



The National Transportation Safety Board Bar Association

www.ntsbbar.org

Summer 2006

President's Message...

by Tony B. Jobe

A Look Inside...



Conceptually, the idea of a mega aviation law seminar hosted by a number of aviation bar associations sounded good, particularly if it occurred near the white beaches and blue waters of Pensacola, and the Blue Angels allowed us to attend a private viewing at the Naval Air Station of their full show in the absence of the general public.

Although the NTSB Bar has presented to its members the Blue Angels Seminars three times since 1993, the idea of a mega bar association conference has never been tried by our Association. However,

the success of the joint aviation law seminar at Whistler in British Columbia several summers ago, where five bar associations convened to hear from excellent speakers in arguably one of the most beautiful venues in North America, allayed my concerns.

As a result of this precedent, the NTSB Bar will host a Blue Angels Seminar in Pensacola, November 7-11, 2006, with a number of other aviation bar associations. Already signed on as co-sponsors are the LPBA's Southern Region and the

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President's Message...

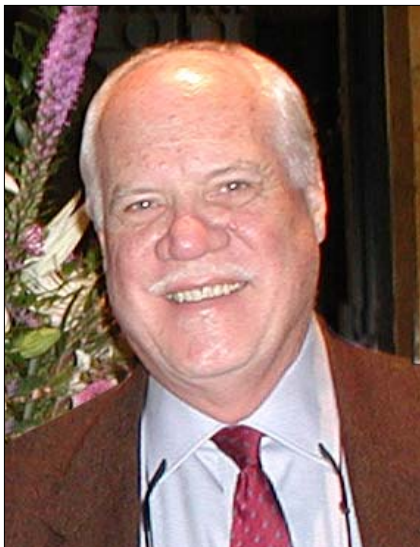
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Florida Bar's Subcommittee on Aviation Law. We are in the process of adding additional co-sponsors from around the country, including Canada. If you know of any bar associations in your area that are aviation oriented, please e-mail me at jobelaw@msn.com the contact information so we can offer the opportunity to join us and extend an invitation to their members to attend.

We booked the Hilton Hotel at Pensacola Beach starting on November 7th through the 11th, holding 100 plus rooms per night. You should make your reservations now through the NTSB Bar's website link under events, to lock in the convention rate which is a substantial discount. You can cancel your room with only 72 hours notice to the hotel.

We already have outstanding CLE speakers for approximately two-thirds of the seminar. Also, the Florida Bar's Aviation Committee and the LPBA have contributed from their membership excellent presenters. We will e-mail you the full agenda with registration forms later this summer.

On Tuesday, November 7th you can register beginning at 3:00 p.m. at the hotel, followed by a welcome reception at the hotel's pool hosted by Nixon Peabody from 5:00-6:30 p.m. Wednesday, November 8th, we will have a full day of CLE presentations and a luncheon at the



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Hilton. Thursday, November 9th, we will have CLE in the morning, followed by bus transportation leaving at noon with a brown bag lunch as we travel to the Naval Air Station at Sherman Field to view the Blue Angels in the private practice flight. There may be an opportunity for autographs. We will then tour the Naval Air Museum until Happy Hour at the Cubi Bar located inside the Museum followed by a four-course meal with wine in the museum's atrium. The same bus transportation will take you back to the hotel that evening. Friday, November 10, will be another full day of CLE with a luncheon. You can play golf and go for a sailboat cruise if you are lucky enough to spend the weekend on the beach.

In this edition of the NTSB Bar Newsletter, you will find a wide variety of legal articles regarding current developments that may affect your practice and other news updates at the Board, and reports

from two of our committees and our Treasurer.

Our membership, finances and committee work remains strong and vibrant. For example, our Select Committee on Aviation Public Policy's soon to be issued publication of a "*white paper*" entitled "International Protection of Safety Data - Criminalization of Violations of Federal Aviation Regulations" is commented on by Hays Hettinger on page 12 of this Newsletter.

Mark Fava reports on the work of the Ad Hoc, Pro Bono Committee for our Bar, and is discussed on page 4. His committee has been studying the possible ways our Bar Association can make pro bono referrals to our members.

Good luck this summer, and I hope you get to enjoy your vacation and this Newsletter in your spare time.

Tony B. Jobe
President

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The Pro Bono Committee appointed by the President at the last Washington Aviation Law Conference in 2005 has looked at several similar pro bono referral projects throughout the country as well as pro bono committees at various state bar associations. The NTSB Bar Association's Pro Bono Committee's goal was to determine if such a program could be developed at our Bar without potential liability or significant exposure in the making of referrals.

The collective analysis and research indicates that such protection from liability to the bar association cannot be guaranteed. Absent liability insurance which would protect the bar association, there would always be the risk that a disgruntled pro bono client, who had been referred to counsel by our bar association, might implicate our bar. Waivers

would generally not be effective in the lawyer referral process.

Other possibilities studied include a hold harmless and indemnification agreement between our bar association and participating attorneys. The committee suggests that participating attorneys would use their own liability insurance for their protection. The feasibility of this solution is unknown. The committee has determined that there is no certain way to completely avoid liability, as the mere making of a referral in most states, will provide the nexus to lead to alleged liability. The pro bono committee seeks the recommendation of the Board of Directors and the members of the bar association at this point.

If you have any suggestions, please contact Mark Fava through the Bar's website or the directory.



Mark C. Fava is a partner and a leader of the Aviation Practice Group at Nelson Mullins Riley & Scarborough. In his capacity as a Commander in the U.S. Naval Reserves, he is a Naval Flight Officer and the former Commanding Officer of an aviation squadron.

Treasurer's Mid-Year Report...

Several years ago, the bar association changed its financial year to correspond with the calendar year. This change has made it easier to keep track of the association's finances on a year to year basis. As of June 13, 2006, the association was maintaining \$23,875.74 in its bank account. The same time last year, June 13, 2005, the association had \$24,564.15 in its account.

For the financial year 2006 thus far, the bar association has incurred expenses of \$14,472.09. These expenses included executive director fees, office supplies, electronic newsletter expenses, website costs, conference call costs, and expenses incurred by the President.

The majority of revenue that the

bar association receives comes from its membership dues. For the calendar year 2005, the association collected \$25,840.00 in dues. The 2005 conference in Washington D.C. brought in \$17,922.25 after expenses. For 2006 thus far, \$7,181.13 has been collected in membership dues, however, a total number for 2006 won't be available until the end of the calendar year.

The bar association continues to be consistent from year to year in its revenue as well as its expenses. If anyone has any questions or would like further information, please feel free to contact me.

Peter J. Wiernicki
Treasurer



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Developments at the National Transportation Safety Board...

The Board currently has two vacant seats with the announcement that former Chairperson and Member, Ellen Engleman Conners, recently left the Board in May. The current acting Chairman is Mark V. Rosenker, and members, Kitty Higgins and Deborah A. P. Hersman. President Bush on June 6, 2006 nominated Robert L. Sumwalt, III of South Carolina. He is to be the next member of the Board for the remainder of a five year term expiring at the end of 2006, and an additional five year term expiring at the end of 2011, and upon confirmation designate him as Vice Chairman. Mr. Sumwalt currently serves as Manager of Aviation for SCANA Corporation. He previously served 24 years as a U.S. Airways captain in the Flight Safety Department. He received his bachelor degree at the University of South Carolina.

