

1950

Analysis of the Civil Aeronautics Board's Precedents in Safety Enforcement Cases

Merrill Armour

Harley G. Moorhead Jr.

Recommended Citation

Merrill Armour et al., *Analysis of the Civil Aeronautics Board's Precedents in Safety Enforcement Cases*, 17 J. AIR L. & COM. 54 (1950)
<https://scholar.smu.edu/jalc/vol17/iss1/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ANALYSIS OF THE CIVIL AERONAUTICS BOARD'S PRECEDENTS IN SAFETY ENFORCEMENT CASES

By MERRILL ARMOUR and HARLEY G. MOORHEAD, JR.*

Mr. Armour, Washington Counsel for Aircraft Owners and Pilots Association, Stanford University Law, 1929 J.D.; Member of California and Supreme Court Bar. *Formerly*, Assistant Chief Examiner, Safety Enforcement Proceedings Division, Civil Aeronautics Board.

Mr. Moorhead, Regional Hearing Examiner, Safety Enforcement Proceedings Division, Civil Aeronautics Board, Kansas City, Mo.; Oberlin College, 1930; Harvard Law, 1933; Nebraska Bar; Lt. Comdr., USNR. *Formerly*, junior partner in law firm of Moorhead & Brumbaugh, Omaha, Nebr.; law clerk to Hon. J. W. Woodrough, U. S. Circuit Court Judge, 8th Circuit, 1935-41; Attorney, NLRB, 1942; Attorney, CAB, 1943 to date.

THE Civil Aeronautics Act of 1938 became effective in August 1938.¹ There is now more than a ten years' accumulation of decisions issued under this Act. These are sufficient to establish a pattern which should be of assistance to pilots in particular, and to counsel who may, from time to time, be called upon to advise or represent persons in safety enforcement cases.² This article will be confined to a summary of cases involving an interpretation of the Act and the Regulations for air safety³ and to cases showing the policies of the Board with respect to the type of sanctions imposed in various types of violations involved. Disciplinary cases, as contrasted with cases relating solely to competency, will be stressed.

In safety enforcement, policies of the Civil Aeronautics Board cover a large field, since they comprise both the promulgation of regulations affecting air safety and also enforcement action. All interpretations of the Civil Air Regulations, as well as the imposition of appropriate sanctions⁴ of suspensions and revocation, are based on the policy of the Board rather than on strict legal interpretation. As an administrative

* The authors plan a subsequent article on competency cases, and cases relating particularly to student pilot, private or commercial pilot and other ratings.

¹ Herein the Civil Aeronautics Act of 1938, June 23, 1938, c. 601, 52 Stat. 977, 49 USC 401, as amended, will be referred to as the Act. The Civil Aeronautics Board, and its predecessor, the Civil Aeronautics Authority will be referred to as the Board, and the Administrator of Civil Aeronautics as the Administrator.

² For an earlier article by the authors on procedure, see 16 J. Air L. 40-52. New Rules of Practice have been promulgated, Dec. 8, 1949, since the publication of this article, which gave citation to the old rules contained in Part 97 of the Civil Air Regulations. The new Rules of Practice for safety enforcement proceedings are not in the Civil Air Regulations but are separately published in the Code of Federal Regulations, 14 C.F.R. Part 301.

³ The Civil Air Regulations, Title 14, Code of Federal Regulations.

⁴ The terminology, "sanction," is apt for the remedial, non-penal orders issued, but is of comparatively recent usage in safety enforcement proceedings practice. Present Board use of such terminology accords with the wording of the Administrative Procedure Act, as in its section 7(c).

agency, the Board is not bound by judicial doctrines of *stare decisis* or *res adjudicata*.⁵ The Board is free to change the basic philosophy expressed in its regulations, or vary the severity of the sanction deemed necessary for particular classes of violations⁶ from time to time for the enforcement of air safety. However, substantial uniformity is maintained, with the imposition of sanctions in different cases varying to accord with the circumstances of the violation and the probable effect which orders will have on the individual and upon others.

A basic change in Board policy was evidenced by the revision of the Civil Air Regulations in 1945. In this revision the Board departed from its previous philosophy of paternal treatment for the pilot and, in fact, recognized his adulthood. The most significant words in the regulations showing the Board's departure are those of the present Section 60.102 of the Civil Air Regulations requiring a showing that the pilots' acts have endangered "the person or property of another" in order to establish a violation of the carelessness rule. It had, before that time, been uniformly held that a pilot would be subject to suspension or revocation if he performed any unnecessary maneuver which might be careless, even though it was performed under such circumstances that no one could possibly be hurt but himself, and no property of another be damaged.⁷ The change to the new rule made it clear that the pilot might take a chance so long as he was not endangering the person or property of others.

CAUSES FOR SANCTIONS

Careless Flying

The Board's philosophy⁸ with regard to the carelessness rule has been attacked occasionally on the ground that it is ambiguous, provides a trap for the pilot and is wholly unfair in that the pilot cannot know what is a careless or reckless operation of an aircraft. However, if a pilot does not know what is careless or reckless operation which may endanger another, his competency is certainly doubtful. This is clearly true with regard to experienced pilots. Under Board interpretation, students are not held to the same degree of knowledge or technique, and from the practical viewpoint their flying is supervised by flight

⁵ *State Airlines, Inc. vs. C.A.B.*, 174 F2d 510, (Apps. D.C. 1949) citing 1 VOM BAUER, *FEDERAL ADMINISTRATIVE LAW* (1942), pp. 74, 183 and 255-9.

⁶ See, for instance, discussion hereinafter relating to the operation of aircraft by a pilot under the influence of intoxicating liquor, footnote 69. In a subsequent article, considerable discussions will be devoted to the sanction policy as it has been developed with regard to student pilots carrying passengers.

⁷ The change of philosophy is, of course, also reflected in other provisions of the Civil Air Regulations, as for example in the change of the former 500 foot altitude minimum to the terms of the present Section 60.107(c) which permits flight under that altitude over open water or in sparsely settled areas when the pilot does not fly closer than 500 feet to a person, vehicle or structure on the surface, nor violate the above stated prohibition against carelessness or recklessness endangering the lives or property of others.

⁸ See statement of CAB Chairman L. Welch Pogue in magazine *Sky Lady*, September-October 1945.

instructors who are held to high standards. If student pilots follow their instructions, they are not likely to be involved with regulations. The simplest reply to the attack can be made by reference to the results of experts who have collaborated in the study of motor vehicle traffic laws, which are of course enacted to meet a similar problem in surface transportation. The Uniform Act Regulating Traffic on Highways, sponsored by the National Conference of Commissioners on Uniform State Laws, contains a provision similar to that of the present regulations.⁹

Certificates are hardly ever suspended or revoked for a violation of carelessness or recklessness alone, but for clear violations of one or more other regulations under circumstances which require the conclusion that the pilot was also flying carelessly or recklessly so as to endanger the lives or property of others. Similarly, a finding of such carelessness or recklessness is usually made when suspension or revocation is ordered. A conclusion (or ultimate finding or mixed conclusion of law and fact) rather than a purely factual finding of carelessness may be made on the basis of the proved violation of regulations other than Section 60.102 when no specific danger to the persons or property of others is proved.

For example, where in the records there has been basis for a presumptive finding that as a matter of law, the pilot's conduct carelessly endangered others or their property. An illustration is provided by the recent proceeding,¹⁰ wherein the Board in affirmance of an examiner ordered the revocation of a student pilot's certificate but reversed the examiner's finding that Respondent had operated an aircraft in a careless and reckless manner so as to endanger the lives and property of others. The student had, contrary to regulations, operated an unairworthy aircraft on cross-country flights for which he was not authorized, but *no specific evidence* of danger was submitted by the Administrator's attorney. Upon the presumptive proof of the proceeding, the final conclusion of carelessness could have been rested, not upon the Administrator's proof of specific factual danger to others, but upon law. In fact, of course, it would stand to reason that such conduct by a student pilot would in all probability endanger others than himself.¹¹

In the Act, Title VI is captioned "Civil Aeronautics Safety Regulation," with the subtitle, "General Safety Powers and Duties." The Board's policy with regard to certificates proceeded against under section 609 is based upon safety. Such basis now precludes consideration of moral characteristics not affecting the development and safety of air commerce.¹²

⁹ Section 10. Uniform Act Regulating Traffic on Highways, 11 Uniform, Laws Annotated, 20. See also Section 20 of the same Act.

