss3/3>

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ADMINISTRATIVE PRACTICE BEFORE THE FAA AND NTSB: PROBLEMS, TRENDS AND DEVELOPMENTS

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IT IS VIRTUALLY impossible for an individual or a business to participate legally in any aspect of civil aviation without first obtaining one or more certificates from the Federal Aviation Administration (FAA), a division of the United States Department of Transportation (DOT). The FAA certifies not only flight crews, including pilots, flight engineers, and navigators,¹ but also ground support personnel, including air traffic control tower operators, aircraft dispatchers, aircraft mechanics and repairmen, and parachute riggers.² Moreover, the FAA certifies almost every conceivable form of aviation business, including domestic, flag, and supplemental air carriers and commercial operators of large aircraft,³ air travel clubs using large airplanes,⁴ scheduled air carriers using helicopters,⁵ foreign air carriers operating within the United States,⁶ operators of helicopters hoisting loads externally,⁷ air taxi and commercial operators of small aircraft,⁸ agricultural aircraft operators,⁹ airports

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¹ 14 C.F.R. §§ 61.1-.171, 63.31-.61 (1980).

² *Id.* §§ 65.31-.133.

³ *Id.* §§ 121.1-.723.

⁴ *Id.* §§ 123.1-.53.

⁵ *Id.* §§ 127.1-.319.

⁶ *Id.* §§ 129.1-.27.

⁷ *Id.* §§ 133.1-.51.

⁸ *Id.* §§ 135.1-.443.

⁹ *Id.* §§ 137.1-.77.

serving certificated air carriers,¹⁰ pilot training schools,¹¹ aircraft repair stations,¹² aviation maintenance technician schools,¹³ and parachute lofts,¹⁴ along with both ground and flight instructors.¹⁵ In addition to obtaining an operating certificate, each flight crew member and air traffic controller must obtain an aviation medical certificate from the FAA.

The FAA's duties also include promulgation and enforcement of the body of administrative law known as the Federal Aviation Regulations¹⁶ pursuant to the authority delegated it by the Federal Aviation Act of 1958.¹⁷ In instances of suspected non-compliance with these regulations the FAA may impose fines (known as "civil penalties") against the violator¹⁸ or place the certificates of those involved in jeopardy of suspension or revocation.¹⁹ Additionally, when the FAA suspects that the holder of an aviation medical certificate is unqualified it may act to suspend or revoke that certificate.²⁰

The procedures followed and appellate recourse available to the accused in civil penalty actions and in actions against FAA operating or medical certificates have been thoroughly discussed in the literature.²¹ This paper will not deal with these fundamentals; rather, it will discuss recent developments that have occurred in the field and will focus on certain unique and often vexing dilemmas typically encountered by the practicing attorney in represent-

¹⁰ *Id.* §§ 139.1-.127.

¹¹ *Id.* §§ 141.1-.101.

¹² *Id.* §§ 145.1-.105.

¹³ *Id.* §§ 147.1-.45.

¹⁴ *Id.* §§ 149.1-.27.

¹⁵ *Id.* §§ 143.1-.23, 61.181-.201.

¹⁶ *Id.* §§ 1.1-199.31.

¹⁷ 49 U.S.C. §§ 1301-1542 (1976) (amended 1978).

¹⁸ *Id.* § 1471.

¹⁹ *Id.* § 1429.

²⁰ *Id.*

²¹ Hamilton, *Appellate Practice in Air Safety Proceedings*, 10 SW. U. L. REV. 247 (1978) [hereinafter cited as Hamilton, *Appellate Practice*]; Hamilton, *Administrative Practice in Aviation Medical Proceedings*, 26 EMORY L.J. 565 (1977); Kovarick, *Procedures Before the Federal Aviation Administration*, 42 J. AIR L. & COM. 11 (1976) [hereinafter cited as Kovarick]; Yodice, *Airman Certification and Enforcement Procedures*, 37 J. AIR L. & COM. 281 (1971) [hereinafter cited as Yodice]; Mathis, *The Traffic Cop of the Skies—FAA Enforcement Actions*, 35 J. AIR L. & COM. 40 (1969) [hereinafter cited as Mathis].

ing people and businesses threatened with such FAA actions. This subject is especially timely and of particular concern to the aviation industry because the Administrator of the FAA has instituted a "get tough" enforcement campaign characterized by vitriolic pronouncements²² and vindictive actions.²³

²² That [enforcement] system is out of date in several important respects. For one thing, the Civil Aeronautics Act of 1938 set a maximum penalty of \$1,000 for each violation of Federal Aviation Regulations. Now, more than 40 years later, the penalty is still \$1,000. At those prices, many operators break the rules as a matter of course, and write off any penalty as an inconvenient but bearable part of the cost of doing business. I want that maximum penalty high enough to hurt. I want it raised to \$25,000. And I want criminal penalties for the worst violators of safety regulations. A driver who endangers the lives of others by breaking the traffic laws is punished as a criminal, and I see no reason why a pilot should be treated any differently. My Chief Counsel has drafted legislative proposals doing both these things. The Office of Management and Budget has approved these proposals, and the Department of Transportation will soon send them to Congress. Most of the measures I'm going to outline for you today, however, can be taken immediately, or in the very near future, by administrative rather than legislative action

A violation that usually carried a certain fine . . . may cost an airman more Administrative law judges employed by the National Transportation Safety Board have frequently reduced the penalties the FAA has imposed on unsafe airmen—even when the FAA has been found to be correct on both the facts and the law. In the past, we have appealed only the most egregious cases in which penalties have been reduced. In the future, the FAA will appeal all unwarranted reductions The law gives me great power to deal with such cases—including the power to close down airlines and seize aircraft if necessary. In the past, [closing down airlines and seizing aircraft has been done] seldom and with reluctance. I will [do so] whenever air safety demands it, and I will do so without any reluctance at all

Address by FAA Administrator Langhorne Bond to the National Aviation Club in Washington, D.C. (March 16, 1979).

As we gear up for tougher enforcement, it has to be considered crude and, at first, a not-so-well organized effort We are going to get better at it. The FAA is a slow organization to get tuned, but when it gets going, it grinds exceedingly fine. . . . [Enforcement] is totally inadequate if it is thought that our role in life is to tell people how to fly safely, as coaches and teachers. That is not FAA's role, although it has been represented that way in the past.

FAA Administrator Langhorne Bond, *quoted in* BUSINESS AVIATION, Dec. 31, 1979, at 213.

FAA Administrator Langhorne Bond, charging that the commuter airline safety record "is unacceptable," told commuter operators last week that "FAA plans to continue beefed-up inspections and will continue to seek heavy fines for ground operators guilty of rule violations." In what was viewed as a hard-line speech at the

I. ENFORCEMENT

The FAA's procedure of enforcement, whether the penalty sought is a civil fine or suspension or revocation of an aviator's certificate, is characterized by the successive impalements of both the accused and his counsel upon the septic horns of a herd of unsavory dilemmas. I will identify and discuss several of these dilemmas, and it may aid the reader in understanding each of them if first the scene is set and it is determined who released these despicable beasts from their cage and with what key.

The United States Constitution, through its Bill of Rights, makes certain guarantees to the people. For example, the Fourth Amendment protects citizens from unreasonable searches and seizures, the Fifth Amendment prohibits compelling a person to be a witness against himself, and the Sixth Amendment guarantees an accused the right to counsel. These rights, as interpreted in court decisions through the years, are available to the accused in criminal proceedings, but because of a curious distinction between actions denominated criminal and civil in nature these rights are, for the most part, denied to those who are accused or the subject of an

opening of FAA's commuter safety symposium last week in Washington, Bond said that in 1978 commuters had 3.93 accidents per 100,000 hours of flight, compared to a figure of .55 for local service carriers. Although Bond conceded that many operators are complying with new Part 135 regulations, he said that, "I look forward to the day when I can impose heavier penalties on those who repeatedly and willfully endanger safety."

