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FAA WAIVER-OF-SANCTIONS DEFENSE—*BOETA* CLOUDS THE CLEARING HORIZONS OF INADVERTENT ACTS

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IN *BOETA V. FEDERAL AVIATION ADMINISTRATION*,¹ the Fifth Circuit reversed the outcome of a series of administrative appeals on the applicability of a waiver-of-sanctions defense to pilot Richard Boeta's sixty-day suspension originally imposed by the Federal Aviation Administration (FAA). The FAA found that Boeta violated two portions of 14 C.F.R. § 91,² "which prohibit anyone from either filing a flight plan for, or operating a flight in, [Reduced Vertical Separation Minimum (RVSM)] airspace unless the aircraft's *operator* is authorized to do so by the FAA."³ The waiver-of-sanctions defense would waive the suspension if Boeta could meet the four requirements of the waiver laid out by the FAA, one of which is the inadvertence of the violation.⁴

The Fifth Circuit panel examined the National Transportation Safety Board's (NTSB) holding to determine whether its decision to uphold the Administrative Law Judge's (ALJ) rejection of Boeta's defense was arbitrary or capricious.⁵ If the NTSB's decision was arbitrary or capricious, the circuit court is allowed to overturn it, which the majority did. The dissent concluded that the facts relied on by the NTSB were consistent with the record and that the record did not show the NTSB's decision was either arbitrary or capricious.⁶ Ultimately, while the court may have wanted to overturn this holding for legitimate, yet unstated, reasons, the challenges to the NTSB and ALJ's fac-

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¹ 831 F.3d 636 (5th Cir. 2016).

² 14 C.F.R. pt. 91, app. G, § 4(b)(1) (2016); 14 C.F.R. § 91.180(a)(1) (2016).

³ *Boeta*, 831 F.3d at 641 (emphasis in original).

⁴ FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 00-46E, AVIATION SAFETY REPORTING PROGRAM (2011).

⁵ *Boeta*, 831 F.3d at 641.

⁶ *Id.* at 651 (Higginson, J., dissenting).

tual findings relied upon by the majority fail to satisfy the deferential standard of review and ultimately cloud the defense.

Richard Boeta's air transport pilot license was suspended by the FAA following a flight that allegedly violated two sections of the Special Federal Aviation Regulations.⁷ He was an employee of Capital Aerospace, LLC (Capital) and often piloted a plane leased to Capital by the plane's owner.⁸ Prior to Boeta's violation, the owner entered into separate lease agreements with both Capital and USAC Airways (USAC), a company that provided Capital use of its FAA authorizations for commercial and RVSM flight.⁹ Under this configuration, USAC acted as the plane's operator, and Boeta was pilot-in-chief for commercial flights in RVSM airspace under USAC's authorization.¹⁰ After some time of this arrangement, USAC gave oral notice to Capital that it was terminating their agreement and would no longer operate the plane, but USAC did not notify the plane's owner or Boeta of any changes (although the court noted that USAC likely intended to end the lease with the owner as well).¹¹ USAC stopped providing Boeta with flight dispatch sheets and removed the plane from its RVSM authorization.¹² Capital resumed both operation of the plane and the duty of sending trip sheets to Boeta and at no time had authorization to fly the plane either in RVSM airspace or for commercial purposes.¹³

On the date of the relevant flight, Boeta received one of Capital's trip sheets instructing him to take the plane from Sugar Land, Texas to Palm Beach, Florida.¹⁴ Before taking off, Boeta filed a flight plan to inform the FAA that the operator was authorized to fly in RVSM airspace and that the flight would be conducted under that authorization, among other things.¹⁵ When Boeta landed in Palm Beach, FAA inspectors met him and asked to see the operator's authorization.¹⁶ Boeta looked for the authorization papers, but they were not onboard the plane, so

⁷ *Id.* at 641 (majority opinion) (citing 14 C.F.R. pt. 91, app. G, § 4(b)(1) (2016); 14 C.F.R. § 91.180(a)(1) (2016)).