¹⁰ *Marvin Kohn*, SR-1-360 (1949).

¹¹ See also *Paul C. Humphreys*, SR-1608 (1946) where a pilot's certificate was suspended for 30 days for low flight which involved no carelessness or recklessness.

¹² Discussion hereinafter of decisions involving moral qualifications will advert to the relationship of morals to safety in aircraft operation.

In safety enforcement proceedings, the Board does not adjudicate issues which lack direct or indirect bearing on air safety. In the *Dansville Flying Service* case it was alleged that the holder of an air agency certificate had rented government owned planes to private persons, from which rental income was said to have been not properly accounted for.¹³ The Board found itself without jurisdiction and in dismissing the complaint, stated, "there is no evidence that the action established had any effect on the safety of aircraft operation, and the record does not establish any lack of integrity of the Respondent." The Board concluded that if the government was entitled to compensation or damages, such claims should be presented before a different tribunal.

Violations of Weather Regulations

The Civil Air Regulations forbid non-instrument pilots to operate aircraft under instrument conditions of restricted visibility and ceiling, and also prohibit the operation of aircraft within control areas and control zone under instrument conditions without clearance.¹⁴ Such requirements are furthered by provision that a pilot should investigate flight conditions before taking off.¹⁵ Serious accidents can result from violation of these provisions.¹⁶

The sanctions which have been imposed by the Board in cases of weather violations range from revocation to suspensions for short periods. In the case of *Charles Farries Thackell*¹⁷ the Board revoked a pilot's certificate for flying under instrument conditions without a rating or equipment for such flight although he was familiar with the country over which he flew and represented that he needed the use of an aircraft in his business. In the case of *Robert C. C. Heaney*¹⁸ a pilot was cleared by the tower at the airport from which he took off but the tower lacked authority for such approval since it was not an Airway Control Center and presumably relied on the pilot in assuming him qualified. The pilot of an airline transport scheduled to take off shortly thereafter heard that first pilot did not have an instrument rating and had filed no flight plan, whereupon he declined to leave the ground until his position could be ascertained. The guilty pilot was called back and thereafter his certificate was suspended for a period of 60 days.

¹³ *Dansville Flying Service, Incorporated*, SR-693, (1944).

¹⁴ CAR, Part 60.3.

¹⁵ CAR, section 60.101.

¹⁶ See, "If You Don't Know Flying," Safety Bulletin 182-48 CAB released February 1, 1949 (Harold G. Crowley). See also, "Runways Shrink!" released May 14, 1948, Safety Bulletin No. 180-48 CAB, H. G. Crowley; and "Cold Weather Safety," Safety Bulletin No. 181-48 CAB, by Fred G. Powell, released September 1, 1948.

¹⁷ SR-1976 (1949). In another case involving mitigating circumstances, the Board terminated a suspension of 6 months against the private pilot certificate of a business man, permitting the Administrator to accept a civil penalty of \$200, *David Hopkins Jenkins*, SR-1-89 (1947).

¹⁸ SR-3-55 (1947).

Discontinuing a Flight

The occurrence of instrument weather requiring a pilot to discontinue plans which were properly safe at take-off has resulted in violations of the Regulations when pilots did not heed the change in weather. In the case of *Richard E. Fennelly*, a private pilot took off on a flight to New Haven, Connecticut from Washington, D. C., but failed to land when he encountered bad weather near Philadelphia. His continuance of the flight resulted in his letting down through an overcast at Scarsdale, New York attempting a landing there with damage to his aircraft and minor injuries to himself and a passenger. His pilot certificate was suspended for six months.¹⁹ Even student pilots are held to accountability in observation of weather conditions.²⁰ Thus, in the case of *Carroll George Pryor*²¹ the student pilot took off with a low ceiling of 400 feet upon his flight instructor's advice that weather conditions were adequate. The student pilot's certificate was suspended for 30 days. In the case of *Edward Downey*²² a student was sent on his first cross country solo by a flight school which may have been misinformed or had misunderstood the official weather report that weather would become bad in the locality the student was to traverse. Encountering weather which closed in in front and in back of him, the student entered a controlled airport without permission and endangered airline traffic. The Board reversed a decision suspending the student's certificate for 6 months in view of the school's responsibilities upon the facts, but nevertheless imposed a suspension of 30 days for the violation. In the case the student did not prove that when weather turned bad he could not have landed in a field, pasture, or small airport and thus avoided the necessity of entering the control zone.²³

¹⁹ SR-1-45 (1947); see also *William Otis Burt*, SR-1-131 (1945) and *Walter James Konantz*, SR-1327 (1946) where commercial pilot certificates were suspended for 3 months in each case.

²⁰ SR-1-45; in cases involving certain other violations, students are exonerated in substantial part from responsibility when they have acted upon the advice of their instructors. For instance, in the case of *LeRoy Edward Kent*, SR-1881 (1947) a student was executing spin recoveries at a low altitude over ranch country in the west in accordance with a suggestion by his instructor that the altitude was sufficient, and the Board upon reconsideration withdrew an order revoking the student pilot's certificate and entered an order suspending the certificate for the period of time for which it had already been held by the Administrator.

²¹ SR-5-118 (1947).

²² SR-3-92 (1948).

²³ When aircraft are seen operating without a clearance by control tower operator, the operators will protect scheduled air transports by refusing clearance into or out of the zone until the aircraft potentially endangering them has landed. In the case of *Elliott Cohen*, SR-5-342 (1949) a private aircraft which was flown into a control zone in instrument weather contrary to tower directions at Lambert Field, St. Louis, caused suspension of commercial operations there with delay of three trips on the ground and another trip in the air to protect airline passengers from the Respondent's conduct. The violation resulted in suspension of Respondent's pilot certificate for 9 months by an examiner although Respondent had need of his aircraft in a business of which he was an executive. No appeal was taken and the order became final.

Inadequate Preparations for Flight

Action has been taken against the certificates of pilots of nearly every class for making inadequate preparations for flight, in cases involving preparations other than investigation of probable weather en-route.²⁴ A violation will not be excused if it would not have occurred with adequate preparations. A pilot taking off at night must fly an aircraft with position lights.²⁵ Before carrying passengers in a night flight he must have made five night take-offs and landings.²⁶ The aircraft's equipment must be so checked as to prevent the failure of radio and lights because of a poor storage battery.²⁷ If a pilot is not qualified for night flying he must not undertake a flight if he should have anticipated arrival after dark.²⁸

From the regulatory point of view, preparations for a flight may be defective in that the pilot has failed to secure a waiver from the Administrator for a flight in the nature of a stunt.²⁹ Thus, in the case of *Raymond Milton Edgerton*,³⁰ a pilot flew an aircraft over and landed on a street of Yoakum, Texas to participate in bringing a Santa Claus to a community celebration in a flight for which local safety precautions had been taken. Due to an accident that was probably not the pilot's fault, the aircraft collided with a truck used in the ceremonies. Respondent's commercial pilot certificate was suspended for a period of 60 days on emergency suspension by the Administrator, and the Board found that such disciplinary action sufficed.³¹

Use of Drugs

A pilot may not legally prepare himself for a flight by relieving a cold or other disabling condition with sulpha drugs. The Board has held that section 43.406 of the Civil Air Regulations prohibits a pilot from flying an aircraft when he is under the influence of such drugs.³²

A pilot must ascertain that his proposed flight is within an area that will not endanger persons or property. A commercial pilot who failed

²⁴ Section 60.101 CAR requires that a pilot "familiarize himself with all available information appropriate to the intended operation."

²⁵ Section 60.113 CAR. *Wallace Eugene Gardinier*, SR-1254 (1945).