BUSINESS AVIATION, Jan. 21, 1980, at 18.

- ²³ FAA told the Delta County Airport in Escanaba, Mich., that as of May 7 no airline may operate into the airport. North Central has been operating 6 flights daily into Delta County. It is highly unusual for FAA to take action as stringent as pulling an airport's operating certificate. The move was described as part of FAA Administrator Langhorne Bond's "get tough" enforcement policy.

BUSINESS AVIATION, May 7, 1979, at 148.

"As part of a get-tough policy on violators, the FAA has asked its 11 domestic regions to issue press releases on some of their enforcement actions. The idea is to discourage potential violators through the threat of public humiliation . . ."

FLYING, March 1980, at 19.

FAA crackdown on violators of the FARs is visible in the increased number of very large fines levied on air carriers and the withdrawal of operating certificates in addition to fining of commuters. Also, the FAA apparently believes negative publicity will reduce the number of violations. The FAA regions have been issuing press releases describing incidents involving suspensions of

investigation in the administrative process.²⁴ The irony of this denial is that a person accused in a civil proceeding is confronted with many of the same dilemmas that confront a person accused in a criminal proceeding. In addition, the potential for many of the same abuses of rights exists in both the criminal and civil contexts. This is particularly true with respect to FAA proceedings in which an accused is even denied some of the rights allowed to participants in other civil proceedings.

A. Investigation

In an FAA enforcement proceeding, a suspect and his counsel first encounter a number of unsavory dilemmas during the FAA's investigation process. Investigation of alleged violations of the Federal Aviation Regulations (FAR) is the duty of FAA inspectors assigned either to Air Carrier District Offices (ACDO), General Aviation District Offices (GADO), or Flight Standards District Offices (FSDO). These inspectors are the agency's "cops"; they bear the same relationship to the FARs as policemen bear to the criminal law. In addition to investigation of FAR violations, the FAA inspectors' duties include the testing of applicants for the

pilot certificates for FAR violations. The press releases, which have covered minor incidents by student pilots as well as more serious ones by professional pilots, are distributed to the news media nationwide.

BUSINESS AND COMMERCIAL AVIATION, Jan., 1980, at 24.

"The FAA proposed a \$1.5 million civil penalty against Braniff Airways for alleged violations of government aircraft—maintenance rules. . . . The \$1.5 million penalty would be the largest ever levied by the FAA. . . ." THE WALL STREET J., Nov. 7, 1979, at 8.

²⁴ It is the rule in the federal system that an extension of the "Miranda doctrine to situations where there is no criminal charge under investigation and where a statement is given by a person who has not been in any way deprived of his freedom would be wholly unwarranted." *F. J. Buckner Corp. v. NLRB*, 401 F.2d 910, 914 (9th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969). *See also* *United States v. Casias*, 306 F. Supp. 166 (D. Colo. 1969); *United States v. Wainwright*, 284 F. Supp. 129 (D. Colo. 1968). The National Transportation Safety Board has held that these procedural safeguards "are not applicable to civil proceedings, or to instances where admissions are made during a non-custodial investigation." *Administrator v. Trier*, 2 N. Trans. S. Dec. 379 (1973). *Accord* *Administrator v. Gable*, 1 N. Trans. S. Dec. 654, 656 (1969); *Administrator v. Smith*, 44 C.A.B. 864, 865 (1966); *Administrator v. Brubacker*, 19 C.A.B. 885, 887 (1954). Contrast this line of cases with the parallel line of cases culminating in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which found a warrantless administrative inspection conducted by the Occupational Safety and Health Administration (OSHA) unconstitutional as being violative of the Fourth Amendment.

various certificates and pilots' licenses issued by the FAA and the investigating of aircraft accidents. These duties, however, are also similar to the duties of ordinary cops who typically administer practical tests to applicants for drivers' licenses and investigate automobile accidents. You may be assured that the FAA "cops" take their enforcement responsibilities every bit as seriously as the cops on the beat. As diligent, dedicated enforcers of the body of law entrusted to their care they are subject to the same pressures and incentives that have given rise to the well-known abuses of the constitutional rights of persons accused under the criminal law.²⁵ Because many of the constitutional protections that have been recognized to favor those accused of crimes have been held inapplicable to administrative cases, the zeal of these "cops" is virtually unchecked.²⁶

1. *The Self-Incriminating Dilemma.*

It has been held that in FAA proceedings the accused enjoys no privilege against self-incrimination and that the investigator is not required to give persons suspected of FAR violations the pre-interrogation "*Miranda*" warnings required in criminal investigations.²⁷ The suspect is never advised before questioning that he is entitled to counsel, that he has the right to remain silent, or that statements that he makes will invariably be used against him in the prosecution of an enforcement action. Thus the suspect in FAA proceedings is in the same dilemma as the pre-*Miranda* criminal suspect. Lord Devlin's famous comment of more than thirty years ago applies equally well today to these cases as it did then to criminal prosecutions:

It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be worse for you if you do not.²⁸

²⁵ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²⁶ See note 24 *supra*.

²⁷ *Id.* But see *Mathis v. United States*, 391 U.S. 1 (1968), which clearly implies that the *Miranda* doctrine applies to any investigation, civil or criminal, where there exists the possibility that the investigation will result in criminal prosecution.

²⁸ *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966), citing Devlin, *The Criminal Prosecution in England* 32 (1958).

The Supreme Court of the United States observed in *Miranda*:

It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill²⁹

Those entangled in the FAA process, usually ordinary citizens, are less likely to be informed of their rights than the criminally accused, despite the frequent repetition of the *Miranda* warnings in the many popular cops-and-robbers television shows. Yet the potential for abuse of constitutional rights voiced in *Miranda* exists in administrative proceedings. One writer examining this dilemma in the similar context of an Internal Revenue Service investigation stated:

To obtain this evidence, the investigator has at his disposal techniques that are fully as coercive in their own way as those used by the police in custodial interrogations. Moreover, the tax investigator can be dangerously deceptive because his position does not carry the presumptive threat and built-in warning attending the FBI agent or local policeman. Thus, a false sense of security and the desire to maintain that security through cooperation combine to pressure the taxpayer to disclose all. This kind of pressure is in no way dependent upon custody.³⁰

The unfortunate person who is the subject of an FAA investigation will find himself caught in a self-incrimination dilemma. He may refuse to submit to FAA interrogation, followed by the unpleasant result that the FAA decides that he has an uncooperative attitude and should be targeted for an especially harsh sanction. On the other hand, he may submit to FAA interrogation. It has been this author's experience that the only practical effect of the suspect's cooperation in these proceedings is to aid the FAA in proving the case against him through damaging admissions, which frequently prove the prosecutor's otherwise unprovable case.

2. *The Presentation of Logbook Dilemma.*

A pilot is required by the regulations to present his logbook for

²⁹ *Miranda v. Arizona*, 384 U.S. at 468.

³⁰ Note, *Extending Miranda to Administrative Investigations*, 56 VA. L. REV. 690, 697 (1970) [hereinafter cited as *Extending Miranda*].

inspection upon the request of the FAA, the National Transportation Safety Board (NTSB or Board), or any state or local law enforcement officer.³¹ The evidence thus obtained by the government can be used not only in the prosecution of an administrative enforcement action, but may also give rise to criminal charges if any apparently false statements appear therein.³² This possibility of self-incrimination does not preclude administrative penalization of the pilot who refuses to present his logbook on Fifth Amendment grounds. The suspect is therefore presented with another dilemma—whether to present his logbook, which possibly will provide the FAA with evidence useful in prosecuting the airman (and even possibly provide the basis for a felony complaint), or refuse to present the logbook, which is in itself a regulatory violation subject to prosecution.