The Government Accounting Office concluded a study of the

NTSB which found that the Board had made progress by developing leading management practices; and hiring a Chief Financial Officer to improve fiscal accountability, but the Board still lacks a full cost accounting system which would provide managers resource tools regarding the cost of individual investigations, and the ability to balance office work load. GAO noted that the Board had developed performance management systems, which are designed to track individual performance, to the agencies strategic goals and objectives. The Board still lacks a strategic plan with result-oriented goals and objectives, and specific strategies to achieve those. The GAO also addressed the lack of efficiencies in the Board's production of accident reports and the closing out of individual recommendations made by the Board. The NTSB routinely takes more than two years to complete major investigations, and small aircraft/

helicopter investigations often are open for more than three years. GAO cited lengthy paper-based and labor intensive impediments to the issuance and implementation of the NTSB's safety recommendations. Lengthy rule-making process has been a challenge to the speedy implementation of the Board's recommendations.

Finally, GAO found that the NTSB's Academy was not generating sufficient revenues to cover costs. Currently the NTSB is attempting to offer rental space at the Academy for conferences and other organizational meetings.

The final recommendations of GAO in this study were, among other things, that the NTSB develop a revised strategic plan that follows performance-based practices, develop a full cost accounting system, and develop a marketing plan for its Academy. The NTSB has agreed with GAO's recommendations.

Bankrupt Insurer Who Tenders Policy Limits Into Court May Get Its Money Back

In an unusual case involving a two plane accident, fourteen deaths, a \$52 million settlement and an insurer who at an early stage tendered its \$1 million policy limits into the court, the Seventh Circuit recently decided, in applying the Illinois contribution statute, that the now bankrupt insurer may get back its \$1 million, some ten years after the funds had been tendered into the court.

The case, factually complicated and presenting challenging issues on interpretation of the Illinois contribution law as well as the practicalities of handling multiparty disaster litigation, shows how a result no one contemplated can come about.

The case, *Reliance National Insurance Co. v. Great Lakes Aviation, Ltd.*, 430 F.3d 412 (7th Cir. 2005) arose out of the crash of two aircraft, one a commuter plane carrying ten passengers and a crew of two, and the other, a private plane carrying two pilots, on a runway in a small municipal airport in Illinois. The crash resulted in the deaths of all fourteen persons aboard the two planes. The manufacturer of both planes was Raytheon Aircraft Company and the operator of the ten passenger plane was Great Lakes Aviation. The owner of the small plane, which had two pilots, carried a \$1 million insurance policy issued by Reliance National Insurance Company. Reliance, after reviewing the facts of the case, deposited its \$1 million policy limits into the Court Registry and promptly filed an interpleader action in the

Federal District Court, naming as defendants everyone who might have a claim to the insurance proceeds, including its insureds (the owners of the small plane), the pilots of both aircraft, the estates of the deceased passengers, the operator of the passenger plane, Great Lakes Aviation, and Raytheon, the manufacturer of both aircraft.

The passengers and the pilots eventually settled their claims against both Raytheon and Great Lakes Aviation for \$52 million and gave a release to all defendants except that both the passengers' estates and the released defendants (Great Lakes and Raytheon) reserved their rights to the interpleaded funds of \$1 million deposited into the Court's Registry by Reliance.

A dispute then arose as to who was entitled to the \$1 million. The passengers, although they had already been compensated in the amount of \$52 million, claimed that they should get the additional \$1 million. The District Judge rejected their claim on the theory that since Great Lakes and Raytheon had already paid \$52 million, equitable principles entitled either Great Lakes or Raytheon to the relatively modest \$1 million deposited by Reliance, the insurer of the small plane's owners. The passengers' estates responded by arguing that as they were the only truly blameless parties in the case, they should get the \$1 million.

The Seventh Circuit Court of Appeals, in a decision by Judge Posner, first agreed with the passengers that neither Great Lakes nor



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Raytheon were entitled to recover the \$1 million under the terms of the Illinois contribution statute. That statute, 740 ILCS 100/2(e) provides that

a tortfeasor who settles with a claimant ... is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

The settling tortfeasors were Great Lakes and Raytheon. Under the plain language of the statute, they were not entitled to recover from the other tortfeasor (Reliance, the insurer of the owners of the small aircraft) whose liability had not been extinguished by the settlement. Thus, even though the passengers had received \$52 million, Reliance's liability was not extinguished by the settlement.

Judge Posner summarized the

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The Board has a new General Counsel. Gary L. Halbert started here February 13. Colonel Halbert is a 1978 Distinguished Graduate from the United States Air Force Academy. After service as an Instructor Pilot, he was selected for the Air Force Funded Legal Education Program, attending the University of Texas at Austin School of Law and graduating with Honors in 1986. He also earned a Master of Science degree from the National War College in Washington, D.C.

He has worked for the Air Force for 27 years, where he held a number of senior legal positions. He most recently was Director, Executive Issues, in Air Force Headquarters Communications, where he was responsible for, among other things, strategic and crisis communications. Earlier positions included Staff Judge Advocate and Legal Counsel to the Commander, Third Air Force, at Mildenhall Royal Air Force Base in the United Kingdom; Executive Assistant to the Air Force Judge Advocate General; Senior Attorney and Legal Counsel to the Commander of Barksdale Air Force Base; Claims Officer; Chief of Military Justice; Deputy Staff Judge Advocate; twice as a wing Staff Judge Advocate; intermediate headquarters Staff Judge Advocate; Chief Counsel for Information and Privacy Law; and Chief Counsel for Administrative Law at the Pentagon. He is admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Armed Forces, and as well as the courts of the State of Texas and the District of Columbia.

Colonel Halbert has also held a variety of operational and staff

assignments including service as an Instructor Pilot, Undergraduate Pilot Training Class Commander, Wing Executive Office, and Air Staff action officer and division chief.

Halbert is a licensed pilot and flight instructor, and has logged approximately 1,500 hours in T-41s, T-37s, T-38s and sailplanes.

Also new at the Board is Katherine O'Leary Higgins, sworn in as the fourth Board Member on February 16th. Member Higgins has had an extensive career in Washington, both in and out of government. She has worked on the staffs of various Congressmen, at the White House as Assistant to the President and Secretary to the Cabinet, as Deputy Secretary of Labor, as Vice President for Public Policy at the National Trust for Historic Preservation, and Vice Chairman of the President's Commission on U.S. Coast Guard Roles and Missions. More detailed information about Member Higgins' experience and background is available on the Board's website.

The Board has been affirmed twice in the last few months. Both cases involved procedural issues. In Casino Airlines v. NTSB and FAA, F.3d ___ (D.C. Cir. 2006) (No. 04-1381, February 2, 2006), the court affirmed the revocation of Casino's operating certificate. Casino had not filed an answer to the complaint, nor had it replied to the Administrator's motion for summary judgment. Casino's argument that it was not represented by counsel at the time was rejected. Casino also argued that its notice of appeal should be treated as an answer. This issue was addressed by the Board in Administrator v.