²⁶ *Peter Gifford*, SR-7-107 (1949) Revocation, 1 year,—flying close to a train and automobiles.

²⁷ *Rockstroh*, 5 CAB 243 (1942) Suspension 6 months, low flying was involved.

²⁸ *Weyman Gordon McDaniel*, SR-1318 (1945).

²⁹ The Administrator also issues waivers for other specialized activities which do not involve stunts but could, or would in the normal course of some activities, involve violations if executed without a waiver. Such activities include banner towing, sky writing, crop dusting or spraying, and predatory animal hunting by use of aircraft. Waivers are issued for air shows, and their terms must be observed.

³⁰ SR-1115 (1945).

³¹ In the more recent case of *Charles Marthens*, SR-6-103 (1949) a somewhat similar Christmas stunt was performed by helicopter and the examiner's decision would have suspended for 30 days the certificate of the commercial pilot. However, upon appeal to the Board, the examiner was reversed because no regulations had been promulgated applicable to the maneuvering of helicopters in congested areas. The pilot's action was not proved careless.

³² *Wayne Hardy Dickerson*, SR-1463 (1946).

to make such preparatory investigation carried a passenger into a canyon over the town of Hot Springs, South Dakota to a vicinity where flight was intrinsically dangerous. Respondent in this case landed on a small, unused racetrack surrounded by houses. His pilot certificate was suspended for six months.³³

With regard to the aircraft to be flown, a pilot to carry a passenger must have had recent experience in aircraft of the same type and horsepower. In prior regulations pilots were rated for aircraft by horsepower and the certificates of some pilots were suspended for attempting to operate aircraft with a horsepower greater than that for which they were certificated.³⁴ Also, in several cases, pilot certificates have been revoked for overloading aircraft while carrying passengers.³⁵

In one case a pilot's flight instructor rating was suspended for 90 days because he neglected to run his engine up to cruising power prior to take off. The flight was made to test a recently repaired aircraft and the pilot's failure to test the engine for cruising power resulted in a serious accident.³⁶ In the case of *Charles Leland Osborn*,³⁷ an airline transport pilot's certificate was suspended for 14 days because he failed to test the elevators to the full limit of their travel prior to take off. In the early case of *Stead, et al., Airman Certificates*,³⁸ the Board stated that the Act calls for the highest degree of care on the part of those who sit at the controls of the airliners that carry the traveling public. In that case the pilot's airline transport rating was revoked for the principal reason that he failed to work an orientation procedure while en-route on instruments in a flight, but the order to show cause that was originally issued in the case included an allegation that he had failed to give proper consideration to the fuel supply on board or to the amount of fuel that might be required for the trip in view of adverse weather and wind conditions, prior to take off. He was exonerated of this charge.

Starting Engine

A number of pilots have subjected themselves to disciplinary proceedings because of their failure to start their aircraft engines with proper precautions. Originally, the regulations required a complicated procedure of blocking the wheels when the engine was to be started

³³ *Wesley Warren Brishen*, SR-1828 (1947).

³⁴ See *G. H. Burns*, SR-889 decided June 28, 1944; *Harold Henry Hoff*, SR-973 (1944). In the latter case the Respondent was induced to fly the aircraft by a lunatic that Respondent did not know was insane. Respondent's certificate was suspended for only 30 days.

³⁵ See, for example, *Loren D. Johnson*, SR-1093 (1945). Therein, a passenger's life was lost in an ensuing accident, and Respondent's commercial pilot certificate was revoked.

³⁶ *Clifford C. Bonifield*, SR-1012 (1945).

³⁷ SR-1487 (1946).

³⁸ 1 CAAR 74 (1939); see also, *Joseph Kuhn*, SR-1944 (1949) supplemental opinion; *E. E. Basham*, SR-547 (1943), SR-623 (1943); *Charles Robert Sisto*, SR-1987 (1948) affm'd CADC (1949).

without a competent operator at the controls, but the form of the present regulations omits specific procedures and merely requires due care in this regard.³⁹ A pilot's carelessness in this regard may cause accidents. In one case an aircraft that the pilot attempted to start by "propping" took off and flew over the airport until it crashed in a river nearby.⁴⁰ In a recent similar case the aircraft took off and flew in airways for approximately two hours over New Jersey until it ran out of fuel, — fortunately crashing without injury to anyone in an open field.⁴¹ When passengers are left aboard the aircraft while the pilot is "propping," such passengers may endanger themselves in their confusion or endanger both themselves and the aircraft. In one case, a passenger in a shoal-grounded seaplane became frightened because unaccompanied and in attempting to go ashore by way of a pontoon put her hand into a whirling propeller which she did not see.⁴² In the case of *Mohamed Joseph Shaik*,⁴³ Respondent's wife, the passenger, became excited and in her attempt to get out opened the throttle, thereby causing an accident which might not otherwise have occurred; Respondent's pilot certificate was suspended for 90 days.⁴⁴

In a case that is cited later as an attempt case,⁴⁵ the Respondent, a flight instructor, attempted to "prop" his airplane containing a passenger although the airplane had a self starter and in spite of the fact that other persons were available to assist him. One of the parking brakes, which were set, was defective, and the aircraft turned in a circle knocking down two persons who were standing nearby. This actual violation plus the attempt to operate an aircraft while in an intoxicating condition led to the revocation of the pilot's certificate.

Low Flight

The most common single cause for the imposition of sanctions is flying at an altitude that is too low for the nature of the maneuvers performed or for the locality in or over which the pilot is flying. Cases often involve a combination of violations, as when a pilot not only flies at a low altitude but also while doing so performs acrobatic⁴⁶ maneuvers (formerly called aerobatics in the Civil Air Regulations).⁴⁷ Of course, low flying in straight and level flight is not as dangerous to persons and property on the surface if not accompanied by the dives,

³⁹ Former Civil Air Regulations Section 60.331; present carelessness rule, section 60.102. With regard to the former regulations and violations thereof, see the following cases: *Chine*, 5 CAB 330; *Speight*, *Id.* 407; *Knauer*, *Id.* 419, 420 (all cases 1942).

⁴⁰ *J. D. Kilford*, SR-566 (1943).

⁴¹ *Robert Seick*, SR-1-336 (1949).

⁴² *Jean May McFarland*, SR-1377 (1946).

⁴³ SR-1429 (1945).

⁴⁴ *Jean May McFarland*—the pilot's certificate was suspended for three months.

⁴⁵ See footnote 84, *Wilburn Glen Allison*, SR-926 (1944).

⁴⁶ Section 60.900 of the Civil Air Regulations; section 60.60 as revised Fifth Region, Vol. 14, No. 136, p. 4303, July 16, 1949.

⁴⁷ Section 60.9(a) of the Civil Air Regulations effective August 1, 1945.

abrupt pull-ups and steep turns which are associated with what is called a "buzz-job."⁴⁸

The sanction that may be imposed for low flight unaggravated by dangerous maneuvers may be as little as suspension for a period of 30 days⁴⁹ or as high as suspension for a period of six months,⁵⁰ depending upon the circumstances of the case. The seriousness of violations of the Civil Air Regulations is determined largely by the danger involved in the particular violations, which is the basis for sanction. However, inattention to the details of section 60.107 of the Civil Air Regulations has led some pilots to confuse certain requirements. When pilots think that they can glide to a safe emergency landing, and thereby avoid endangering persons or property on the surface, they sometimes forget that, regardless of their judgment on emergency landings, they must nevertheless maintain the prescribed altitude of 1,000 feet above the highest object within a horizontal radius of 2,000 feet from the aircraft.⁵¹ Similarly, some pilots neglect the requirement that an emergency landing must be made without danger to persons or property on the surface.⁵² Respondents have contended that in flights over cities their low altitude was justified by availability of a city park or golf course, whereas in fact such a park or golf course was not shown to be available when regard was given to the safety of persons congregated there.⁵³

When dives are made at persons on the surface (or vehicles, vessels or structures) the availability of a site for emergency landing becomes a less crucial factor in the case in view of the unquestionable danger to the person or property at which the pilot has dived. The availability of a safe place for emergency landing still retains its importance as an issue, but such issue becomes secondary in importance to the danger from the dives. Such diving at persons or objects is one of the most dangerous of violations and consequently will usually cause revocation of the pilot's certificate.⁵⁴

⁴⁸ The term "buzzing" by itself can mean low noisy flying and does not necessarily connote the dives and pull ups of "zooming." At hearings in proceedings, examiners require specific evidence of what a pilot has done rather than a conclusionary reference to aeronautical jargon to establish the danger involved in a violation—and hence the appropriate order.