3. *The Absence of Counsel Dilemma.*

Confronted by an FAA inspector's questioning, a suspect is not likely to consider that he should first obtain legal counsel before making any statements.³³ If this thought did occur, it is almost certain that the suspect's next thought would be: "But if I insist on talking to my lawyer, the investigator will assume that I must have something to hide. I might avoid punitive action by appearing to have nothing to hide."³⁴ Thus the suspect is presented with the absence of counsel dilemma. Should he insist on speaking to an attorney before talking with the FAA and have the inspector note this "bad attitude" that confirms that the suspect did something

³¹ 14 C.F.R. § 61.51(d)(1) (1980).

³² 18 U.S.C. § 1001 (1976) provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

³³ The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. *Miranda v. Arizona*, 384 U.S. at 471. See also note 30 *supra*, and accompanying text.

³⁴ "Those agencies whose cooperation is highly important to the success of the subject's business have a further lever, for there is substantial incentive to stay within the good graces of such an agency." *Extending Miranda*, *supra* note 30, at 705-06.

wrong? Or should he talk to the FAA without counsel and risk making irreparably damaging admissions?

If an attorney has an ongoing professional relationship with aviators and aviation businesses, he may do them a good service by forewarning them to make it a standard operating procedure to call him and confer prior to making any statements to FAA investigators encountered in this context. This is, of course, a rare opportunity and it is far more likely that the first contact counsel will have with the suspect will be after the damaging admissions have been made. At that point there is often little the attorney can do to affect the outcome of the proceedings beyond simple plea-bargaining in hope of reducing the penalty that will be assessed for the inevitable conviction.³⁵ For this reason, the initial encounter between the suspect and the agency's investigator may be the single most crucial moment in the entire proceeding. The individual's on-the-spot decisions whether to first call his attorney and whether to discuss matters with the investigator, if inadvisedly made, may irretrievably destroy any chance of a successful defense of subsequent charges. Yet alone and unadvised, it is almost certain that the suspect will make the wrong decision.³⁶

4. *The Accident Reporting and Investigation Dilemma.*

The operator³⁷ of an aircraft involved in an accident³⁸ is required to notify the NTSB immediately by the most expeditious means available.³⁹ The NTSB then has the duty to investigate the accident

³⁵ In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Supreme Court of the United States observed with respect to a criminal case:

In *Gideon v. Wainwright*, 372 U.S. 335, we held that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if] for all practical purposes, the conviction is already assured by pretrial examination.

378 U.S. at 487-88.

³⁶ See generally Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

³⁷ "Operator means any person who causes or authorizes the operation of an aircraft, such as the owner, lessee, or bailee of an aircraft." 49 C.F.R. § 830.2 (1979).

³⁸ 49 C.F.R. § 830.2 (1979) defines those aircraft accidents for which notification is required.

³⁹ 49 C.F.R. § 830.5 (1979).

and determine the facts, conditions, circumstances, and causes of the accident.⁴⁰ Some field investigative authority has been delegated by the Board to the FAA.⁴¹ Many enforcement actions arise out of the investigation of these aviation accidents,⁴² yet statements made by the operator in filing the required report and in cooperating with the investigation may later be admitted into evidence in an enforcement proceeding arising out of the accident.⁴³ Thus the self-incrimination dilemma raises its ugly head in yet another guise.

Another vexing problem that sometimes presents itself involves what is known as the "Lindstram Doctrine." In *Administrator v. Lindstram*⁴⁴ the Board held that when a person is accused of careless or reckless operation⁴⁵ that allegedly resulted in an aircraft accident, the Administrator can establish a prima facie case simply by proving the fact of the accident, supported by some evidence that rules out causes other than pilot error, such as malfunction of an aircraft system or component or weather conditions. In this manner the Administrator's burden of proof is remarkably eased and the burden of going forward shifts to the accused who must overcome this presumption of carelessness by presentation of reliable, probative, and substantial evidence.⁴⁶ This doctrine has caused the FAA to tend to investigate accidents assigned to it only to the extent necessary to establish a prima facie enforcement case, rather than to probe deeply enough to establish accurately the probable cause of the accident based on reliable scientific facts.⁴⁷ The prac-

⁴⁰ Independent Safety Board Act of 1974, 49 U.S.C. §§ 1901-1907 (1976) and 49 U.S.C. § 1441 (1976) (amended).

⁴¹ 49 C.F.R. § 800 app. (1979).

⁴² See generally Mathis, Yodice, and Kovarick, *supra* note 21.

⁴³ Edward C. Bessey, 13 C.A.B. 550 (1952); Charles Robert Sisto, 13 C.A.B. 125, 130 (1948), *aff'd*, 179 F.2d 47 (D.C. Cir. 1949).

⁴⁴ *Administrator v. Lindstram*, 41 C.A.B. 841, 842 (1964).

⁴⁵ 14 C.F.R. § 91.9 (1980).

⁴⁶ *Administrator v. Davis & Menecke*, 1 N. Trans. S. Dec. 1517, 1520-21 (1971).

⁴⁷ In *Administrator v. Hardin*, Docket No. SE-3925, NTSB Order No. EA-1317, slip op. (Aug. 21, 1979), two passenger-carrying air taxi flights operated by two different companies crashed within a few minutes and a few miles of each other on the ice of a remote Alaskan bay. Although neither pilot had any contact with the other between the time of the accident and interviews by FAA investigators, each related that he was operating by reference to instruments in "white-out" conditions (the loss of visual reference despite visual meteorological conditions), that he was cruising at an indicated altitude of 500 feet, and that he had flown into the ice without warning with the altimeter still

tical effect of such slipshod investigation can be to shift the burden of aircraft accident investigation to the accused, a considerable disadvantage⁴⁸ to him and contrary to Congressional intent.⁴⁹

Thus the suspect is faced with another dilemma. If he cooperates in the reporting and investigation of accidents it is likely that in so doing he is also assisting the agency in preparing an enforcement case against him. On the other hand, if he fails or refuses to cooperate this in itself may give rise to an enforcement action⁵⁰ or even criminal sanctions.⁵¹ In addition, failure of the suspect to commission a thorough, scientific independent investigation, at his considerable expense, may damn the aviator because of a sloppy government investigation, caused in part by the Lindstrom Doctrine.

B. Accusation

Upon completion of an investigation by the appropriate field office, the violation report file is forwarded to the FAA Regional Counsel who institutes a legal proceeding for enforcement (either by civil penalty or certificate action).⁵² The Regional Counsel sends

indicating that altitude. Although the pilots requested the FAA inspectors to pull the altimeter from the wreckage and subject them to scientific testing and although the accident reports suggested a meteorological explanation for the accidents, the FAA neither inspected the altimeters nor analyzed the local meteorological conditions during its investigations.

⁴⁸ In *Administrator v. Hardin*, Docket No. SE-3925, NTSB Order No. EA-1317, slip op. (Aug. 21, 1979), the administrative law judge held and the Board affirmed that the attribution of the accident to altimeter error, either because of mechanical malfunction or weather phenomenon, is an affirmative defense and the burden of persuasion is on respondent. Clearly, respondent failed in this burden. In addition, respondent presented no evidence tending to establish that the altimeter mechanically malfunctioned prior to impact. *Id.* at 6.