⁸ *Id.* at 638–39.

⁹ *Id.*

¹⁰ *Id.* at 639.

¹¹ *Id.* at 640.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

he requested a faxed copy from Capital.¹⁷ Capital sent USAC's outdated authorization form that still listed the plane as authorized to fly in RVSM airspace.¹⁸ The inspectors, however, had procured an updated copy of USAC's authorization from the FAA database, which meant that they were aware that the plane was no longer listed.¹⁹ Had the inspectors not obtained a new copy, they would have held Capital's copy to be valid and would not have found a violation.²⁰ Within ten days of the incident, Boeta filed an Aviation Safety Report (ASR) through the FAA's reporting program, which formed the basis of his waiver-of-sanctions defense.²¹

The FAA suspended Boeta's air transport pilot license for sixty days, stating that he, as pilot-in-chief, had wrongfully filed a flight plan with the FAA and proceeded to fly in RVSM airspace without a properly authorized operator.²² Boeta appealed the FAA's sanction to an ALJ, who upheld the order.²³ Boeta then appealed the ALJ's decision to the NTSB, which upheld the ALJ's order.²⁴ The Fifth Circuit panel heard Boeta's appeal of the NTSB decision on three issues.²⁵

Boeta's three issues were that the NTSB erred in finding that the ALJ "(1) properly limited Boeta's cross-examination of several witnesses, (2) properly rejected Boeta's defense of reasonable reliance, and (3) properly rejected Boeta's request for a waiver of sanctions under the FAA's ASR procedure."²⁶ The Fifth Circuit panel majority upheld the NTSB's decision on the first and second issues but reversed on the third issue, stating that "the NTSB's decision affirming the ALJ's rejection of Boeta's waiver-of-sanctions defense under the ASR procedure was arbitrary and capricious as a matter of law."²⁷

The critical issue is whether the court correctly reversed the denial of Boeta's waiver-of-sanctions defense in light of the "highly deferential" standard of review.²⁸ A court must uphold a

¹⁷ *Id.* at 640–41.

¹⁸ *Id.* at 641.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 647.

²⁸ *Id.* at 642.

decision made by the NTSB unless it is “unsupported by substantial evidence” or is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”²⁹ Credibility determinations made by an ALJ are “non-reviewable unless there is uncontrovertible documentary evidence or physical fact [that] contradicts it.”³⁰ The ALJ heard trial testimony from both Boeta and the FAA inspectors and found the inspectors to be more credible.³¹

The Fifth Circuit majority found that Boeta was entitled to the waiver-of-sanctions defense because he met the four requirements listed under the ASR program. The program allows a pilot to avoid penalties for a violation if:

- (1) the violation was “inadvertent and not deliberate,”
- (2) the violation did not involve a criminal offense, an accident, or action showing a lack of qualification or competency,
- (3) the pilot has not committed a similar violation within the previous five years, and
- (4) the pilot can prove that he filed the ASR within ten days of the violation.³²

The parties did not dispute anything other than whether Boeta’s conduct was inadvertent.³³ A violation must be both “not deliberate” and “inadvertent” to satisfy the first element of the defense.³⁴ There is no technical definition of “inadvertent,” and after reviewing precedent, the majority stated “that whether an act—or, as here, an omission or failure to act—is ‘inadvertent’ depends on the exact nature of the act or omission in question and the discrete facts and details of the situation.”³⁵

In determining that Boeta was not inadvertent, the ALJ found, and the NTSB affirmed, that Boeta failed to satisfy two pre-flight duties placed on him as pilot-in-chief, namely to: (1) review a plane’s authorizations, and (2) ensure that the paperwork was physically inside the aircraft.³⁶ The Fifth Circuit majority held, however, that these duties did not exist in the airline regulations and that the ALJ incorrectly relied on the

²⁹ 5 U.S.C. § 706(2)(A), (E) (2016).