⁴⁹ *D. P. Fisher*, SR-988 (1944).

⁵⁰ *J. R. Sharkey*, SR-1222 (1945).

⁵¹ *Earnest Joseph Straub*, SR-5-173 (1948); *Edwin S. Alexander*, SR-1-64 (1948).

⁵² An emergency will not justify landing within the congested area. *Albert H. Hardin*, SR-2-19 (1947). Nor will the availability of rough country adjacent to the congested area be accepted as sufficient when the pilot in fact would not in emergency land there for fear of killing himself. *John S. Arvidson*, SR-6-183 (1949).

⁵³ See *Straub* case, footnote second above. Also, it is a violation of section 60.107(b) to fly less than 1,000 feet over an open air assembly of persons. However, 15 or 20 persons waiting for a bus in a rural area are not such an open air assembly of persons. *Charles E. Acey, Jr.*, SR-1-111 (1948).

⁵⁴ *Gragian*, 1 CAAR 272 (1939); *Guttermuth, Id.*, 661 (1940). See also, bulletins, footnote 61 hereinafter.

Acrobatic Flight

The Civil Air Regulations define acrobatic flight very broadly in order to cover all maneuvers that are potentially dangerous because of the skill required in safe execution, the strain and stress placed upon the aircraft flown, and the possibility of accidents arising from such maneuvers as by a sudden gust of air or unexpected malfunctioning of the aircraft. The maneuvering of an aircraft in an abnormal attitude with an abrupt change of altitude or with abnormal acceleration of speed constitutes acrobatic flight if the performance is done intentionally.⁵⁵ Pilots have been held to have been engaging in aerobatics when diving, performing excessively steep turns, or taking off with too great an angle of climb.⁵⁶ However, in enforcement of the regulations, the Board distinguishes substantial violations which in fact endanger safety from the more technical violations which arise only because of the broad definition set forth in section 60.900 of the Civil Air Regulations and summarized above.⁵⁷

Pilots are forbidden to perform acrobatic maneuvers in civil airways, over congested areas or open air assemblies of persons, in inadequate visibility (less than 3 miles) or at an altitude less than 1,500 feet.⁵⁸ Pilots who carry passengers are under the obligation to provide both themselves and their passenger with parachutes before performing aerobatics. One examiner has pointed out that this regulation⁵⁹ serves the purpose of psychologically preparing the passenger for the flight and warning him of potential danger as well as serving the more obvious purpose of providing a means of descent to the ground in the event of structural failure of the aircraft resulting from an acrobatic maneuver.⁶⁰

The relation of aerobatics to the dives and turns that occur in the typical "buzz job" was referred to above in connection with low flight. The number of aircraft accidents which have resulted from such maneuvering by competent pilots, as well as many of poor or mediocre ability, has justified regarding such diving and turning as dangerous within the intent of the provisions of the Civil Air Regulations relating to aerobatics.⁶¹

⁵⁵ Section 60.9 CAR.

⁵⁶ See, for example, *Ferguson*, 5 CAB 76 (1941); *Davidson*, Id. 109 (1941); *cf. Woosley*, Id., 227, 229 (1942).

⁵⁷ Sanctions imposed by the Board vary with the danger, as appears from the cases in footnote 56 immediately above. A common sense construction of the section was upheld by the Board in *Henry Herman Koch*, SR-5-373 (1949) where Respondent's aircraft was said to have "swooped down" but the Board found that "the abrupt change in altitude of Respondent's aircraft which the record established does not of itself constitute an acrobatic maneuver."

⁵⁸ Section 60.106 CAR.

⁵⁹ Section 43.409 CAR.

⁶⁰ *Russell M. Simpson*, SR-5-212 (1948).

⁶¹ See "Buzzing . . . Jail Bait," "What Causes Collisions?" Safety Bureau Releases, CAB.

Traffic Pattern Violations

Traffic pattern violations are usually filed in cases of uncontrolled airports, since in the patterns of controlled airports orders from the tower are issued and normally heeded, so that in these cases violations are associated with conditions of inadequate visibility. Pilots occasionally violate a traffic pattern through failure to observe the tetrahedron on the ground at the airport, but occasionally violations occur simply because a pilot is unwilling to take the time and trouble to maneuver with necessary precaution.⁶²

The more serious violations arise with regard to take-offs and landings. Even experienced pilots sometimes neglect to protect themselves and others by adequate surveillance of air and taxiing traffic prior to, in, or after take-off or landing.⁶³ Occasionally, aircraft have overtaken other aircraft on final approach, particularly when a low wing monoplane overtakes a high wing monoplane.⁶⁴ Such a result should not occur if the pilots observed the Civil Air Regulations and the local traffic pattern.

Right of Way in the Air

The majority of violations involving right of way in the air or flying too close to another aircraft occur when a pilot decides to make practice gunnery runs or to buzz some other aircraft. Sometimes the offending pilot will only attempt to fly close to, or in formation with another aircraft without the permission of the pilot of the aircraft thus escorted.⁶⁵ The potential danger of such maneuvers, particularly the buzzing of another aircraft, is illustrated by the occurrence in which a Navy pilot collided with an Eastern Airlines Transport causing the death of all persons in the transport and himself.

Right of way in the air may be subsidiary to failure to maintain a proper lookout in a safety enforcement proceeding. Thus, although a non-scheduled airline was held responsible in a court for a collision with an Eastern Airlines Transport,⁶⁶ the Board nevertheless found that the pilot in command of the Eastern Airlines aircraft had violated the

⁶² See *Thomas R. Murray*, SR-3-103 (1948), an extreme case where diving over a town was also involved. The sanction was in effect revocation with a prohibitory period of a year and 8 months. See also *Wesley Herboldshimer*, SR-5-100 (1947).

⁶³ *Clarence Newton Van Deventer and William August Latour*, SR-1296, SR-1297 (1946); *Albert Paul Mantz*, SR-6-119 (1949). In the latter case, the famous pilot was exonerated in the examiner's findings. *Pierce P. O'Carroll*, SR-721 (1944), 144 F2d 993 (1944).

⁶⁴ See *George A. Van De Sande*, SR-3-138 (1948). However, in this case the Board terminated the proceeding for laches.

⁶⁵ Such violation was the principal cause of revocation of Respondent's private pilot certificate in *Henry Herman Koch*, SR-5-373 (1949).

⁶⁶ *Eastern Airlines vs. Universal Airlines* D.C. for Dist. of Col. Case No. 130-47, now pending on appeal.

Civil Air Regulations by failure to maintain an adequate lookout personally or by his co-pilot.⁶⁷

Moral Issues

Suspensions or revocations which are not based on one or more of the Civil Air Regulations may be classed as those raising moral issues, although the legal criterion is the requirements of the public interest under section 609 of the Act and the "proper qualifications" of an applicant for a certificate under that section with its implied reference to section 602. Of course, some violations such as the operation of an aircraft while under the influence of intoxicating liquor,⁶⁸ could also be regarded as violations indicating a lack of strength of moral character.⁶⁹ The classification of certain causes for sanction as moral issues has both historical and practical justification.

Under former regulations, including those promulgated prior to the Act and enforced by the Bureau of Air Commerce, there was a specific regulatory requirement that airmen should be "of good moral character."⁷⁰ The requirement had obvious bearings on the public interest other than those concerned only with air safety. One illustration is the anti-social result that would ensue if aircraft were permitted to become instrumentalities for use in criminal enterprises.⁷¹ Criminal use of aircraft has been minimal.