The Board further stated:

Respondent devotes a considerable portion of his appeal brief to adequacy of the aircraft accident investigation conducted by the Board and/or the FAA, particularly with respect to examination of the altimeter. The instant proceeding, however, is based exclusively on the record herein and cannot be based on, or used as a forum to collaterally attack, the accident investigation.

Id. slip op. at 6 n.9.

⁴⁹ Compare *Administrator v. Simmons*, 1 N. Trans. S. Dec. 1122 (1971); *Administrator v. O'Leary*, 1 N. Trans. S. Dec. 913 (1970); *Administrator v. Rapattoni & Swanson*, 1 N. Trans. S. Dec. 241, 245 (1968).

⁵⁰ 49 U.S.C. § 1429 (1976).

⁵¹ *Id.* § 1472(g).

⁵² The investigating field office has authority to dispose administratively of the case by a "Warning Notice" or a "Letter of Correction." 14 C.F.R. § 13.11

the accused a letter captioned "Notice of Proposed Civil Penalty" or "Notice of Proposed Certificate Action" that states the penalty sought by the FAA.⁵³ If the FAA has chosen to proceed against the accused's certificate, the Regional Counsel is required to offer the accused the opportunity for an informal conference.⁵⁴ Although not required by statute, as a practical matter such a conference is also usually available upon request in a civil penalty action. The conference generally provides an opportunity for plea-bargaining and some informal discovery. Mitigating circumstances can be pointed out at the conference.⁵⁵ Statements made by the accused at the conference are generally not used against him at a subsequent hearing. An important exception, however, does exist. If the accused's story should change between the time of the informal conference and the hearing, statements made at the informal conference can be used for impeachment purposes by showing prior inconsistent statements.⁵⁶

It has been the author's experience with the FAA's new "get tough" enforcement policy⁵⁷ that while the informal conferences were previously a useful settlement tool, they have become less so today. This is apparently the result of the fact that an insufficient proportion of those persons accused of violations of the FARs are now resisting enforcement and carrying appeals to the NTSB⁵⁸ or forcing the Administrator to resort to the courts.⁵⁹ As a result, there is not the same kind of case load pressure upon FAA attorneys as there is upon prosecuting district attorneys, pressure that results in the compromise settlement of most of their traffic and criminal cases. Consequently, the FAA is taking full advantage of the situation. The Administrator is now more inclined to seek

(1980). In the author's experience, these low-level means for resolving controversies have largely fallen into disuse under the "get tough" policy.

⁵³ 14 C.F.R. §§ 13.15(b), 13.19(c) (1980).

⁵⁴ 49 U.S.C. § 1429(a) (1976).

⁵⁵ See Hamilton, *Appellate Practice*, *supra* note 21, at n.33.

⁵⁶ U.S. DEPT. OF TRANSPORTATION, FEDERAL AVIATION ADMIN., HANDBOOK 2150.2, HANDBOOK FOR HANDLING LEGAL ASPECTS OF FAA ENFORCEMENT PROGRAM § 23 c. (1968, as amended).

⁵⁷ See notes 22 and 23 *supra*, and accompanying text.

⁵⁸ For the procedures involved in appealing certificate actions to the NTSB, see authorities cited in note 21 *supra*.

⁵⁹ See authorities cited in note 21 *supra* (procedures followed in actions to correct a civil penalty).

heavier penalties than were previously assessed, and the Regional Counsel is less inclined to compromise cases. Perhaps the Administrator's "get tough" policy merits a "get tougher" response from those suffering the effects of the policy.

There are so few opportunities for the accused's counsel to have a real impact on the outcome of the proceedings that special attention should be paid to possible technical defects existing at the moment of accusation, particularly where the Administrator has chosen to proceed against the accused's certificate. Upon receipt of an order of suspension or revocation, counsel should determine whether the complaint clearly and unmistakably states a cause of action⁶⁰ and whether the accused received timely notice of the basis for the action.⁶¹ In addition, counsel for the Administrator may make a fatal error early in the prosecution by not timely filing his complaint with the Board.⁶² Defense counsel should compare the

⁶⁰ If it does not state a cause of action the Administrator's complaint may be vulnerable to a motion to dismiss. *See, e.g., Administrator v. Choate*, Docket No. SE-3475, NTSB Order No. EA-10011, slip op. (June 1, 1977).

⁶¹ The so-called "stale complaint rule," 49 C.F.R. § 821.33 (1979), provides for dismissal in instances where the accused was not put on notice of the investigation and pending action within six months of the date of the alleged incident. For examples of the Board's recent treatment of this rule, *see Administrator v. O'Donnell*, NTSB Order No. EA-1323, slip op. (Aug. 30, 1979); *Administrator v. Cowell*, NTSB Order No. EA-1285 slip op. (May 23, 1979); *Administrator v. Lewis*, NTSB Order No. EA-1177, slip op. (Aug. 24, 1978).

⁶² The Rules of Practice in Air Safety Proceedings provide, at 49 C.F.R. § 821.31(a) (1979), that the FAA's counsel must file his order of suspension or revocation as his complaint within five days after the filing of the notice of appeal. In his slip opinion of May 13, 1977, in *Administrator v. Force*, NTSB Docket No. SE-3536, Chief Administrative Law Judge Boyd noted:

Parenthetically, it should be noted that this office has observed that in many instances the complaint is not filed even within the liberalized interpretation that has just been indicated. That is, in many instances, especially in the last six months, this office has noticed that the complaint has lagged in many cases several weeks behind the time in which it should have been filed under the interpretation five (5) days from notice by us. However, no motion to dismiss was filed in these instances. But in fairness, this Administrative Law Judge gives notice that continued late filing of complaints shall in the future be acted upon if meritorious motions are made on this lack of timeliness. In the circumstances, a copy of this order shall be served upon all of the counsel for the Administrator that regularly practice before us in these proceedings.

Id. at 2.

Almost a year later, the full Board in its slip opinion of April 20, 1978, in *Administrator v. Kortum*, NTSB Order No. EA-1132, stated:

With respect to the future, however, we believe it would be in-

date of the filing of the complaint with the date of the filing of his own appeal. If the rule has not been complied with by the Administrator, defense counsel should file a motion to dismiss the complaint as not timely filed.⁶³

C. Trial Preparation and Discovery

The Federal Rules of Civil Procedure do not apply to administrative proceedings for certificate actions⁶⁴ and the NTSB Rules of Practice in Air Safety Proceedings (Rules of Practice)⁶⁵ make little provision for discovery.⁶⁶ In practice, discovery is largely a matter to be worked out informally between counsel. Consequently, the results vary between regions, between attorneys in the same region, and between cases; the only common thread is their unpredictability.⁶⁷ The Rules of Practice provide for application to the administrative law judge for orders not specifically provided for by rule. These may include motions to compel, motions for production of documents, and other typical civil discovery procedures.⁶⁸ The judge's rulings on such interlocutory motions, however, are not subject to appeal to the full Board prior to the Board's consideration of the entire proceeding, which occurs subsequent to the judge's initial decision. In addition, rulings on such motions are not

appropriate to continue in effect a procedure which is not spelled out in the Board's Rules of Practice and thus which is not officially noticed to all parties and their representatives appearing before the Board. Therefore, the Administrator will henceforth be expected to file his order (as the complaint) within 5 days of receipt of the notice of appeal whenever a copy thereof has been duly served upon him (or his representative) by the respondent. In order to assure uniform compliance with this procedure, a copy of this decision should be disseminated by the Administrator to all Regional Counsels' offices of the FAA.

Id. at 4.

⁶³ 49 C.F.R. § 821.17(a) (1979).