Jane Mackell has worked at the Safety Board for over 10 years, in both the Office of General Counsel and as Deputy Managing Director. She is now semi-retired, works for the Board out of her home in Arizona, and teaches at the Prescott campus of Embry-Riddle Aeronautical University.

Ocampo, NTSB Order No. EA-5113 (2004), where we held that a notice of appeal *could, in certain circumstances*, be treated as an answer. Because the court found the failure to file a reply to the motion for summary judgment was a sufficient basis for the Board to uphold the order of revocation, it did not address this question. However, you should be aware that the court's interpretation of Ocampo is not entirely correct and should not be relied upon.

In Cornish v. FAA and NTSB, ___ F.3d ___ (8th Cir. 2005) (No. 04-2698, November 28, 2005), with Judge Loken writing for a unanimous court, the Board's procedural strictness was again

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Bankrupt Insurer

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two competing theories: the passengers “clean hands” theory that they were the only truly innocent parties in the case and Great Lakes and Raytheon’s theory that “we’ve suffered enough” by already paying \$52 million. The court found both arguments “equally wide of the mark”. 430 F.3d at 416.

If Great Lakes and Raytheon weren’t entitled to recover the \$1 million, who was? With respect to the passengers, the \$1 million would be owed to them only if they satisfied two conditions: that the owners of the small aircraft were liable in tort to the passengers and that the amount of the money the passengers had already received

(\$52 million) in settlement of their claims did not equal or exceed their legal entitlement. Judge Posner found that the owners of the small aircraft, even if they were found liable, could defend the case on the ground that the passengers had already been fully compensated by the \$52 million settlement and, given the rule that “a tort victim can obtain only one recovery for his harm, no matter how many tortfeasors inflicted it”, *Bosco v. Serhant*, 836 F.2d 271, 280 (7th Cir. 1987), the passengers may be entitled to no further recovery.

On other hand, based on the clear language in the Illinois contribution statute, neither Raytheon nor Great Lakes was entitled to the \$1 million. The court ruled that if the passengers failed to establish the liability of the owners of the small

aircraft, the money should go back to Reliance, who deposited it into the Registry of the Court. However, given the fact that Reliance is in bankruptcy, the money would either go back to the trustee in bankruptcy for Reliance or, in the unlikely event that the claim was viewed to be abandoned by the trustee, the money would escheat to the State of Illinois.

This procedurally complicated case had a long life (ten years from the date of the accident until the Seventh Circuit’s decision) and indicates the tortuous winding path that multiparty cases can take as they make their way through a judicial system which seeks to accommodate the rights of the various parties when weighed against clear statutory mandates.

Reflections on the Enforcement Docket

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affirmed. In this case, although a notice of appeal was timely filed, the appeal brief was not due to a mistake in applying the Board’s rules. Good cause for the filing delay was not found. Significantly, the court held that the Board “need not attempt to catalog what might be good cause in other cases when it consistently rules that mistakes by the appellant’s attorney in construing the agency’s procedural rules is *not* good cause.” Slip op. at 3, emphasis in original. Following affirmation of the Board’s procedural decision, the court denied Cornish the right to challenge the

basis for the FAA’s order, *i.e.*, its drug testing rules.

Finally, one procedural issue that seems to be attracting considerable attention lately is whether the Administrator is charging an independent or a residual carelessness (§ 91.13(a)) violation. The Board had the opportunity further to elucidate its policy on this subject in *Administrator v. Bassett*, NTSB Order No. EA- 51295 (2005). In this case, at the hearing the Administrator sought to amend the complaint to clarify that the § 91.13(a) charge was independent. The law judge found an independent violation. The Board concluded that, in addition to the *Lindstam* doctrine, the independent § 91.13(a) violation finding could stand because, although it might

not have been clear in the complaint, it was abundantly clear in the Administrator’s response to respondent’s earlier motion for summary judgment (decided 3 months before the hearing) that an independent § 91.139a) allegation had been made. Thus the issue for the Board in these cases is whether respondent has had adequate notice to prepare in advance of the hearing that an independent violation was being charged.

US Airways Pilots' Timeline of Relevant Dates

- 1999** Last profitable year for Company. Between 1995 and 1999 the Company reported approximately \$2 billion in profits.
- May 24, 2000** UAL Merger Announced. (Management becomes "singularly focused" on consummating the merger. During the next year Company loses competitive position in key markets.)
- 2000** Company reports a loss of \$165 million for the year.
- July 27, 2001** UAL Merger Terminated.
- September 11, 2001** Terrorist attacks; National Airport Closed to all air traffic.
- 2001** Company reports a loss of \$2.1 billion for the year.
- March 11, 2002** David Siegel becomes new CEO; brings in new management team.
- May 16, 2002** Company unveils their Restructuring Plan in a meeting with all of the carrier's unions.
- July 13, 2002** Pilot leadership agrees to send out Company's final restructuring offer to pilots for ratification. Total package grants Company 85% of their request — approximately \$465 million in yearly concessions for 6-½ years.
- August 8, 2002** Ratification vote completed. Pilots vote in favor by 75%-24%. *Restructuring I* becomes effective (retroactive to July 1, 2002.)
- August 11, 2002** Company files for bankruptcy protection.
- October 30, 2002** Company informs ALPA that restructuring concessions are not adequate because of revenue shortfall. Additional yearly concessions of \$400 million are needed — one half to come from labor.
- December 13, 2002** MEC ratifies *Restructuring II* authorizing additional productivity and wage concessions valued at \$101 million yearly and additional pension concessions valued at \$78 million yearly.
- January 30, 2003** Company announces that to obtain ATSB loan they must terminate Pilots' Defined Benefit Pension Plan; issues "Notice of Intent to Terminate" to all Plan participants.
- February, 2003** ALPA opposes the Company's proposed termination of the Pension Plan through filing formal Objection in Bankruptcy Court.
- March 1, 2003** Bankruptcy Court decision issued — Judge rules that Company request to terminate Pilots' DB Plan is permissible under ERISA, but finds that labor issues must be decided by the System Board, not the Federal Bankruptcy Court. Also, Company may enter into a follow-on DC Plan.
- March 22, 2003** MEC agrees to follow-on DC Plan and contractual modifications; opposition to termination of pension plan with drawn by ALPA.
- March 31, 2003** Company emerges from bankruptcy; receives RSA investment (\$240 million) and ATSB loan funds (total of \$1 billion).
- April 19, 2004** CEO David Siegel resigns. Bruce Lakefield appointed as CEO. CFO Neal Cohen resigns effective May 3, 2004. Dave Davis named CFO.
- May 17, 2004** Company presents Transformation Plan calling for \$295 million in yearly cost reductions from the pilot group.
- September 6, 2004** Transformation negotiations conclude with presentation of Company's last proposal to the Association's governing body, the Master Executive Council. The MEC, by roll call vote, refuses to send out proposal for membership ratification. Negotiations terminate.
- September 12, 2004** Company files for bankruptcy protection.
- September 23, 2004** Negotiations resume in bankruptcy.
- October 1, 2004** T/A reached by pilots' Negotiating Committee and Company; resulting *Transformation Plan* cuts Company's costs by an average of \$367.4 million annually over 5 years.
- October 21, 2004** *Transformation Plan* ratified by the pilots.
- March 14, 2005** MidAtlantic Airways sold to Wexford-Republic Holdings. Transaction includes \$125 million capital investment in US Airways by Wexford and purchase options for MDA to include gates and slots for \$110 million (within bankruptcy at US Airways' option) or \$58 million for MDA outside of bankruptcy.
- May 19, 2005** Merger announced between US Airways Group and America West Holdings Corporation which would create the sixth largest US carrier by capacity.
- September 16, 2005** US Airways Plan of Reorganization receives Bankruptcy court approval.
- September 23, 2005** US Airways and America West pilots finalize negotiation of the terms of a Transition Agreement. The Agreement states that the pilot groups will remain separate and covered by their employment agreements until the "Operational Pilot Integration" is completed.
- February 10, 2006** US Airways announces recall of 55 furloughed pilots.
- May 9, 2006** US Airways Group reports first quarter profit of \$64 million.