⁶⁷ *Joseph B. Kuhn*, SR-1944 (1949). Nor, according to such decision, may a pilot commit his aircraft to a course which would require affirmative action on the part of the other pilot to avoid a collision. Certain other issues were also raised. Case is pending on appeal.

⁶⁸ Prohibited by section 43.406 of the Civil Air Regulations, the violation occurs when the operator of an aircraft has indulged in intoxicating liquor to an extent that renders it unsafe for him to operate an aircraft. *In re Nance*, 5 CAB 201 (1941); see also *James Bruce Warren*, SR-1399 (1946).

⁶⁹ The piloting of an aircraft while under the influence of intoxicating liquor provides an illustration of the fluctuation in sanctions imposed by the Board to correct a type of offense. After a period in which the Board followed an order of revocation by prohibitory periods as low or lower than one year, this policy of leniency was called up for reconsideration by a case wherein a commercial pilot appealed from an examiner's decision revoking the pilot's certificate and providing that another certificate might not be issued to the pilot until after expiration of a period of six months. *Stanley H. Woodward*, SR-1-176 (1948). Upon reconsideration of its policy made with benefit of oral argument, the Board reversed the examiner with regard to the prohibitory period and issued an order wherein revocation of the pilot certificate was followed by a further order prohibiting the issuance of any certificate to Respondent for a period of three years. The serious threat to air safety that is caused by piloting an aircraft while intoxicated is now cause for revocation followed by a prohibitory period of two to three years, *ceteris paribus*. See *Robert Valentine Shutter*, SR-1-291 (1949), *George O. Smith*, SR-3-261 (1949).

⁷⁰ Such requirement did not extend to the ground instructor rating, Part 23 of the Civil Air Regulations as issued May 1938 under the Air Commerce Act of 1926.

⁷¹ In one proceeding before the Board, a student pilot forged and altered the name of a well known commercial pilot and upon such forgery induced an operator to provide him with a rented aircraft. The pilot used the aircraft in an attempt to evade apprehension as a fugitive from justice. However the attempt was unsuccessful since, at the time of the Board proceeding revoking the Respondent's pilot certificate, he was stated to be an inmate of a State penitentiary. *Samuel Godsey*, SR-1132 (1945).

A discussion of the reasons why criminals do not use aircraft is not appropriate in this article but it seems probable that one big deterrent is the fact that the use of an aircraft increases substantially the likelihood of detection.

Inquiries Into Private Life

In the earlier enforcement of the Civil Air Regulations, the provision requiring good moral character had an unfortunate effect upon enforcement procedures. In suspension and revocation cases, inquiries would be instituted into the private affairs of airmen concerning events that had no relationship to criminal activities or to air safety. Such inquiries were embarrassing to airmen and, in absence of any substantial relationship to the public interest, the prevalence of such basically irrelevant issues in proceedings led to the abandonment of the requirement. An exception to abrogation exists in the case of aircraft and engine mechanics who are still subject to a regulation requiring good moral character. With regard to such excepted airmen, the Board has narrowed the field of inquiry by decision rather than by abrogation of the regulatory requirement. Thus, in the case of *Samuel Bert White*,⁷² the Board revoked the Respondent's mechanic certificate for over-indulgence in intoxicating liquor while on duty, but stated,

"We are not unmindful of the fact that facts pertaining to a person's private affairs as distinguished from facts relating to the duties which he undertakes as the holder of a certificate, are matters over which we exercise no jurisdiction."⁷³

Further, certain other cases that have been decided by the Board may be read to indicate that charges attacking an airman's good moral character will not be found sustained unless they are supported by clear and convincing evidence.⁷⁴

Another cause for which airman certificates are suspended or revoked although it is not specifically prohibited by any regulation, is obstructing enforcement of safety regulations. In one case a pilot's certi-

⁷² SR-459 (1943).

⁷³ See also *Paul A. Soucy*, SR-1-265 (1949), involving the moral character of a mechanic.

⁷⁴ The case of *Chester Raymond Dickson*, SR-6088 (1944) involved an allegation of crime that the Respondent had defrauded the Government by filing claim for flight training to trainees for which he had pleaded guilty to an indictment and was fined \$8,000. Thus, court records supported the Administrator's charges. However, upon the evidence the examiner found that the Respondent had executed the claim relying upon the statements of others without any intention of defrauding the Government. It appeared that the difficulty lay basically in the Respondent's failure to complete accurate records and that he had in fact given many students more time than was required without charge to the Government or the student. The Board affirmed the examiner and dismissed the complaint. See also and compare the two cases of *Robert A. Nelson*, 5 CAB 372, 452 (1942, 1943) involving question of attempted bribery. In the latter of these the Board found (p. 458) that the Administrator had properly refused to issue the Respondent an instructor's rating and to accept an application for any further test for such rating; but it found further that the evidence did not establish that the Respondent lacked the good moral character required and that such refusal would no longer be justified.

cate was suspended for a period of 6 months because he assaulted an inspector who was engaged in the performance of official duties.⁷⁵ In another case, an airman's certificate was suspended for a total period of 90 days because he piloted a former pilot, whose certificate had been revoked, to an airport where the pilot whose license had been revoked assaulted the employee who had reported the violation that had caused revocation.⁷⁶

Moral issues having a direct bearing upon air safety arise in cases where pilots pad their log books or otherwise falsify official records. Such conduct could result in the certification of an unqualified applicant for a rating⁷⁷ or render inaccurate aircraft and engine log books upon which inspections are based.⁷⁸

A number of cases arise from dishonesty in official examinations. The pilot certificates held by applicants taking an examination for a higher rating have been revoked for such conduct.⁷⁹ In other incidents, the violation has not been as severe and only a suspension has been ordered.⁸⁰

Pilot certificates have been revoked as a result of the pilot's alteration or forgery of certificates.⁸¹ In another case⁸² a person falsely represented himself to be a private pilot when he was in fact a student pilot. The case involved other violations but which were not discussed with regard to separable sanction. The circumstances proved in the case indicate that the sanction which was imposed upon all the violations was greater because of this false misrepresentation.

Use of Fundamental Principles

The Board's files also include records of other cases interesting for their reliance on fundamental principles not included in the Civil Air Regulations. Action has been taken by the Board against certificates of airmen who have not complied with Board orders.⁸³ In one case,

⁷⁵ *Herbert M. Peters*, 5 CAB 478 (1943).

⁷⁶ *James Owen Brooks*, SR-929 (1945). The total 90 day suspension consisted of an emergency suspension of 60 days followed by a further suspension for 30 days.

⁷⁷ See *Gerald Kenneth Halverson*, SR-999 (1945) and *G. P. Beyer*, SR-882 (1944). Certificates were revoked in each case. See also *Francis X. March*, SR-1129 (1945) and *L. J. Marcucelli*, SR-590 (1943). In these cases the pilot certificates were suspended.

⁷⁸ See *Primo*, 5 CAB 72 (1941) involving suspension of an air agency operator's private pilot certificate for a period of 60 days, and *Betzoldt*, 5 CAB 166 (1941) involving what was in effect a suspension of a private pilot's certificate for 120 days.

⁷⁹ *Hassen Ali Easmeil*, SR-1056 (1945); *G. A. Graham*, SR-631 (1943); *H. T. Logar*, SR-848, and *C. W. Poston*, SR-725 (both 1944); *John Stanley Steber*, SR-1394 (1946).

⁸⁰ *Joseph Franklin Shileds*, SR-1-172 (1948) and *Jack Kenneth Brown*, SR-4-79 (1948); *Harro Maxfrederick Wild*, SR-2-265 (1949).

⁸¹ *Donald Tait Speirs*, SR-1242 (1945); *Samuel Godsey*, SR-1132 (1945). Such conduct also justifies proceeding for a criminal fine or imprisonment, or both, under 902(b) of the Act.

⁸² *Weyman Gordon McDaniel*, SR-1318 (1945).