⁶⁴ *Administrator v. Cockes*, 2 N. Trans. S. Dec. 1756, 1758-59 (1975).

⁶⁵ 49 C.F.R. §§ 821.1-821.63 (1979).

⁶⁶ A party may request permission from the administrative law judge to take depositions either upon oral examination or by written interrogatories. *Id.* § 821.19.

⁶⁷ See *Administrator v. Lewis*, NTSB Order No. EA-1177, slip op. (Aug. 24, 1978); *Administrator v. McClain*, 1 N. Trans. S. Dec. 1542 (1972); *Administrator v. Sims & McGhee*, NTSB Docket Nos. SE-3425 and 3426 (opinion of Mar. 31, 1977).

⁶⁸ 49 C.F.R. § 821.14(a) (1979).

subject to judicial review.⁶⁹ An exception is made in extraordinary circumstances if the consent of the judge who made the ruling is obtained.⁷⁰

It is difficult to imagine any justification for the Board's failure to provide by rule for customary civil discovery in these actions or for any clear-cut right to discovery that is not dependent upon case-by-case exercise of judicial and prosecutorial discretion. This is especially true since the FAA's statutory investigative powers give the Administrator virtually unchecked precomplaint discovery, backed by not only administrative but also criminal sanctions.⁷¹ Yet by comparison those accused must apply to the administrative law judge for permission to engage in any discovery at all and have little, if any, meaningful recourse if discovery is refused.⁷²

D. *Hearing and Adjudication*

When the FAA has chosen to act against an accused's certificate, the only provision for a due process hearing is for the hearing conducted by the administrative law judge of the NTSB.⁷³ At this hearing, which is the rough equivalent of a trial in the criminal context, the Rules of Practice place upon the FAA the burden of proving the violations charged by a preponderance of substantial, reliable, and probative evidence.⁷⁴ Such a quantum of evidence is not required in order to establish a *prima facie* case, however, which shifts the burden of going forward to the accused, so that the Administrator's initial burden is negligible.⁷⁵ This is particularly true since there is no rule excluding hearsay evidence in these proceedings⁷⁶ and since the accused enjoys no privilege against being

⁶⁹ *McGhee v. NTSB*, No. 78-1039 (10th Cir. June 29, 1978) (order dismissing appeal).

⁷⁰ 49 C.F.R. § 821.16 (1979).

⁷¹ See notes 50 & 51 *supra*, and accompanying text.

⁷² See notes 67-70 *supra*, and accompanying text.

⁷³ For general procedures and considerations in the conduct of these hearings, see Hamilton, *Appellate Practice*, Mathis, Yodice, and Kovarick, *supra* note 21.

⁷⁴ 49 C.F.R. §§ 821.32, 821.49(a) (1979).

⁷⁵ Since the Administrator can satisfy his burden of establishing a *prima facie* case exclusively through hearsay evidence, the Administrator's case-in-chief can (and often does) consist only of the agency investigator's testimony relating what he was told by others about the incident. See, e.g., *Administrator v. Walters*, Docket No. SE-3294, NTSB Order No. EA-963, slip op. at 7 (Feb. 16, 1977).

⁷⁶ The hearsay nature of such evidence goes only to the weight to be attached

compelled to testify.⁷⁷

When the time comes to put on the defense, however, we find that the FAA's Orwellian pigs are again more equal. Although the FAA may call the accused and his employees and compel their testimony, it claims the right to prevent the accused from similarly calling and compelling the testimony of FAA employees.⁷⁸ The Board, in aid of these efforts, has not been willing to exercise its authority to pursue contempt sanctions⁷⁹ when the Administrator has relied upon these rules to intimidate witnesses and thwart the Board's own compulsory process. Similarly, the Board has refused to sustain an administrative law judge's dismissal of the Administrator's complaint where a pattern of intimidation and resistance had, in that judge's opinion, operated to effectively deny the accused due process of law.⁸⁰

The Rules of Practice provide counsel the right to submit proposed findings and conclusions, accompanied by supporting reasons, to the judge prior to the initial decision.⁸¹ In the past it was the practice of the Board to allow these to be submitted in writing following the hearing and a written decision would be rendered at a later date.⁸² This is no longer a uniform practice; the Board has held that the rule's requirements are met if the judge simply

to it in the case and not to its admissibility. *Administrator v. Trier*, 2 N. Trans. S. Dec. 379 (1973); *Petition of Ewing*, 1 N. Trans. S. Dec. 1192, 1197 (1971); *Administrator v. Howell*, 1 N. Trans. S. Dec. 943, 944 n.10 (1970). The Board has also held that hearsay evidence, when not contradicted by direct competent legal evidence, and even when uncorroborated, is "substantial" evidence within the meaning of the rule. *Administrator v. Ortner*, 1 N. Trans. S. Dec. 396, 397 n.5 (1973).

⁷⁷ See Yodice, *supra* note 21, at 286.

⁷⁸ 49 C.F.R. § 9.5 (1979).

⁷⁹ 49 U.S.C. § 1903(b)(3) (1976) provides:

In case of contumacy or refusal to obey a subpoena, an order, or an inspection notice of the Board, or of any duly designated employee thereof, by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such district court shall, upon the request of the Board, have jurisdiction to issue to such person an order requiring such person to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

⁸⁰ *Administrator v. Sims & McGhee*, Docket No. SE-3426, NATS Order No. EA-1107, slip op. (Jan. 11, 1978) and NTSB Order No. EA-1069, slip op. (Sept. 9, 1977).

⁸¹ 49 C.F.R. § 821.39 (1979).

⁸² Hamilton, *Appellate Practice*, *supra* note 21, at 259-60.

provides for oral argument at the conclusion of the hearing.⁸³

E. Full Board Appeal

Even after the administrative law judge renders his initial decision and order, the accused has not yet exhausted his administrative remedies that are prerequisites to judicial review; he first must appeal the order to the full Board.⁸⁴ In such an instance, the party seeking review must give a notice of appeal to the Board within ten days after an oral or written decision has been rendered.⁸⁵ The timely filing of such a notice of appeal automatically stays the effectiveness of the initial decision; therefore, the Administrator's order of suspension or revocation will continue to be stayed and the accused's certificate will continue in effect during the pendency of the appeal.⁸⁶ Generally, an appeal to the full Board is made on the basis of briefs and the issues are narrow.⁸⁷ The Board has the power to grant oral arguments on these appeals, but exercises it

⁸³ Administrator v. Enright, Docket No. SE-3373, NTSB Order No. EA-0993, slip op. at 5-6 (April 21, 1977); Administrator v. McElroy, 2 N. Trans. S. Dec. 444 (1973). The assessment of the credibility of witnesses is within the exclusive province of the administrative law judge, who alone is in a position to gauge the demeanor of the witnesses. Administrator v. Bennie, NTSB Order No. EA-1047, slip op. (July 25, 1977). Where the judge has made a clear determination of credibility the Board will not disturb that determination on review. Administrator v. Sims & McGhee, Docket No. SE-3425 and 3426, NTSB Order No. EA-1370, slip op. at 10 (Jan. 25, 1980); Administrator v. Utley, Docket No. SE-3864, NTSB Order EA-1258, slip op. at 4 (Mar. 8, 1979); Administrator v. Witfeldt, Docket No. SE-3792, NTSB Order EA-1209, slip op. at 7 (Nov. 2, 1978). "It is the policy of the Board not to disturb credibility findings except where compelling reasons exist for doing so." Administrator v. Leonhardt, Docket No. SE-3654, NTSB Order EA-1168, slip op. at 8 n.9 (Aug. 15, 1978), and cases cited therein. The Board's findings of fact, if supported by substantial evidence, are conclusive upon the courts of appeals upon judicial review. 49 U.S.C. § 1486(e) (1976).