In the last *NTSBBA Newsletter*, Winter 2005, John Easton of Houston wrote an excellent article introducing the Federal Officer Removal Statute, 28 U.S.C. §1442, with a survey of some of the relevant cases including three that have had the largest impact for aviation practitioners: *Magnin*, *AIG Europe* and *Britton* (citations omitted). His analysis is also an excellent “checklist” for counsel litigating this issue.

Since then, we also have dealt with this statute in extensive litigation, some of which is still pending, and offer the following as additional “bullets” to Mr. Easton’s reminders to counsel when dealing with the removal-remand considerations, particularly in the context of action taken by FAA designees.

In a recent “blockbuster” case, the United States Court of Appeals for the Eighth Circuit held that Philip Morris “acted under” the direction of the Federal Trade Commission (FTC) in its testing and advertising of “lowered tar and nicotine” “light” cigarettes, supporting federal officer removal (see *Watson v. Philip Morris Companies*, 420 F. 3d 852 (8th Cir. 2005)). A Petition for Certiorari in this case is pending before the US Supreme Court in Docket No. 05-1284. On May 22, 2006, the Court invited the Solicitor General to file a brief expressing the views of the United States.

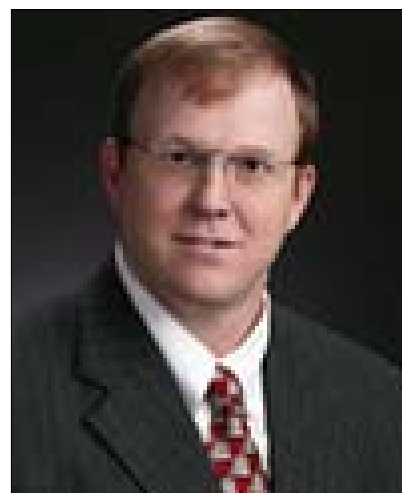
If the Court grants Certiorari in *Philip Morris*, it may settle the dispute among the circuits with respect to when a private party is “acting under” a federal officer within the meaning of the statute. This is particularly significant in aviation litigation when the facts of the case

involve an FAA designee, such as those involved in *Magnin*, *AIG Europe* or *Britton*. Counsel for Petitioners (the Cauley and Kellogg firms of Little Rock and Washington, respectively) contend that the federal courts are divided as follows: The First, Seventh and Eleventh Circuits have adopted an official function test; the approach of the Eighth and Fifth Circuits rests on the comprehensiveness and detail of federal control and regulations; and the Ninth and Tenth Circuits construe the “acting under” clause to permit removal to federal court if the federal officer had “general supervision” over the private actor.

The FAA designee may be an individual or an organization. Under 49 U.S.C. §44702 (d), the FAA Administrator may delegate to a qualified “private person” a matter related to issuing certificates, or related to the examination, testing, and inspection necessary to issue a certificate she is authorized by statute to issue under §44702 (a), including airman certificates, type certificates, production certificates, airworthiness certificates, and otherwise. On September 30, 2005, the FAA published its final rule on the Establishment of Organization Designation Authorization Program (70 Fed. Reg. 59932, October 13, 2005), which updates and revises the former rules at 14 C.F.R. part 183 concerning such designees as the Designated Engineering Representative (DER), Designated Manufacturing Inspection Representative (DMIR), and the Designated Pilot Examiner (DPE), and now adds the Delegation Option Authorization (DOA) holders. Presently, DOA holders include Cessna, New Piper,



Hays V. Hettinger career as legal counsel with the Federal Aviation Agency/Administration spanned 33 years until his retirement in 1994 as Assistant Chief Counsel for the Enforcement Division, FAA WDC. Mr. Hays currently serves as a consultant to Winstead’s Aviation Law Practice.



John J. Reenan joined Winstead’s Litigation/Dispute Resolution Practice in 2003.

Raytheon, McCauley, Hartzell, and the Boeing Company (for the 737-900 series).

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We’re on the verge now of seeing the Very Light Jet (“VLJ”) receive certification from the Federal Aviation Administration, and several companies are competing to begin mass production. Eclipse Aviation, Adam Aircraft, Cessna, Century Jet, Diamond Aircraft Industries, Inc., and others have waiting lists of paying customers, each of whom has made a significant deposit on a future aircraft. Composite materials, smaller more powerful engines with improved thrust-weight ratio, glass cockpits, comfortable cabins, and better fuel efficiency are going to make these new aircraft very special, indeed.

The evidence shows that aircraft sales enjoyed an increase for six years, from the passage of the 1994 General Aviation Recovery Act up until “9/11”. GARA resulted in continual increases in production of new aircraft, at least in the near term, according to the July 16, 2002 issue of *General Aviation News*, a reliable reporter of such information. It was reported by GAN that the six-year increases culminated in 2000, with a record-breaking year. General Aviation billings for 2000 reached \$8.6 billion, up 9.1%, as manufacturers shipped a total of 2,819 airplanes. GA News says that the shipment number represents a 12.5% increase from the previous year. So, things were on the rise before the terrorists hit New York.

GA News said in the 2002 article: “The increases were expected to continue into 2001, with a backlog of orders and new jets set to enter the market. But the double whammy of a worldwide recession and the terrorist attacks of Sept. 11 killed that forecast. In 2001, U.S. manu-



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facturers shipped 2,634 aircraft, a drop of 6.6%. Numbers for 2002 are expected to remain flat — or worse — but hope is on the horizon. A number of new airplane models are set to come to the market in the next 24-36 months.”