⁸³ See *Lewis Wilson McNutt*, SR-1010 (1945); *John Warren Tapp*, SR-6-76 (1949).

action was taken against a pilot certificate on the ground that its holder made a serious attempt to violate Civil Air Regulations, preparing to take off while in an intoxicated condition, but being persuaded at the last moment not to fly the airplane.⁸⁴ In another proceeding, a student pilot certificate was suspended because the student induced another student pilot to carry him as a passenger contrary to regulations.⁸⁵

Although all of these cases may be grouped under the heading of moral offenses and thus under a term which is broader than usual concepts of regulation, it will be readily apparent that each cause for sanction stands upon well settled principles of law that are traditional in other branches of jurisprudence and that each has an intimate relation to the enforcement of air safety.

STATUTORY AUTHORITY FOR SAFETY ENFORCEMENT

The Board's authority for action in safety enforcement cases is contained in sections 602 (b) ⁸⁶ and 609⁸⁷ of the Act.⁸⁸ The greater part of such action by the Board is undertaken under section 609. For the Board's authority to act in emergencies to protect the public safety

⁸⁴ *Wilburn Glen Allison*, SR-926 (1944).

⁸⁵ *Wilbert C. Land*, SR-1248 (1946).

⁸⁶ Subsection (a) of Section 602 provides for the issuance of airman certificates specifying the capacity in which the holders are authorized to serve as airmen, and subsection (c) provides for the form and recording of such certificates. Subsection (b) contains, following the text quoted hereinafter, a proviso relating to the issuance of certificates to aliens which is here deleted as irrelevant to this article. With such deletion, and giving parenthetical effect to Reorganization Plan No. III, 53 Stat. 561, 5 USC 133 *seq.*, subsection (b) reads as follows: "Any person may file with the Authority (Administrator) an application for an airman certificate. If the Authority (Administrator) finds, after investigation, that such person possesses proper qualification for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, it shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Authority (Board and Administrator) may determine to be necessary to assure safety in air commerce. Any person whose application for the issuance or renewal of an airman certificate is denied may file with the Authority (Board) a petition for reconsideration, and the Authority (Board) shall thereupon assign such application for hearing at a place convenient to the applicant's place of residence or employment . . ."

⁸⁷ 52 Stat. 1011, 49 U.S.C. 559. "The Authority (Administrator or Board) may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may re-examine any airman, and, after investigation, and upon notice and hearing, (the Board) may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority (Administrator, as determined by the Board) in refusing to issue to the holder of such certificate a like certificate. In cases of emergency, any such certificate may be suspended, in whole or in part, for a period not in excess of thirty days, without regard to any requirement as to notice and hearing. The Authority (Administrator) shall immediately give notice of such suspension to the holder of such certificate and (the Administrator and the Board) shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority (Administrator) may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days."

⁸⁸ The effect given parenthetically to Reorganization Plan III in the footnotes above is a *prima facie* construction made upon its terms. Complete judicial or administrative construction does not appear in decided cases.

as distinguished from the Administrator's authority, reference is made to section 1007 of the Act.

Power to Issue Certificate

As may be observed from the text, Section 602 (b) of the Act provides that any person whose application for the issuance or renewal of an airman certificate is denied by the Administrator may file with the Board a petition for reconsideration, and the Board shall thereupon assign such application for hearing at a place convenient to the applicant's place of residence or employment. At first glance, and because section 602 authorizes the issuance of airmen certificates, it would appear that the provision for review of a denial is not related to enforcement but solely to the competency of the applicant. The relevance to an applicant's conduct turns upon the interpretation of the words "properly qualified," whether the words refer only to ability to perform the skills and duties of an airman rating or have a broader significance. The broader application and relation of this section to enforcement was established in an early case which has been uniformly followed, *Bruce L. Dunbar*.⁸⁹

In that case Dunbar's application for private pilot certificate was denied by the Administrator for lack of proper qualifications, and Dunbar filed a petition for reconsideration under the terms of section 602 (b) of the Act. Following a public hearing, the examiner found that Dunbar had an extended record of violations of the laws of Massachusetts and New Hampshire, particularly motor vehicle laws, and that while Dunbar displayed greater than average technical skill in the piloting of the aircraft, his tendency to violate the laws dealing with the operation of motor vehicles was reflected in his operation of aircraft; and for these reasons the examiner found that Dunbar was not qualified to hold a private pilot certificate. The Board, without relying solely on the motor vehicle violations, found that the described tendencies of Dunbar's were "becoming evident in his operation of aircraft." The Board denied the petition and, in effect, sustained the examiner on the ground that Dunbar lacked mature judgment, had a tendency toward recklessness, lacked respect for laws designed for the protection of the public and had an attitude of defiance toward those whose duty it was to enforce these laws.

Interpreting "Properly Qualified"

The broad meaning of the words "properly qualified" that is implied by the holding in the Dunbar case is probably required by the form of section 609 which makes revocation of an airman's certificate depend upon finding a cause which would, had it occurred at the time of application, have justified refusal to issue a like certificate. Serious violation of the Civil Air Regulations can undoubtedly constitute such

⁸⁹ *Bruce L. Dunbar*, SR-3-2, 1 C.A.A. 525 (1940).

cause. Moreover, one of the objectives of the Act is "The regulation of air commerce so as to best promote its development and safety."⁹⁰ Section 1005 (e) of the Act requires "every person subject to this Act . . . to observe and comply with any order, rule, regulation, or certificate issued by the Authority under this Act . . ." and in section 610 (a) of the Act, subsections (1) through (4) contain reference to certain certificates and their terms with the provision in subsection (5) that it shall be unlawful, — "For any person to operate aircraft in air commerce in violation of any other rule, regulation, or certificates of the Authority under this title." Thus, construction of the Act as a whole requires the interpretation given to "properly qualified."

Anticipating Hazards

In the case of *Wallis*,⁹¹ the complaint alleged certain violations that had been committed by a student pilot, prior to issuance, and unknown to the Board or Administrator at the time of the issuance of his certificate. He contended that he was not engaged in air commerce at the time of the violations and challenged the Board's jurisdiction over the matters alleged in the complaint. In arriving at the conclusion that the Board had authority to take action notwithstanding the defense raised and also regardless of whether the acts were done while he was directly engaged in air commerce the Board stated, "It is far more important that the Civil Aeronautics Board anticipate and prevent the creation of hazards to air commerce than it is to take remedial and punitive steps after losses of life and property have actually occurred in the channels of air commerce."

With respect to the particular acts which occurred prior to the time that he held an airman certificate, the Board states that if he at that time had held an airman certificate, proceedings might have been commenced to revoke that certificate. Further, the Board stated, "Also, had the acts of the Respondent, as specified in these paragraphs, come to the attention of the Administrator of Civil Aeronautics before Respondent's student pilot certificate was issued, such certificate would undoubtedly have been denied. That the student pilot certificate was issued to the Respondent on August 14, 1940, is no bar to the present proceeding, since for the first time the acts complained of have come to the attention of the Administrator and the Board."

Nance Case Changes

The *Dunbar* and *Wallis* cases show early policy that continues. Section 602 (b) also still implicitly operates, in those proceedings wherein

⁹⁰ Section 2(e) of the Act, 52 Stat. 980, 49 USC 402. The public interest is defined by reference to Section 2 of the Act. *American Airlines, Inc., et. al.*—1 CAAR 480, 483 (1939). The public interest is the basis for suspensions under section 609, as appears hereinafter.