⁸⁴ 49 U.S.C. § 821.47 (1976); McGhee v. N.T.S.B., No. 78-1039 (10th Cir. June 29, 1978) (order dismissing appeal); Overseas Nat'l Airways v. CAB, 426 F.2d 725 (2d Cir. 1970); McManus v. CAB, 286 F.2d 414 (2d Cir.), cert. denied, 366 U.S. 928 (1961).

⁸⁵ 49 C.F.R. § 821.47 (1979).

⁸⁶ *Id.* § 821.43.

⁸⁷ The Board's scope of review is limited by 49 C.F.R. § 821.49 (1979), which provides that on appeal the Board will consider only the following issues:

- (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?

rarely.⁸⁸ The Board's unique appellate procedures generally allow each side only one brief; the appellant typically is not afforded the opportunity to file a second brief rebutting that filed by the appellee.⁸⁹ The full Board's order does constitute a final agency action that is subject to judicial review.⁹⁰ Although either party may petition the Board to rehear, reconsider, modify, or allow reargument on its order, the filing of such a petition is neither a prerequisite to judicial review nor does it toll the statute of limitations for filing the petition for judicial review.⁹¹

F. Judicial Review

Jurisdiction over petitions for review of final Board orders lies only with the United States Courts of Appeals.⁹² Venue is proper in the circuit of the petitioner's residence or principal place of business or in the United States Court of Appeals for the District of Columbia.⁹³ The FAA does not have standing to seek judicial review of the Board's final order; only the respondent may do so.⁹⁴ Pursuit of judicial review *does not* automatically stay the effect of the order of suspension or revocation; therefore, defense counsel must take affirmative action to secure a stay order at this point to protect the client's interest.⁹⁵

⁸⁸ 49 C.F.R. § 821.48(g) (1979).

⁸⁹ *Id.* § 821.48(a), (d), (e).

⁹⁰ 49 U.S.C. § 1486(a) (1976).

⁹¹ 49 C.F.R. § 821.50 (1979); *Consolidated Flower Shipments v. CAB*, 205 F.2d 449 (9th Cir. 1953).

⁹² 49 U.S.C. § 1486(a) (1976); *Robinson v. Dow*, 522 F.2d 855 (6th Cir. 1975).

⁹³ 49 U.S.C. § 1486(b) (1976). Objections to venue may, however, be waived. *Bond v. NTSB*, 608 F.2d 835 (10th Cir. 1979); *Panhandle E. Pipe Line Co. v. Federal Power Comm.*, 324 U.S. 635 (1945).

⁹⁴ *Lee v. CAB*, 225 F.2d 950 (D.C. Cir. 1955).

⁹⁵ Application for the stay order pending judicial review is required to be made first to the Board, if practicable. FED. R. APP. P. 18. The Board has authority to postpone the effective date of its actions, pending judicial review, upon a finding that justice so requires. 5 U.S.C. § 705 (1976). If the Board denies the motion for a stay order, the court may grant such an order upon a showing of good cause and after reasonable notice to the Board. 49 U.S.C. § 1486(d) (1976). Where the appellant's qualifications to hold the certificate are at issue, however, a stay is typically not granted. *See, e.g., Administrator v. Bond*, Docket No. SE-3618, NTSB Order No. EA-1138, slip op. (May 5, 1978). The fact that a stay order has been denied and the period of suspension may have been completed during the pendency of the judicial review does not render the case moot since the appellant is entitled to a review of the record of conviction, notwithstanding the fact that he may have already "served his time."

The Board's findings of fact are binding upon the court upon review, provided they are supported by substantial evidence.⁹⁶ Although the cases provide a wealth of inspirational verbiage on the proper application of the substantial evidence test upon judicial review of agency actions,⁹⁷ it has been the author's experience that in practice this standard is more often an ineffectual chimera than a real safeguard.⁹⁸ Thus, once the administrative law judge has

⁹⁶ 49 U.S.C. § 1486(e) (1976); *Aadland v. Butterfield*, 502 F.2d 799, 800 (8th Cir. 1974); *Morton v. Dow*, 525 F.2d 1302, 1307 (10th Cir. 1973).

⁹⁷ Congress has entrusted to the courts of appeals the duty to determine, on review of adjudicatory proceedings of an administrative agency, whether the record discloses substantial evidence to support the agency's findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). This is the only check provided by law to assure that persons subjected to the punitive actions of administrative agencies have not suffered administrative sanctions without a substantial evidentiary showing of good legal cause for the sanctions. The Administrative Procedure Act, 5 U.S.C. § 706 (1976), requires that the reviewing court hold unlawful and set aside agency findings that are unsupported by substantial evidence in cases that are reviewed on the record of an agency hearing, as required by statute. Reviewing restrictions similar to those found in the Federal Aviation Act of 1958, the Supreme Court, writing in *Universal Camera Corp.*, stated: "It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of the evidence on the record . . ." 340 U.S. at 493. More recently, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1970), the Court confirmed that this provision of the Administrative Procedure Act requires the courts of appeals, upon review of agency action, to make a specific finding of compliance with the standards enumerated in the Act. In *Illinois Cent. R. Co. v. Norfolk & W.R. Co.*, 385 U.S. 57, 66 (1966), the Court held that a court of appeals, upon its review of administrative agency proceedings, *must* apply the test of substantiality to the evidence. In *NLRB v. Columbian Enamelling & Stamping Co.*, 306 U.S. 292 (1939), the Court, noting that "substantial evidence" is more than a scintilla but may be less than a preponderance, stated: "It means such relevant evidence as a reasonable mind might accept as evidence to support a conclusion. . . . [E]nough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Id.* at 300. The primary responsibility of the court of appeals is applying the "substantial evidence" test to agency adjudicatory proceedings is to assure that due process guarantees have been afforded the citizen in order to prevent "rubber-stamping" of administrative hearings that could allow or encourage such hearings to deteriorate into mere ritualistic charades. *City of Fulton v. Federal Power Comm'n*, 512 F.2d 947 (D.C. Cir. 1975).

⁹⁸ In practice, the "substantial evidence" test is so highly subjective that it renders the outcome of its application unpredictable. It is a surgical tool the Court *can* use in connection with a truly scrutinizing review to arrest the cancerous spread of administrative abuses. In current practice, however, the courts of appeals, harried by staggering case loads, rarely seem willing or able to invest the time required for such scrutiny. The easier course upon finding some trace of evidence in the record is to call it substantial and dispose of the appeal rather than to engage in the kind of meticulous and analytical weighing that, if thoroughly done, might distinguish the scintilla from the substantial.

made his findings of fact, particularly where he has couched his basis for these findings in terms of a credibility choice between witnesses whose testimony conflicts, there can be little hope for reversal of those findings at any subsequent stage.⁹⁹ In addition, although the Administrative Procedure Act¹⁰⁰ specifically provides for judicial review of the underlying procedural conduct of the entire administrative appeal process to assure compliance with the requisites of due process, the courts have granted such deference to the propriety of agencies' procedures that the agencies need rarely fear penetrating scrutiny by the reviewing court.¹⁰¹

The Federal Aviation Act clearly empowers the court upon review to affirm, modify, or set aside the agency's order, in whole or in part, and, if necessary, to order further proceedings by the Board or Administrator.¹⁰² The courts, however, have characterized the Board's selection of a penalty as more a matter of discretion than of precedent and have shown a marked reluctance to modify penalties imposed by the Board even where such penalties were in excess of those imposed previously for similar violations.¹⁰³