Since that time, several companies have endured the crucible of manufacturing evolution, the production version of Darwin’s “survival of the fittest”. According to a recent article on the Aviation International News website dated June 2006, after coming off an all-time record for billings and a four-year high in new turbine airplane deliveries last year, the business jet industry continued an increase in the first quarter of this year. The article reflects that manufacturers recorded the highest first-quarter billings in history: \$4 billion, an increase of 39.7 percent over the first quarter of 2005. The AIN website article cites General Aviation Manufacturers Association

(“GAMA”) figures released last month, indicating that Original Equipment Manufacturers (“OEMs”) delivered 189 business jets and 47 business turboprops, a 36- and 34-percent increase, respectively, over the 139 jets and 35 turboprops shipped in the first quarter of last year.

Forecasts from the Federal Aviation Administration reflect that the US general aviation fleet will increase from 214,591 aircraft in 2005 to 252,775 in 2017, growing 1.4% a year. The optimistic news is apparent in the international arena, as well. Green Car Congress provides timely and accurate reporting and analysis of relevant developments around the world. It reported in its May 28, 2006 edition of its website that China, which has the second-most air traffic in the world, now has 570 general aviation aircraft. This is 235 more aircraft than in 2002.

The website, “greencarcongress.com”,

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Federal Officer Removal

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As Mr. Easton points out, “counsel needs to diligently examine each complaint to assess all possible bases for removal” from state to federal court. As indicated, the three tests are:

1. The action is being brought against a private person acting under a federal officer;
2. there is a “causal connection” between what the officer has done under asserted official

authority and the action against him; and

3. the private actor is able to advance a colorable federal defense.
- OF CRITICAL IMPORTANCE, are the 30 day time limits for removal. See 28 U.S.C. §1446. This section normally must be read and strictly followed. However, a recent case holds that, in the case of a §1442 federal officer removal, the liberal interpretation of §1442 extends to the timeliness analysis under §1446. See *Durham v. Lockheed Martin*, 445 F.3d 1247 (9th Cir. 2006).

Addendum:

Mr. Hettinger, who co-chairs the Select Committee on Aviation Public Policy, reports that despite the litigation demands recently on committee members the Committee hopes to complete its work this summer on a forthcoming publication calling for international protection of safety data collection systems, while allowing for the proper administration of justice without criminalizing negligence by aviation professions. This paper will be available for consideration at the next Plenary Session of the ICAO, scheduled to be held in 2007.

The “Domino Effect”

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went on to report that according to official figures, China is estimated to require 12,000 general aviation aircraft by 2012. China is just one example of a country with a rising demand for new aircraft.

This information appears to demonstrate that there is a pent-up demand for the new VLJ aircraft in business use. In addition to purchases for corporations, the use of VLJ's in the new air-taxi concept development will also increase sales. So, a lot of VLJ's will likely be sold in the next 10 years. It is common knowledge in the aviation industry that no business jet model has sold more than 60 aircraft in a year. At least two of the potential manufacturers of VLJ's stand a very good chance of breaking this mold. The VLJ market has the potential to be strong. What will be the effect of a solid VLJ market, if it occurs?

Here is where it gets interesting. If, and this is a big “if”, VLJ's are marketed to and well-received by

individual purchasers and small corporations who decide to move up from the light twins and more expensive single-engine reciprocating models that they currently utilize, General Aviation may be on the verge of experiencing a “hand-me-down” chain of events in the sale of used aircraft. It does not take a lot of imagination to predict that as the higher-end reciprocating engine aircraft are sold off so that sellers may move to VLJ's, many aircraft owners are going to be tempted to “move up”, as it were. The 421, Baron and Bonanza owners move up to a VLJ; their aircraft are in turn purchased by the 182RG, Commander, and Cherokee Six owners; those aircraft are then purchased by the 182 drivers; those aircraft are in turn bought by the 172 and Warrior owners. Tiger and Mooney owners will keep their airplanes because of their rabid product loyalty, so there is a slight flaw in the theory, but you get the point. The market price is what the market bears, and the market price for used aircraft may just cause a boon in sales. If enough

aircraft owners move to the VLJ, we may see a whole bunch of less affluent pilots move up to aircraft that were previously unattainable to them. The VLJ is about to change aviation, and the change may include the potential to disrupt the dynamics of used aircraft sales. New general aviation aircraft manufacturers would be wise to anticipate this possible domino effect, and figure out how to adjust their prices to make it attractive to buy a new airplane, when used aircraft may become available for an even more competitive price.

If the dynamics of aircraft sales do change, one possible effect is that flying may become more affordable. This in turn could attract more people to aviation. The sale of VLJ's will also raise a number of other new issues, such as insurance minimums for training; liability of air-taxi operators; revision of Part 135 regulations to accommodate the performance of the new aircraft; changes to air traffic control to integrate more aircraft; and, many others. It will be interesting to watch the events unfold.

New in this *NTSB Bar Association Newsletter* is a “Point-Counter Point” Section. Please enjoy aviation attorney, well known to all, Alan Armstrong of Atlanta, who makes his case concerning the FAA Operation Specification A008, and the Counter Point provided by the FAA through three well known attorneys from this agency, Rebecca MacPherson, Joe Conte and Allen Horowitz, who also have filed their response.

Our newsletter seeks to foster an open forum with a balanced presentation of various controversial but important issues that are newsworthy and informative for our members.

Please submit your articles to the editor for publication, but expect to have controversial issues presented in this “Point-Counter Point” section.

Point

FAA Operation Specification A008 — Killing a Flea with a Sledgehammer

by Alan Armstrong

I. Introduction

Beginning in August of 2006, the FAA intends to implement (and apparently enforce) the requirements of FAA (Draft) Operation Specification A008 (the “Operation Specification” or “A008”). The Operation Specification, if implemented in its present form, is likely to disrupt the air taxi industry and put a number of air taxi operators out of business. The Operation Specification is an over-reaction by the FAA to “solve a problem” when there were ample regulations and enforcement criteria to prevent the “problem” the Operation Specification is intended to address. This paper will examine the history leading up to the FAA’s creation of the proposed Operation Specification.

II. The Darby Case

The genesis for the Operation Specification is the case of *Administrator v. Darby Aviation, d/b/a Alpha Jet International, Inc.*, NTSB Order

Number EA-5159 (May 26, 2005) (“Darby”). *Darby* highlights the confusion that exists within the FAA’s ranks about operational control. For example, while the Birmingham Flight Standards District Office (“FSDO”) found that Darby possessed the requisite operational control over an aircraft leased to Darby with flight crew, the Teterboro FSDO reached the *opposite conclusion*. The fact that the Birmingham FSDO concluded that a business arrangement between Darby and Platinum Jet Management (“Platinum”) satisfied Darby’s obligations to maintain operational control over an aircraft as required by the Federal Aviation Regulations provided Darby absolutely *no protection* in litigation before the National Transportation Safety Board (“NTSB”) when the FAA initiated an emergency order of suspension following an accident involving a flight that was allegedly operated under the authority of Darby’s air carrier certificate.