⁹¹ SR-61, 5 CAB 87 (1941).

a revocation of an airman certificate is ordered.⁹² Formerly, airmen certificates expired by their terms in given periods of time, and the Administrator⁹³ would refuse reissuance or issuance of a certificate of another rating for reason that the applicant had been reported to have violated the Civil Air Regulations.⁹⁴ This practice was changed after the case of *Nance*.⁹⁵ Therein such denial and review led to a lapse of over 3 months wherein a pilot was deprived of his commercial pilot certificate pending issuance of a decision by an examiner and approximately 4 months pending decision by the Board. The Board therein found that the violations required suspension for a period in excess of 4 months. However, the deprivation of a certificate to him could have been regarded as inconsistent with those provisions of section 609 which limit emergency suspensions to a period totaling 60 days. Possible collision of such practice with the policy of the Act is particularly apparent when further attention is directed to section 3 of the Act providing, "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." After the decision in the *Nance* case, airmen certificates were made continuing in duration.⁹⁶

Prohibitory Period

When revocation of a pilot's certificate is ordered, the Board now provides as part of the order the period of time wherein another certificate may not be issued to the offender.⁹⁷ This practice accords with the spirit of the Act in that it avoids the delay possibly incident to requiring revoked pilots to bring proceedings under section 602 (b) for issuance of another pilot certificate. In the revocation proceeding, the Administrator recommends a prohibitory period indicating that in his opinion the violation or violations of the pilot require such a prohibition for air safety and that a certificate would not be issued sooner. The Respondent may contend for a shorter period before the examiner, or

⁹² Such analysis has not been confirmed by the Board, although it was the basis of an examiner's decision which became final as an order of the Board in absence of appeal. *John Warren Tapp*, SR-5-364 (1949).

⁹³ The Administrator was under the authority of the Board (Authority) until Reorganization Plan No. III became effective June 30, 1940. Thereafter, the Civil Aeronautics Administration under the Administrator and the Board functioned separately.

⁹⁴ *Alexander*, 5 CAB 15 (1940). In this case a complaint was filed with the Board by the Administrator while Respondent still held a valid certificate, but the certificate expired prior to hearing. Thereafter, Respondent brought the case before the Board to review the Administrator's denial of a certificate. (For explanation of the procedure in this case, further reference should be made to other decisions.) The Board subsequently held, in effect, that it loses jurisdiction in a suspension or revocation proceeding upon expiration of the airman certificate. *Gardner*, 5 CAB 86 (1941); *Knapp*, Id. 215 (1942). Thus, expiration of the certificate of *Alexander* required an alteration of procedure.

⁹⁵ 5 CAB 201 (1941).

⁹⁶ Sec. 20.51 (b) C.A.R.

⁹⁷ Under former practice, the Civil Air Regulations prohibited the issuance of a certificate for a period of one year after revocation. These regulations were abrogated upon the basis of Board experience that one year was insufficient as a sanction to protect air safety in some cases and too long in others.

on appeal from the examiner's decision before the Board. Decision on the period's duration makes a subsequent proceeding by the pilot under section 602 (b) unnecessary. It obviously is more convenient to airmen than indecision with regard to issuance of a new certificate and, possibly, the necessity of participating in a second proceeding involving, to a substantial extent, the same facts.

This practice of in effect combining revocation proceedings under section 609 with anticipatory proceedings under 602 (b) was instituted prior to the enactment of the Administrative Procedure Act, but it is in the spirit of the last sentence of section 9 (b) of the Act. That sentence provides,

"In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been fully determined by the agency."

The present practice assumes application by the airman for a new certificate, and such assumption appears to be justified by Board experience.⁹⁸

Efficiency of Procedure

Although the Board does not require a formal application from the pilot for renewal or a new certificate, and for reasons of public safety could probably refuse to anticipate a proceeding under section 602 (b) in a proper case,⁹⁹ the present practice of interpolating anticipatory proceedings under section 602 (b) into revocation cases is a measure of efficiency and a substantial convenience to airmen. When the circumstances of an airman change, subsequent to a final order, Board practice permits his filing a petition for reconsideration of the order.¹⁰⁰ Section 1005 (a) and (d) of the Act permits the Board to retain control over its orders and thus prevents orders under section 602 (b), from operating with hardship that could not be anticipated at the time of decision.

Section 602 (b) is not applicable to all safety certificates. The Board has determined that it has no authority to review the Administrator's action in denying an applicant for an air agency certificate, *Ernest E. Boyer*.¹⁰¹ The Board's decision in this case was rested in part

⁹⁸ It is only in exceptional cases that a pilot is willing to sacrifice his right to fly. Occasionally a pilot who has had a violation accident fatal to a relative or friend has indicated that he does not desire to fly again, and in a few cases pilots have decided permanently to cease flying for financial reasons.

⁹⁹ The Attorney General's Manual on the Administrative Procedure Act (p. 91) regards other provisions of section 9 (b) as inapplicable to airmen certificates for reason of the public safety, specifically the provision for what the Manual refers to as "another chance."

¹⁰⁰ See, for example, *Fred Girod*, SR-857 (1945); *William P. Rayburn*, SR-4-188 (1949). Similar relief for respondents has also been granted on petitions filed by the Administrator. *Herbert Seabourne*, SR-2-128 (1948).

¹⁰¹ *Ernest E. Boyer*, SR-342, 5 C.A.B. 311 (1942).

upon Reorganization Plans Numbers III and IV, but it would appear that the case need not be rested upon these two plans but may rest solely upon the Act itself. The authority to review the denial by the Administrator of an applicant is specifically covered in section 602 and is confined to airmen certificates.¹⁰² One possibly might question the merits or logic of preferring all airman certificates, which include mechanics and technician certificates, above air agency or other safety certificates with regard to this particular protection.¹⁰³ However, it seems clear enough that by including this right of appeal to the Board with respect to airman certificates and omitting any mention of other safety certificates, the legislative intent to give such right solely to airmen is established.

Amendment, Suspension and Revocation of Certificates

The greater part of the Board's safety enforcement action is undertaken under the provisions of section 609 of the Act.¹⁰⁴ Few points that are distinctly referable to the wording of the section have been raised. However, it should be noted that the criterion for the suspension of certificates is the requirement of the public interest, rather than violation of the Act or the Civil Air Regulations.¹⁰⁵ Thus, in the absence of such a violation, it would appear the public interest may require suspension of an airman certificate, and the Board has so interpreted the Act. The terms of section 609 of the Act may also be noted for the provision that upon issues of revocation, the Board shall determine the causes which will justify the Administrator in refusal to issue a safety certificate.

Civil Penalties

Under an interpretation of Reorganization Plans Numbers III and IV by the Attorney General¹⁰⁶ it was concluded that the Administrator had complete authority over the compromise of civil penalties and that the Board's authority was confined to taking action with respect to various safety certificates. While this interpretation is arguable in law

¹⁰² The term "airman" was defined broadly under Section 9(k) of the Air Commerce Act of 1926, "The term 'airman' means any individual (including the person in command and any pilot, mechanic, or member of the crew) who engages in the navigation of aircraft while under way, and any individual who is in charge of the inspection, overhauling, or repairing of aircraft or of parachutes. (As amended by the Act of June 19, 1934, 48 Stat. 1113.)" In the 1938 Act, Section 1(6) rephrases this definition and includes also aircraft dispatchers and air-traffic-control operators.

¹⁰³ Reason for preference to pilots may be found in the public policy of freedom of air transit quoted above from Section 3 of the Act.

¹⁰⁴ The relevant terms of section 609 are set forth above in footnote 87.

¹⁰⁵ As hereinabove stated, under section 610(a) of the Act, the violation of the terms of any safety certificate or the violation of any other rule or regulation promulgated by the Board under Title VI (containing the safety provisions of the Act) is also "unlawful" and hence a violation of the Act itself. Under the predecessor Air Commerce Act of 1926, section 3(f), the criterion for suspension or revocation was the violation of regulations promulgated under that Act.