³⁰ *Miranda v. Nat’l Transp. Safety Bd.*, 866 F.2d 805, 807 (5th Cir. 1989).

³¹ *Boeta*, 831 F.3d at 648 (Higginson, J., dissenting).

³² *Id.* at 642 (majority opinion) (quoting FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 00-46E, AVIATION SAFETY REPORTING PROGRAM (2011)).

³³ *Id.*

³⁴ *Ferguson v. Nat’l Transp. Safety Bd.*, 678 F.2d 821, 823 (9th Cir. 1982).

³⁵ *Boeta*, 831 F.3d at 643.

³⁶ *Id.*

FAA inspector's personal knowledge to find them.³⁷ It stated that the regulations put the onus on the operator to keep its employees informed of changes to its operational authorization rather than on the pilot to check for changes.³⁸ Because USAC never advised Boeta of the change in relationships, he was still USAC's agent. Therefore, USAC failed to meet its ongoing obligation to keep Boeta informed of any changes that affected his responsibilities.³⁹ The majority acknowledged that although Boeta could have, and perhaps should have, realized a change because of the new trip sheets, he "was largely ignorant of the shifts in these entities' respective relationships."⁴⁰ The majority then analogized Boeta's case to *Garvey v. Meacham*, another NTSB case in which a plane ran out of fuel before reaching its destination because the pilot failed to visually check the fuel tanks before takeoff.⁴¹ There, the NTSB found that the pilot's inadvertence was partly justified by reliance on circumstances that were reasonably assumed to be unchanged.⁴² Similarly, Boeta relied on his assumption that the authorization was still valid because he had not been told otherwise.⁴³ For these reasons, the majority found, Boeta's actions were inadvertent, which satisfied the requirements of the waiver-of-sanctions defense under the ASR procedure.⁴⁴

Writing in dissent, Judge Stephen A. Higginson believed that all three issues should have been affirmed on appeal.⁴⁵ Judge Higginson found that the NTSB's holdings *were not* arbitrary or capricious and *were* consistent with the record, and he found specifically that Boeta's actions were not inadvertent.⁴⁶ He turned to a Ninth Circuit case that was acknowledged, but not relied on, by the majority that defined an "inadvertent" act as one "that is not the result of a purposeful choice."⁴⁷ Judge Hig-

³⁷ *Id.* at 644–45; *see, e.g.*, 14 C.F.R. §§ 91.9(b), 91.103, 91.203, 91.503 (2016); FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 91-85, AUTHORIZATION OF AIRCRAFT AND OPERATORS FOR FLIGHT IN REDUCED VERTICAL SEPARATION MINIMUM AIRSPACE App. 4, p. 1 (2009).

³⁸ *Boeta*, 831 F.3d at 644–45; *see* 14 C.F.R. § 119.43(c) (2016).

³⁹ *Boeta*, 831 F.3d at 645–46.

⁴⁰ *Id.* at 646.

⁴¹ *Garvey v. Meacham*, Order No. EA-4633 Docket SE-19922, 1998 NTSB LEXIS 16, at *1 (Feb. 5, 1998).

⁴² *Boeta*, 831 F.3d at 647; *Meacham*, 1998 NTSB Lexis 16, at *1.

⁴³ *Boeta*, 831 F.3d at 647.

⁴⁴ *Id.*

⁴⁵ *Id.* at 648 (Higginson, J., dissenting).

⁴⁶ *Id.*

⁴⁷ *Ferguson v. Nat'l Transp. Safety Bd.*, 678 F.2d 821, 828 (9th Cir. 1982).

ginson emphasized that the ALJ saw three days of testimony and made factual determinations that should not be changed on appeal because they were supported by a reasonable reading of the record, which satisfied the substantial evidence standard.⁴⁸ One such determination was that Boeta purposefully chose *not* to check the operator's RVSM authorization before takeoff and therefore did *not* act inadvertently.⁴⁹ The ALJ found that Boeta had knowledge that USAC did not operate the flight in question and that Capital had in fact been operating all flights for several months.⁵⁰ Taking these finding as true, Judge Higginson stated that the NTSB's affirmation of the ALJ was neither arbitrary nor capricious and that the waiver-of-sanctions defense was not available to Boeta.⁵¹