On November 17, 2003, Darby



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and Platinum entered into a charter management agreement allowing Platinum to operate its aircraft

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under the authority of Darby's air taxi certificate. Platinum paid Darby a monthly "Part 135 certificate fee;" and the parties further agreed that in the event Darby provided a revenue flight, then 90% of the funds would go to Platinum and 10% of the funds would go to Darby. Throughout the term of their relationship, Darby never provided such a flight. The pertinent facts were:

- (a) Platinum provided the aircraft;
- (b) Platinum maintained the aircraft;
- (c) Platinum provided and paid for its own maintenance personnel;
- (d) Platinum prepared and kept the maintenance records on the aircraft;
- (e) Platinum employed and dispatched the flight crew;
- (f) Platinum scheduled pilot and flight attendant training;
- (g) Platinum conducted pre-employment and random drug testing;
- (h) Platinum prepared and submitted TSA criminal history records;
- (i) Platinum provided flight scheduling; and
- (j) Platinum prepared and kept records of trip itineraries and flight manifests using Platinum letterhead on the documents.

Before Platinum was allowed to operate on Darby's air taxi certificate, a base inspection by FAA inspectors had to be accomplished and a proving run had to be accomplished as well. As a consequence of these activities by inspectors in the Birmingham FSDO, the relationship between Darby and Platinum

was found to be appropriate and *in compliance* with the Federal Aviation Regulations.

On February 2, 2005, the aircraft leased by Platinum to Darby crashed at the Teterboro Airport. The aircraft had been dispatched with a captain who was not authorized to operate the aircraft on Darby's air taxi certificate. The captain indicated he believed it was a Part 91 flight, by reason of which such qualifications were unnecessary. Darby maintained the flight was not one of its flights, since the captain of the aircraft was not on Darby's air taxi certificate. Predictably, an extensive investigation ensued. The FAA brought an emergency order of suspension of Darby's air taxi certificate, claiming that Darby had "surrendered operational control of its certificate" to Platinum. In a hearing before Judge William R. Mullins on the FAA's emergency order of suspension, Judge Mullins reasoned that since the Birmingham FSDO performed a base inspection and was involved in the proving runs while the Teterboro FSDO was not, the conclusion of the Birmingham FSDO that Darby maintained the requisite operational control trumped the opinions of the Teterboro FSDO inspectors to the contrary. Accordingly, Judge Mullins refused to uphold the FAA's emergency order of suspension of Darby's air carrier certificate.

The FAA appealed Judge Mullins' decision to the NTSB, arguing that it did not have to prove a violation of the Federal Aviation Regulations. The FAA maintained that an emergency order of suspension is akin to a request for a 709 checkride under 49 C.F.R. § 44709(a). In other words, if the FAA has reason to

question the competence or safety of a certificate-holder, then all it has to prove is that the incident in question "raises a question over its qualifications to hold its certificate, without regard to the likelihood that the lack of competence played a role in the incident."¹

The NTSB agreed with the FAA's legal analysis that it was not incumbent upon the FAA to prove a violation in order to suspend, on an emergency basis, Darby's air carrier certificate. Moreover, the NTSB chose not to give meaning to the determination made by the Birmingham FSDO that the relationship between Darby and Platinum satisfied the requirements for operational control under the Federal Aviation Regulations.

III. The FAA's Wet Lease Policy Guidance of October 25, 2005

It has become fashionable for the FAA to publish "guidance" or documents denominated as an "interpretation" of the Federal Aviation Regulations in the Federal Register to abolish a body of case law that has evolved over several decades. A major premise of American jurisprudence has been that the law will be properly formed and evolved as a consequence of conflict between two well-informed and competent advocates who represent parties with competing interests or diametrically opposed perspectives on an issue. This is akin to debate in an academic community involving a thesis and an antithesis where educated peers of the debaters decide which argument is true and which argument is false. The FAA's publication of a "policy guidance" or an "interpretation" undermines this

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basic tenet of American jurisprudence. Rather than the law being formed by a tribunal considering the merits of conflicting arguments, the FAA, after considering comments in response to its policy guidance or interpretation decides how the law or policy will be articulated or applied. In effect, one advocate in a debate has the final authority to determine the outcome of the contest. This approach to the development of aviation safety initiatives and policies is pernicious and undemocratic. However, the FAA maintains it possesses the authority to (in effect) *legislate* policies and safety initiatives in this questionable manner based on 49 U.S.C. §§ 44709(b)(3) which provides:

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

The FAA has exploited this declaration by Congress by publishing guidance and interpretations in the Federal Register, which overturned decades of well-reasoned case law.

The FAA's *Wet Lease Policy Guidance* was published in 70 Federal Register 61684 on October

25, 2005 (the "Policy Guidance").² The focal point of the FAA's Policy Guidance was the *Darby* case, which (the reader will recall) did not involve proof by the FAA that any violation of the Federal Aviation Regulations had occurred. Rather, all the FAA proved in *Darby* was whether or not a question had been raised about the qualifications of *Darby*. Nevertheless, the FAA went on to declare in its Policy Guidance that the "illegal operator" had held itself out to the public as a legitimate air carrier.³ While, over many years, the FAA has published advisory circulars and bulletins explaining operational control, the Policy Guidance appeared to venture into new territory. The Policy Guidance spoke in terms of "inadequate operational control."⁴ The Policy Guidance maintained that a wet lease (i.e., the lease of an aircraft with at least one pilot) from an aircraft owner to an air taxi operator was illegal even though there was no finding made in *Darby* of a violation of the Federal Aviation Regulations.⁵

The Policy Guidance maintained that aircraft owners could only dry lease their aircraft to air taxi operators.⁶ However, the Policy Guidance contradicted itself by declaring that a wet lease from the aircraft owner that provided the pilots would be appropriate in the event there was a "written acknowledgement" signed by the air carrier, the aircraft owner and the pilots, declaring that the airmen would serve only as the agents of the air carrier during all Part 135 operations.⁷ Having declared earlier that *written documents and contracts were not material* and that the FAA would evaluate situations involving wet leases on a case-by-case basis looking at the particular facts of the case, the FAA, again, contradicted itself by declaring:

An acknowledgement that the pilots are the carriers' agents (*even where the pilots remain the employees of the owner, as evidenced, for example, by the owner's issuance of IRS Form W-2's*) helps reduce any confusion as to which party has the authority and the responsibility to conduct a safe for-hire flight.⁸

While the *self-contradictory terms* of the Policy Guidance should be disturbing to any air carrier which leases aircraft from owners who may also make their pilots available to operate the aircraft under the air carrier's certificate, the FAA is about to adopt far more ominous and troublesome "guidance" for air taxi operators in the form of the Operation Specification.