¹⁰⁶ Attorney General opinion May 2, 1940 contained in letter to Director of the Bureau of the Budget confirming the Director's interpretation of Reorganization Plans III and IV.

and may also be regarded as unfortunate on the basis of the results that have followed,¹⁰⁷ it is an accomplished fact. Through the cooperation between the Board and the Administrator results fair to the parties have been achieved in some instances. In the *Herbert M. Peters case*,¹⁰⁸ the Board found that a pilot had violated certain Civil Air Regulations but dismissed the case, "without prejudice to reopening the case on motion of the Administrator if Respondent fails to pay on or before July 24, 1942 a civil penalty of \$50.00 assessed against him." In another case, *Joel Eck*,¹⁰⁹ the Board dismissed the proceedings revoking a student pilot's certificate for carrying a passenger, on the ground that the pilot had paid to the Administrator a civil penalty of \$500.00, which the Administrator had accepted. The Board may institute safety enforcement proceedings by order to show cause through its Bureau of Law even when the Administrator does not choose to institute a proceeding upon a complaint,¹¹⁰ and the imposition and compromise of a civil penalty for a violation does not preclude simultaneous action for suspension or revocation of the airman's certificate.¹¹¹ However, even when the violation involves both an operating certificate and the pilot's certificate, a compromise of a civil penalty in the case of the operating certificate will be considered in mitigation in the issuance of an order for suspension or revocation of the pilot's airman certificate.¹¹²

Severity of Sanctions

Upon comparison of sanctions imposed on holders of different airman ratings, the Board follows a policy of considering the effect of an order on the individual. It imposes sanctions of shorter duration on those who earn their livelihood by use of a certificate than on those who utilize certificates only for pleasure. Comparatively short periods of suspension of the certificates of airline pilots or aircraft and engine mechanics bear heavier upon the holders than substantial suspension, or even revocations would bear upon some pleasure flyers. Similarly, flight instructors and commercial pilots may be severely disciplined by an order which would be nominal in its application to the average student or private pilot. So also, a short period of suspension will affect

¹⁰⁷ The separability of the imposition and compromise of civil penalties from proceedings for suspension and revocation is one aspect of the separation of unified control which has been criticized by impartial official investigators of present enforcement of air safety. See SURVIVAL IN THE AIR AGE, pp. 50-51. Rec. 89, p. 52 (1948). Senate Report No. 949, 80th Cong., 2nd Sess., Rec. No. 84, pp. 50-51, Rec. 89, p. 52 (1948). See also Final Report of the Attorney General's Committee on Administrative Procedure, p. 175 (1941).

¹⁰⁸ See *Peters*, 5 CAB 346 (1942); also *Roy Tant Hutchison*, SR-4-32 (1948); *Cyrus Thompson Willock*, SR-919 (1944).

¹⁰⁹ SR-K-24 (1946).

¹¹⁰ *James W. Wilson*, SR-1276 (1945).

¹¹¹ In *Raymond L. Schillig*, SR-1081 (1944) the Board on its own motion issued an order to show cause why the Respondent's pilot certificate should not be suspended or revoked although the Administrator had compromised a civil penalty in the amount of \$25.00. Therein, the Respondent had permitted a student pilot to carry a passenger in Respondent's aircraft as then contrary to section 20.726 of the Civil Air Regulations; Respondent himself was the passenger carried.

¹¹² *John B. Bethel*, SR-5-265 (1949).

a pilot who uses an aircraft in his business with as much force as substantially longer periods would affect persons flying only for pleasure.

Since the Board's action is remedial rather than penal, personal factors are often considered in decreasing the severity of a sanction in particular cases. The Board's sanction policy admits consideration of the results of a violation which in itself disciplines the individual, as where a pilot realizes that his violation has caused the loss of a personally owned aircraft in a crash or the payment of a substantial amount for its repair. Injuries to pilots, hospital expenses and other physical or financial damage is sometimes reason for decreasing what would otherwise have been the duration of a sanction.¹¹³ Action by States in punishing pilots for violations is considered.¹¹⁴ The individual's attitude towards the Civil Air Regulations, his past record, his maturity or high value as a pilot to his community can occasionally afford reason for the imposition of a lesser sanction.¹¹⁵ Prior violations are considered and result in more severe sanctions. The enumerated factors are usually reflected in the recommendation of sanction made by the Administrator's safety agents and attorneys, but when recommendations do not reflect consideration of proper items, those items may also be considered in the formulation of orders by examiners and the Board because the Board is not limited to the sanctions recommended by the Administrator but may impose more severe sanctions.¹¹⁶

Deferring Sanctions

The Board has often been requested to make a period of suspension or revocation begin at a future date later than the date when it would normally begin under usual Board practice. Present practice does not permit such a deferring of the effective date of an order.¹¹⁷

Denials are made although the respondents have claimed a necessitous use for aircraft or other appealing reasons in requesting the deferments. In past periods of the Board's practice, the effective dates of orders were occasionally deferred upon request, particularly during the war period and for reasons bearing directly or indirectly upon the national defense. In *William Leonard Morse*,¹¹⁸ a pilot's services were needed for the U. S. forestry service. In the case of *Thomas Guy Brown*,¹¹⁹ a doctor's patients required services which necessitated his transportation by his own aircraft; however, subject to the deferment, the Board revoked the doctor's certificate noting that his reason for not studying the Civil Air Regulations was that they were too dry. In

¹¹³ *Freddie Dorman York*, SR-1426 (1946).

¹¹⁴ *Manuel M. Franco*, SR-1-322 (1949).

¹¹⁵ *John B. Bethel*, SR-5-265 (1949); *Earl Jusken Allen*, SR-41 (1945).

¹¹⁶ *Eugene Thomas Skowieczny*, SR-1033 (1944); *Charles Edward Zunker*, *Harold William Vedder*, SR-1040, 1041 (1945).

¹¹⁷ *John D. Rockefeller*, SR-1-258 (1949), *William Dale Crane*, SR-5-283 (1948), *Francis Leon Barber*, SR-3-384 (1949), *Thomas A. Hellender*, SR-3-401 (1949).

¹¹⁸ SR-1028 (1945).

¹¹⁹ SR-914 (1944).

the case of *Alvin Earl Young*,¹²⁰ a pilot was similarly permitted a deference due to the food emergency in his agricultural region where farmers depended upon his services and contact with the city to obtain parts for tractors and to perform other services for farming. In the case of *Orin R. Alexander*,¹²¹ a suspension of pilot certificate was granted to assist an employer in the prevention of forest fires.

From the discussion above, it must appear that a regulatory policy has developed which is more analogous to equitable doctrines than to legal formalism which would disregard personal and causatively material facts to achieve a mechanical uniformity. The Board in effect forecast this development as early as 1939 in the case of *Ingalls*.¹²²

In that case it appeared that a well know pilot of long experience and high competency showed "disturbing deficiencies in her knowledge of the current provisions of the Civil Air Regulations." Acting in ignorance of regulations and under claim of right, the pilot was proved to have flown over a restricted area of Washington, D.C.¹²³ and dropped pamphlets to further her efforts as a representative of the Women's National Committee to Keep United States Out of War.¹²⁴ In her testimony, the pilot declared dependency upon her pilot certificate for her livelihood, although she then held a rating insufficient for such use of it.¹²⁵ The Board, with regard to her experience and competency stated,

"All pilots must exercise an extremely high standard of care in the operation of aircraft, must have a thorough knowledge of the pertinent parts of the Civil Air Regulations, and must carefully observe them if the maximum safety in air navigation is to be achieved. However, to accomplish this purpose, we must expect even more of the pilots of long experience who have had thousands of hours of solo flying time, for they provide guidance and instruction for those of more limited experience."

In discussing the appropriate order, it stated:

"Our purpose in proceedings of this character is to take such action with respect to individual airmen as will promote safety in air navigation."

Her pilot certificate was not revoked but was suspended until she should, upon written examination, demonstrate thorough familiarity with certain pertinent parts of the Civil Air Regulations. The same basic individualized approach to air safety proceedings is still utilized.

¹²⁰ SR-1150 (1945).

¹²¹ SR-1549 (1946).

¹²² 1 CAAR 512 (1939).

¹²³ Prohibited pursuant to terms of Sec. 4 of the Air Commerce Act. The Board held such terms superior to the general terms of Section 3 of the Civil Aeronautics Act granting freedom of transit in air commerce.

¹²⁴ Section 60.347 CAR then prohibited the dropping of objects from aircraft with certain exceptions immaterial to the case.

¹²⁵ Section 20.611 CAR then prohibited pilots of solo pilot rating, which she held, from piloting aircraft for hire.