⁹⁹ See note 85 *supra*, and accompanying text. In one recent case, involving a charge that the pilot had flown too low at night over a sparsely-populated rural area, the only evidence whether the pilot had in fact operated within 500 feet of persons and homes in violation of 14 C.F.R. § 91.79(c) was the testimony of two housewives who made no estimate of the aircraft's proximity but merely related their hysterical reactions to the aircraft's passage and their wonder, on the following day, how the aircraft had missed some power lines in the area. The pilot and one of his passengers testified that at no time was he within 500 feet of the houses. The administrative law judge couched his initial decision in credibility terms, finding for the FAA. *Administrator v. Terry*, NTSB Docket No. SE-3556 (Oct. 4, 1977). Although defense counsel on appeal to the full Board carefully couched his arguments in terms of the substantiality of the evidence, even if the credibility of the government's witnesses was unimpeached, the Board found that the judge's finding of a violation "rested squarely on a credibility choice between conflicting testimony" and therefore deferred to the judge's finding. Docket No. SE-3556, NTSB Order No. EA-1106 (Jan. 23, 1978). On judicial review defense counsel beseeched the court of appeals to review the evidence to determine its substantiality. The court found the evidence substantial and affirmed the Board's order suspending the pilot's commercial certificate. *Terry v. NTSB*, 608 F.2d 418 (10th Cir. 1979).

¹⁰⁰ 5 U.S.C. §§ 551-559 (1976).

¹⁰¹ 49 U.S.C. § 1486 (1976). See 5 U.S.C. §§ 551-559 (1976).

¹⁰² 49 U.S.C. § 1486(d) (1976).

¹⁰³ Historically, precedent has played a strong role in the Board's review of the propriety of the sanctions sought by the FAA in each particular case. See, e.g., *Administrator v. Johnson*, 2 N. Trans. S. Dec. 1598, 1600 (1975). Escalation of sanctions above precedential levels appears to be a part of the FAA's

Although the judgment and decree of the court of appeals is subject to further review by the Supreme Court of the United States, this is available only upon certification or by the granting of a writ of certiorari,¹⁰⁴ a highly improbable event.

G. *Extraordinary Remedies*

Under some circumstances the FAA is empowered to suspend or revoke a certificate without prior notice or hearing.¹⁰⁵ Such "emergency orders" take effect immediately and the filing of an appeal with the NTSB does not stay the effectiveness of the order pending a hearing.¹⁰⁶ The Administrator's decision to invoke the emergency authority has been held not subject to review.¹⁰⁷ The Rules of Practice, however, do provide for accelerated pleading and hearing procedures in emergency cases.¹⁰⁸ Although the Administrator historically has used the emergency power quite sparingly,¹⁰⁹ initial indications are that it is now being relied upon more frequently and with less hesitation as a part of the "get tough" policy.¹¹⁰

The FAA's decision to proceed under its emergency authority may throw the accused and his counsel onto the horns of another dilemma if the accused individual or business relies upon its certificate authority in order to earn its income. In fact, the Administrator's decision to resort to the emergency authority may dispose of the case for all practical purposes. This is because counsel

"get tough" policy. See notes 22 & 23 *supra*. If the Board goes along with this trend, precedent effectively flies out the window since it has been held that the agencies exercise a broad discretion in imposing sanctions and that the sanctions should not be overturned on judicial review unless they are unwarranted in law or without justification in fact. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973); *French v. CAB*, 378 F.2d 468 (10th Cir. 1967); *Nadiak v. CAB*, 305 F.2d 588 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963). The fact that the severity of the sanctions is greater than that of sanctions that have been imposed in similar cases does not render them unwarranted in law or without justification in fact. *Terry v. NTSB*, 608 F.2d 418 (10th Cir. 1979). See also *Barnum v. NTSB*, 595 F.2d 869 (D.C. Cir. 1979).

¹⁰⁴ 49 U.S.C. § 1486(f) (1976).

¹⁰⁵ 49 U.S.C. § 1485 (1976).

¹⁰⁶ *Administrator v. Metro Air System, Inc.*, 2 N. Trans. S. Dec. 285 (1973).

¹⁰⁷ *Administrator v. Harvey*, 1 N. Trans. S. Dec. 1450, 1452 (1972).

¹⁰⁸ 49 C.F.R. §§ 821.54-.57 (1979). The Board is required to finally dispose of such an appeal within sixty days. 49 U.S.C. § 1429(a) (1976).

¹⁰⁹ See Kovarik, *supra* note 21, at 24.

¹¹⁰ See note 22 *supra*, and accompanying text.

defending an emergency certificate action must make an unpleasant choice. He may press the client's rights to an expedited hearing under the rules, but his hearing preparation will be hampered by having less than a week to complete as much discovery as possible. He must then try the case whether he is ready or not fully prepared. On the other hand, counsel may elect to waive the expedited hearing procedures and attempt to prepare an adequate defense while the suspension of his client's operations continues. This may effectively drive the client out of business during the pendency of the appeal.

H. Summary Seizure of Aircraft

Another weapon in the Administrator's enforcement arsenal that formerly was relied upon sparingly is the authority to seize summarily the accused's aircraft and hold it as security for satisfaction of a potential civil penalty.¹¹¹ This may also become a commonly-used weapon under the "get tough" policy. When the summary seizure of an accused's aircraft accompanies emergency action against the accused's certificate this may be, for all practical purposes, the *coup de grace*, since without the aircraft or his certificate the accused will likely have no means to pay for his defense.

I. Injunctive Relief

Historically, injunctive relief has been sought successfully by the government only in controversies arising out of compliance or non-compliance with the FARs.¹¹² With the FAA taking an increasingly adversarial and belligerent stance toward certificate-holders and applicants, counsel representing members of the aviation industry may find it necessary to resort to petitions for injunctive relief on behalf of their clients. This may be particularly necessary where the Administrator effectively precludes or interferes with the accused's operations without resorting to formal enforcement proce-

¹¹¹ 49 U.S.C. §§ 1471(b), 1473(b) (1976); 14 C.F.R. § 13.17 (1980). There is some question regarding the constitutionality of these provisions and the decisions on point are in conflict. *Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598 (E.D. Pa. 1974), held the provisions constitutional, but more recently *United States v. Vertol H21C*, 545 F.2d 648 (9th Cir. 1976), found the provisions unconstitutional as a denial of due process. Each of these cases involved the summary seizure of a helicopter allegedly being operated commercially in violation of the Federal Aviation Regulations. See Hamilton, *Appellate Practice*, *supra* note 21, at 263.

¹¹² See Hamilton, *Appellate Practice*, *supra* note 21, at 264.

dures that would give rise to a right to the due process hearing and subsequent appeals.¹¹³

II. MEDICAL CASES

Although there has been much less sound and fury in the area of medical cases than in the area of enforcement, there have been some notable developments. In virtually simultaneous rulings, three United States Courts of Appeals agreed that the denial of a pilot's petition for exemption from an FAR is subject to judicial review, but that the test upon review is whether the denial was arbitrary and capricious, thus constituting an abuse of discretion. In these cases the courts found that the Administrator's blanket policy of refusing to grant exemptions from the "Age 60 Rule"¹¹⁴ was not an abuse of discretion.¹¹⁵

The administrative law judge's initial decision and order in cases reviewing the denial, suspension, or revocation of a medical certificate most often turns upon a credibility choice between the airman's physician expert witnesses and those testifying for the FAA. Thus, the factors guiding the judge in making his credibility choices have been the subject of many Board pronouncements of increasing sophistication. Basically, in balancing conflicting opinions of expert medical witnesses the judge should follow the opinion that he finds more persuasive, logical, and in-depth.¹¹⁶ The testimony of the attending physician may be entitled to some additional weight, however, especially when the precise diagnosis is not as complete as it could be and when the attending physician must be relied upon to testify concerning the airman's medical condition.¹¹⁷ In practice, the evidence includes not only the testimony of medical experts but also the documentary history of the airman's medical condition. Greater weight is given to the testimony of an acknowl-

¹¹³ See, e.g., *Baltic Aviation, Inc. v. Bond*, No. 79-C-677 (D. Colo., June 11, 1979) (temporary restraining order).