IV. The Operation Specification

The bottom line as far as the FAA is concerned is that beginning in August of 2006 an air taxi operator must either own all of the aircraft it operates or, if the aircraft are leased, the aircraft must remain in the legal custody of the certificate holder and must remain in the air taxi operator's "exclusive possession or custody during all Part 135 flights."⁹ With regard to pilots, the FAA maintains each pilot must be in the direct employ of the air taxi operator or be an "agent during every aspect of the Part 135 operations, including those aspects related to any pre-flight duties."¹⁰ Further, "[e]ach pilot must be specifically listed by name and airman certificate number on a list of pilots maintained by the certificate holder at its (sic) main base of operations..."¹¹

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Citing 14 CFR §§ 135.25, the FAA asserts that at least one aircraft that satisfies the pertinent requirements “must remain in the certificate holder’s exclusive legal possession and actual possession.”¹² An air taxi operator may not operate under a fictitious name.¹³

The Operation Specification again complains about wet leases and the fact that lessor should not dictate to the lessee (the air taxi operator) who can fly the airplanes on the trips. The Operation Specification warns air taxi operators about the danger of transferring, surrendering, or abrogating or sharing operational control responsibility with any other party.

Additionally, the FAA maintains “...the certificate-holder may not wet lease from or enter into any wet leasing arrangements with any person not authorized by the FAA to engage in common carriage operation under Parts 121 or 135 of the Federal Aviation Regulations...”¹⁴

Accordingly, the Operation Specification, at least one management person must determine before a flight that the crewmember is qualified, that the aircraft is airworthy, and that the flight can be initi-

ated and conducted or terminated in accordance with Part 135 of the Federal Aviation Regulations.¹⁵

Finally, the failure of the pilot to comply strictly with the Part 135 requirements may subject the air carrier to legal enforcement action.¹⁶

Finally, it is very important to note that the FAA has been continuously changing the Operation Specification. Currently, it is advancing its seventeenth (17th) draft of the document. The National Business Aircraft Association (“NBAA”) is working hard to ameliorate burdens imposed by this moving target sponsored by the FAA. With this ever-changing Operation Specification scheduled to take effect in August of 2006, air taxi operators must be experiencing a level of concern in attempting to comply with this constantly-evolving “safety initiative.”

V. Conclusion

The function of all government organizations is to perpetuate their own existence. Recent history suggests that the function of the FAA is to enlarge and magnify its power at every available opportunity. It is curious that a case that did not involve any proof of a violation of the Federal Aviation Regulations is going to have such far-reaching and draconian effects on the air taxi industry. Precisely why the air taxi industry is in need of the Operation

Specification remains unexplained by the FAA. Rather, a case that involved a lack of coordination and communication between the air taxi operator and the lessor of the aircraft resulting in the dispatching of the aircraft with an unqualified captain has now become transformed into a mandate embodied in the Operation Specification. Respectfully, the Operation Specification will have significant adverse effects on the industry as the FAA undertakes to solve a problem that was never serious in the first instance.

Footnotes:

¹ *Administrator v. Darby Aviation, d/b/a Alpha Jet International, Inc.*, NTSB Order Number EA-5159 (May 26, 2005), p. 18.

² 70 Fed. Reg. 61684 (October 25, 2005) [Docket Number: FAA-2005-22765].

³ 70 Fed. Reg. 61685.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 61686.

⁷ *Id.*

⁸ *Id.*, Italics supplied.

⁹ The Operation Specification, par. 2.

¹⁰ *Id.*, par. 1.

¹¹ *Id.*

¹² *Id.*, par. 3.

¹³ *Id.*, par. 4.

¹⁴ *Id.*, par. 5.

¹⁵ *Id.*, par. 6.

¹⁶ *Id.*, par. 7.

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Counter Point

FAA Operation Specification A008: Reemphasizing the Duty of Carriers to Maintain Effective Control Over Their Common Carriage Operations.

by **Rebecca MacPherson, Joe Conte and Allan Horowitz**

I. Introduction

The draft Operation Specification A008 (OpSpec A008) which is planned for implementation later this summer largely restates the Federal Aviation Administration's existing policy regarding an air carrier's responsibility to maintain operational control over its air carrier operations. Rather than having draconian effects on the air taxi industry, OpSpec A800 will reiterate existing law on acceptable business practices. While Mr. Armstrong may believe that the circumstances in the Darby case were so extreme as to obviate any additional policy guidance, the FAA believes that the facts surrounding that case, and investigations into other questionable operations, indicate a potentially pervasive misunderstanding of the duties and responsibilities imposed by Federal statutes and regulations.

At the outset, we urge readers to carefully read the decision of the National Transportation Safety Board (NTSB or Board) in the case of *Administrator v. Darby Aviation d/b/a Alphajet International, Inc.*, NTSB Order No. EA-5159 (2005). Examination of the pertinent facts of the case, which are set forth below, leads to the inescapable conclusion that Darby Aviation d/b/a Alphajet International, Inc. surrendered operational control of flights for compensation or hire to

Platinum Jet Management based on the "Charter Management Agreement" and the manner in which it was implemented.

As a result of the illegal operations at issue in *Darby*, the FAA initiated legal enforcement action against both Darby and Platinum, and has engaged in a collaborative effort with industry (NBAA and NATA) to develop a new operational control op spec, which clearly articulates an air carrier's responsibility to exercise operational control and the manner in which it must be exercised; and to better educate both FAA personnel and the on-demand air carrier community with respect to the exercise of operational control.

In a nutshell, the FAA is acting to reduce the chances that either an illegal operator or a less than vigilant certificated operator will fail to conduct a safe operation. Our goals in issuing OpSpec A008 are to make sure that:

1. only certificated carriers conduct common carriage flight operations in accordance with part 121 or 135 safety rules;
2. certificated carriers have sufficient management control systems in place to make required safety assessments before such flight operations commence;
3. certificated carriers have actual, practical and effective means of control over flightcrews; and



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Joe Conte is the manager of the Operations Law Branch of the FAA's Regulatory Division within the Office of the Chief Counsel. He has served in this position since 1992. In addition to advising senior level management within the FAA, Mr. Conte assures the legal sufficiency of all FAA rule-making activities related to parts 91, 119, 121, 125 and 135 of the Federal Aviation Regulations.

Allan Horowitz is the FAA's Office of Chief Counsel's Special Programs Manager for the Enforcement Division. As such, he is responsible for unique enforcement programs such as hazardous material enforcement, as well as high-profile enforcement actions like those involving operational control.

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4. certificated carriers have not attempted to relinquish or shift responsibility and accountability for the safe operation of such flights to others.

II. FAA's Authority to Act

The FAA is authorized under its governing statute “to encourage the development of civil aeronautics and safety in air commerce.”¹ Air carriers, on the other hand, have a statutory “duty to provide service with the highest possible degree of safety in the public interest.”²

Consistent with our authority, the agency has a duty to take whatever action it deems appropriate to protect the public interest, when the FAA determines that an air carrier is providing service at a level that does not satisfy the “highest possible degree of safety” standard.

Congress has not limited the FAA's authority to act to specific enforcement actions, as Mr. Armstrong implies in his article, but more generally requires the agency to regulate in a manner that best ensures aviation safety without imposing unreasonable restrictions on the aviation industry. The actions undertaken by the FAA over the past several months and the anticipated issuance of OpSpec A008 later this summer are fully consistent with the agency's mandate to protect aviation safety, and they do not represent a “pernicious and undemocratic” approach to the development of aviation safety initiatives.