While the majority's decision to reverse part of the NTSB's holding is theoretically within its power, it failed to produce "uncontrovertible documentary evidence or physical fact [that] contradicts" the holding.⁵² Instead, the majority reversed on the issue because it disagreed with the results, not because the results were unsupported by the record evidence. In doing so, the majority side-stepped the deferential standard of review to reach what is presumably the desired end, although the true motives remain unknown. In the process, the majority created its own, new test, leaving the standard by which "inadvertence" should be measured clouded.

The majority cited the Ninth Circuit's *Ferguson v. NTSB* definition of inadvertent⁵³—"that an inadvertent act is one that is not the result of a purposeful choice"⁵⁴—but only the dissent applied it to the facts.⁵⁵ The majority combined that definition with dictionary definitions to create its own test, which resulted in a deeply fact-intensive determination that is dependent on "surrounding circumstances."⁵⁶ That disjointed and hazy rule offers no guidance in practice. Boeta's decision not to check the authorization when he had good reason to be suspicious, as the

⁴⁸ *Boeta*, 831 F.3d at 648–49 (Higginson, J., dissenting); see *Ellis v. Liberty Life Assurance Co. of Bos.*, 394 F.3d 262, 273 (5th Cir. 2004).

⁴⁹ *Boeta*, 831 F.3d at 649 (Higginson, J., dissenting).

⁵⁰ *Id.* at 650–51.

⁵¹ *Id.* at 651.

⁵² *Miranda v. Nat'l Transp. Safety Bd.*, 866 F.2d 805, 807 (5th Cir. 1989).

⁵³ *Boeta*, 831 F.3d at 643 (majority opinion).

⁵⁴ *Ferguson v. Nat'l Transp. Safety Bd.*, 678 F.2d 821, 828 (9th Cir. 1982).

⁵⁵ *Boeta*, 831 F.3d at 650 (Higginson, J., dissenting).

⁵⁶ See *id.* at 642–44 (majority opinion).

majority conceded he had, constitutes a purposeful choice.⁵⁷ The NTSB used the *Ferguson* test, but the majority claimed because it “did not consider any other surrounding circumstances,” the NTSB could not properly find inadvertence.⁵⁸ But this “surrounding circumstances” test does not meet the “documentary evidence” or “physical fact” requirement needed to overturn an NTSB opinion.⁵⁹ Perhaps the majority’s true motive was to change the definition of inadvertent. Even so, the majority did not succeed in redefining inadvertent; the majority instead created a new test that only muddied the otherwise useful *Ferguson* definition.

Applying the majority’s new test, Boeta’s surrounding circumstances boiled down to whether the two duties placed on him by the ALJ and the NTSB were proper.⁶⁰ The majority is correct that these duties do not appear in the regulations, and perhaps another possible true motive was avoiding the judicial imposition of those duties. If so, the majority successfully met this end.⁶¹ It used the *Meacham* case to show how surrounding circumstances can lead to inadvertent actions.⁶² But, *Meacham* is not an apt comparison, as Judge Higginson points out in his dissent.⁶³ There, the pilot was the last person to refuel and fly the plane; he knew both how long it had been flown and how many gallons of fuel it used in flight.⁶⁴ His reliance on this information gained through personal experience was not subject to the “red flags found to exist in Boeta’s case.”⁶⁵ Boeta had reason to check on the authorization status because, as the ALJ found, he was aware that USAC did not operate the relevant flight, that USAC had not operated a flight in the preceding six months, that Capital did not have RVSM authorization, and that he could only fly in RVSM airspace if USAC was the operator.⁶⁶ Analogous warning signs were not available in *Meacham*. That pilot’s actions were deemed to be inadvertent under an ex-

⁵⁷ *Id.* at 646.

⁵⁸ *Id.* at 644.