¹¹⁴ 14 C.F.R. § 121.383(c) (1980).

¹¹⁵ *Gray v. FAA*, 594 F.2d 793 (10th Cir. 1979); *Rombough v. FAA*, 594 F.2d 893 (2d Cir. 1979); *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978).

¹¹⁶ *Petition of Evans*, 2 N. Trans. S. Dec. 2299, 2300 (1976); *Petition of Wittmaack*, 2 N. Trans. S. Dec. 1011 (1975); *Petition of Ewing*, 1 N. Trans. S. Dec. 1192, 1196 (1971).

¹¹⁷ *Petition of Bank*, Docket No. SM-1792, NTSB Order No. EA-1094, slip op. (Dec. 13, 1977).

edged medical expert who testifies at the hearing and is subject to cross-examination than is given to written reports that are inconclusive or are subject to interpretation.¹¹⁸

The FAA continues to argue that the question on review is not whether the airman is medically qualified for certification at the time of the hearing but is only whether he was qualified at the time of the FAA's denial. This argument was recently rejected at the trial level in a rather colorful initial decision issued by Administrative Law Judge Thomas W. Reilly in *Petition of Spivey*:

It would seem that only a scenario from a Franz Kafka novel about the impenetrable never-yielding bureaucratic maze would dictate that a pilot, who has clear evidence *prior* to a hearing that he is no longer an "unacceptable risk to air safety" and that there is now no longer a reasonable expectation of heart attack in the next 2 years, must nevertheless hold his tongue at that hearing, dare not mention such evidence, but must first *lose* this hearing and then reapply to that Great Bureaucracy to start the wheels rolling again so he can introduce such evidence at his *later* (2nd) hearing some 2 or 3 years down the road. This simplistic recipe for frustration and endless gamemanship may prove amusing to overworked Government lawyers who would like to dissuade taxpayers from continuing to press for their rights, but it is a shabby way to treat American citizens who expect more from their favorite bureaucracy. A taxpayer's individual resources are very limited in dueling with the Government, while the Government's, of course, are endless (it has the combined taxpayers' money). In recognition of this imbalance in resources, the taxpayer (pilot) should be allowed to put his best foot forward, once and for all, at the hearing, his "*day in court*," and not be told he must save (ignore) his best evidence for some *other* hearing 2 or 3 years hence. . . . it seems absurd to insist that the trier of the facts close his eyes to a nearly 10-month time lapse with a positive test at the end of that time, and look *only* at an earlier 2-1/2 month test (and be suspicious of its prognosis implications because it is *ONLY* 2-1/2 months). I am sure that the Federal Air Surgeon is not so sensitive as to be seriously embarrassed because his good faith decision made a year and a half ago has been proven to be obsolete and overtaken by events, the passage of time, and much later testing of the patient. He does not take delight in permanently grounding pilots *unnecessarily*. On the contrary, like any physician, surely he welcomes news of a patient clearly establishing substantial re-

¹¹⁸ *Petition of Wilhem*, Docket No. SM-1641, NTSB Order No. EA-1074, slip op. (Sept. 27, 1977).

covery and a radically-improved prognosis for the future. Furthermore, this is the Petitioner's appeal, not the Federal Air Surgeon's—so this is not simply an academic exercise designed to tally how many times the Federal Air Surgeon was right when he uttered decisions a year or two ago.¹¹⁹

The Board has amended its Rules of Practice relating to medical cases to provide that where the airman is simultaneously pursuing both an appeal of the denial of the certificate to the Board and a petition for exemption to the Federal Air Surgeon, he may request that the Board hold his petition for review in abeyance pending final action on his petition for exemption, or for 180 days from the date of issuance of the Administrator's denial, whichever occurs first.¹²⁰ The airman's counsel should be alert to the fact that if such a delay is requested and counsel fails to request a hearing during that 180-day period, the Board may preemptorily dismiss the appeal.¹²¹

Although the FAA admits that there is really no such thing as a "disqualifying medication,"¹²² it continues to deny issuance of aviation medical certificates based on the airman's "use of a disqualifying medication."¹²³ In one recent case the airman's perspicacious neurologist observed in his report:

The sweet irony of this whole kind of problem is that if the patient were to take adequate doses of anticonvulsants such as Dilantin, the chance of his having another seizure, even under extenuating circumstances of physical or mental fatigue would be almost infinitesimal. In other words in order to get his flying license the patient can't take any medication, but if he were able to take medication, he would certainly be safe to fly.¹²⁴

¹¹⁹ Docket No. SM-2352, 11-3 (December 6, 1979).

¹²⁰ 49 C.F.R. § 821.24(d) (1979).

¹²¹ *Id.*

¹²² Letter from Audie W. Davis, Chief Aeromedical Certification Branch, Civil Aeromedical Institute, Federal Aviation Administration to J. Scott Hamilton (Nov. 16, 1977).

¹²³ Letter from Audie W. Davis, Chief Aeromedical Certification Branch, Civil Aeromedical Institute, Federal Aviation Administration to George Lebsack (Dec. 27, 1979).

¹²⁴ Letter from Robert H. Colfelt, M.D., Seattle Neurological Clinic to J. Scott Hamilton (July 3, 1979).

III. CONCLUSION

The woeful state of the current procedures followed in enforcement cases was perhaps most eloquently summarized by an airman who, proceeding *pro se*, complained to the FAA prosecutor that "*I feel like I have been unduly processed.*"¹²⁵ Indeed, the present system is more like a formal and ritualistic "processing" than an effort to discover the truth while respecting the individual's dignity and autonomy in the face of accusations by the federal government. If these matters are to be denominated "civil" so as to deny the accused the rights attendant to those accused of crimes, then the accused should at least be afforded the ordinary concomitants of due process in civil litigation, including the rights to liberal discovery and to compel the government's own employee witnesses to appear for confrontation and cross-examination. The present system simply affords the accused the worst of both the criminal and civil worlds, a shameful and intolerable situation.

There is no longer predictability or uniformity in the imposition of sanctions in these cases and this too does not appear justifiable. Most states long ago resorted to "point systems" in order to achieve uniformity in the penalization of terrestrial traffic offenders. In such systems the law typically provides for the assessment of a certain number of points for each regulatory violation and then prescribes what accumulation of points shall result in the suspension or revocation of the driver's certificate.¹²⁶ The adoption of a similar system by the FAA to penalize violations of the FARs would go far toward assuring equal sanctions for equal misdeeds.

The United States Courts of Appeals should refrain from granting an unearned presumption of rectitude to the Board's deliberative process and should scrutinize these cases more closely on judicial review in order to distinguish between the realities of due process and empty, formalistic rituals that masquerade as due process. Counsel for the appellants from such governmental prosecution should aid the courts in recognizing these distinctions.

¹²⁵ Carl Schellenberg, FAA Great Lakes Regional Counsel, related this anecdote from his earlier experiences as a trial attorney with the FAA's Rocky Mountain Region. Conversation with Carl Schellenberg in Aurora, Colorado (Summer, 1977).

¹²⁶ COLO. REV. STAT. ANN. § 42-2-123 (Supp. 1978).