⁵⁹ *Miranda v. Nat’l Transp. Safety Bd.*, 866 F.2d 805, 807 (5th Cir. 1989).

⁶⁰ *See Boeta*, 831 F.3d at 644.

⁶¹ *Id.* at 644–45.

⁶² *Id.* at 646–47.

⁶³ *Id.* at 650 (Higginson, J., dissenting).

⁶⁴ *Garvey v. Meacham*, Order No. EA-4633 Docket SE-19922, 1998 NTSB LEXIS 16, at *1 (Feb. 5, 1998).

⁶⁵ *Boeta*, 831 F.3d at 650–51 (Higginson, J., dissenting).

⁶⁶ *Id.*

panded *Ferguson* definition that is more similar to the majority's new test (though the majority here failed to point that out).⁶⁷

In *Meacham*, the NTSB defined inadvertence as "not merely the result of any purposeful choice. Conduct for which waiver of sanction will not be granted is that which 'approaches deliberate or intentional conduct in the sense of reflecting a wanton disregard for the safety of others.'"⁶⁸ Under that test, Boeta's inaction does seem inadvertent. Yet instead of relying on that comparison, the majority insists that Boeta's reliance on what he thought were unchanged circumstances mandates the same outcome as in *Meacham*.⁶⁹ To summarize the majority's stated motive for the decision: Boeta reasonably relied on the operator to update his knowledge of the authorization, which was a sufficient surrounding circumstance to make his inaction inadvertent.⁷⁰

The problem with the majority's reasoning comes in the form of the standard of review. If the majority hid its true motives because those motives did not satisfy the highly deferential standard, the stated motive similarly fails. The dissent is correct in that "the NTSB's rulings [are not] arbitrary and capricious and [the] factual findings are consistent with the record."⁷¹ The majority should have come out and stated what it really wanted, whether it was to refuse judicially imposing the NTSB's duties on pilots, to adopt a new definition of inadvertent, or even to create a fairer outcome for a pilot caught between two companies. As it is, the opinion does not establish a clear test for future plaintiffs to know, or plaintiffs' attorneys to counsel their clients on, whether they satisfy the waiver-of-sanctions defense.

In this case, a pilot conducted a flight in RVSM airspace without the proper paperwork. The FAA, ALJ, and NTSB held that his actions were not inadvertent, thus precluding him from using the waiver-of-sanctions defense.⁷² On appeal, the Fifth Circuit reversed and declared his actions to be inadvertent, which opened the defense to him. The Fifth Circuit took the *Ferguson*

⁶⁷ *Meacham*, 1998 NTSB Lexis 16, at *2 (1998).

⁶⁸ *Id.* (quoting *Ferguson v. Nat'l Transp. Safety Bd.*, 678 F.2d 821, 828 (9th Cir. 1982)).

⁶⁹ *Boeta*, 831 F.3d at 647 (majority opinion).

⁷⁰ *Id.*

⁷¹ *Id.* at 648 (Higginson, J., dissenting).

⁷² FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 00-46E, AVIATION SAFETY REPORTING PROGRAM (2011).

definition used by the NTSB⁷³ and clouded it in a quest to overturn the previous holdings under a highly deferential standard of review. The resultant degradation of the standard of review, coupled with a new, fuzzy definition, places future use of the defense into question. The purpose of the ASR program is to encourage airline personnel to self-report problems they encounter.⁷⁴ This new cloud of uncertainty may put more people at risk of litigation and may end up discouraging disclosure. Such an outcome would be contrary to the FAA's stated objective and has broad implications in an area of complex and important regulation.

⁷³ *Boeta*, 831 F.3d at 643 (majority opinion); *Ferguson v. Nat'l Transp. Safety Bd.*, 678 F.2d 821, 828 (9th Cir. 1982).

⁷⁴ FED. AVIATION ADMIN., ADVISORY CIRCULAR NO. 00-46E, AVIATION SAFETY REPORTING PROGRAM (2011).