The FAA's actions are fully consistent with both its own enabling legislation and with the Administrative Procedure Act.³ While Mr. Armstrong may prefer all govern-

mental action be ultimately dictated by “a tribunal considering the merits of conflicting arguments,” such an approach is not only unwieldy, but contrary to the separation of powers doctrine established in the United States Constitution.

Nevertheless, Mr. Armstrong's concern that the FAA regulates and issues policy guidance without the benefit of debate and public participation is misguided.

FAA officials have made presentations at workshops for part 135 on-demand carriers, FAA inspectors, and others concerning operational control and draft OpSpec A008. By the time this article is printed, workshops will have been held in Newark, Washington, Los Angeles, Chicago, Atlanta, Ft. Lauderdale, Las Vegas and Anchorage. We have taken suggestions from trade associations, private sector attorneys, FAA field inspectors, and part 135 carriers concerning the draft op spec. We believe that many of the suggestions we've incorporated have made the draft clearer and more focused on the key safety and control issues. We are interested in reviewing all comments to the document that will be issued later this summer. In regard to those parts of the op spec that we view as merely restatements of existing regulations and case law, we expect few, if any, substantive objections. In regard to those parts of the op spec that would be new requirements, we will review those comments in order to decide whether to impose those new requirements.

III. Operating Authority Under 14 CFR Part 119

When the FAA considers whether to grant an applicant (an individual or an entity) a Part 119 air carrier

certificate or a Part 119 operating certificate, we evaluate whether the applicant has the people, equipment and capability to conduct common carriage operations in accordance with the more demanding safety rules applicable to such operations set forth in parts 121 and 135 of the Federal Aviation Regulations.⁴ Applicants receiving a part 119 certificate are authorized to conduct common carriage operations through the carrier's employees and agents. The carrier is responsible and accountable for the actions and inactions of its employees and agents during part 121 and part 135 operations. A Part 119 certificate holder is not authorized to create an environment whereby it appears that it is conducting the operations, but in reality someone else is conducting the common carriage operations. This “surrender of operational control” by the certificated carrier to an uncertificated individual or entity is particularly troublesome because, by statute, only certificated operators are allowed to operate as an air carrier.⁵ Even in situations where a carrier hasn't surrendered operational control to an outside entity, a carrier cannot allow itself to develop sloppy business practices that cause it to be ignorant of critical safety issues in its own operations or surrender authority and control over its own employees and agents.

The FAA has found in the course of several investigations that some air carriers have allowed non-certificated businesses to operate as if they were the certificated carriers. The business arrangements discovered in these investigations have raised “red flags” because they use business practices as a shield that hides the actual nature of operations.

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Full-fledged transfer of financial responsibility for operations, including acceptance of legal liability, or the addition of the name of a non-certificated aircraft owner to a carrier's operations specification as a d/b/a are both questionable practices. Acceptance of financial and legal liability for the value of the aircraft hull may be perfectly acceptable, but the wholesale transfer of liability from the carrier to the aircraft owner for the safety of flight operations indicates that the owner will control the day-to-day operations for which it is willing to accept liability. Likewise, the use of a d/b/a designation is not always problematic. These fictitious alter-egos are often used to show an affiliation between two carriers (e.g., United Express or Delta Connection). However, the improper use of a d/b/a designation creates the illusion that the certificated carrier has dry leased the aircraft from the noncertificated aircraft owner and actually operates the common carriage flights. In reality, the aircraft owner operates the flight, and the true essence of the business arrangement can be likened to the carrier illegally leasing out its part 119 certificate to the noncertificated aircraft owner to operate as if it were an air carrier.

One business practice that is prohibited outright is the "wet lease" of an aircraft from a person not authorized to engage in common carriage operations to a part 119 certificate holder.⁶ The FAA has determined that this type of wet lease arrangement invariably results in an illegal shift of operational control. In those circum-

stances where it is legal for a US carrier to wet lease an aircraft (e.g., a US carrier may wet lease an aircraft to another US carrier), such arrangements must be brought to the FAA's attention before flight operations commence so that the FAA can assess which carrier has operational control of the flight.⁷ A fuller discussion of the issues surrounding wet leases can be found in the FAA's *Proposed Wet Lease Policy Guidance*, published in the Federal Register last fall.⁸

In most cases where there is a question as to whether the carrier has surrendered operational control of common carriage flights to an uncertificated third party, the FAA and adjudicative bodies like the NTSB examine several factors to determine whether operational control has shifted improperly. In the cases we've examined in which the carrier has surrendered operational control to a non-certificated aircraft owner, we have found that such common carriage flights not only fail to comply with the part 119 certification rules, but they also fail to comply with the operational and maintenance safety rules imposed on carriers. Most troubling, however, is often such operations also fail to comply with the rules of parts 91 and 43.

Even when there isn't a surrender of operational control by the carrier to a non-certificated third party, we've run across situations where a carrier doesn't have management systems in place to properly and effectively oversee its flight operations in accordance with the safety rules. For example, the rules require that the carrier know the flight, duty and rest status of the flight-crews and the duty and rest status of the flight attendants before a flight or series of flights com-

mences. And carriers are supposed to know about the maintenance status of aircraft at the beginning of a duty day. We have found that several carriers had no procedures in place for carrier managers to obtain such information before flights commenced. Such failures are inconsistent with all fundamental concepts of operational control and are inconsistent with "... the duty of an air carrier to provide service with the highest possible degree of safety...."⁹

In order to address these concerns, the FAA has drafted OpSpec A008 for on-demand part 135 operators. Substantively, we believe that 95% of the op spec restates existing requirements and provides the boiled-down black letter law from several cases addressing operational control issues. The only "new" requirement that the agency will be proposing is a requirement for a carrier to communicate with an aircraft owner's insurance company and any financial institution about business arrangements to use the aircraft in the carrier's common carriage operations.¹⁰ Because OpSpec A008 is largely a reiteration of existing guidance, we believe the document will serve as a useful outline for carriers to ensure they maintain operational control of their flight operations and maintenance responsibilities.

IV. Administrator V. Darby

On February 2, 2005, a Challenger 600 aircraft leased by Platinum to Darby crashed incident to takeoff on a flight departing Teterboro Airport, Teterboro, New Jersey. It was an on-demand passenger-carrying charter flight that was conducted under the ostensible authority of

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Darby's air carrier certificate. The events that led to the crash were set in motion on November 17, 2003, when Platinum and Darby executed an illegal "Charter Management Agreement", allowing Platinum to exercise operational control¹¹ over passenger-carrying revenue flights that were conducted under the ostensible authority of Darby's air carrier certificate. The terms of the agreement permitted Darby to create an environment that allowed Platinum, an uncertificated entity, to operate flights for compensation or hire under the apparent authority of Darby's air carrier certificate, when Darby had no knowledge of the critical safety factors that are essential for the exercise of operational control.

On March 23, 2005, the FAA issued an emergency order suspending Darby's air carrier certificate until it demonstrates to the satisfaction of the Administrator that it has not surrendered operational control of flights conducted under its certificate. Darby appealed the order to the NTSB and a hearing was held before Administrative Law Judge (ALJ) William R. Mullins. Although the ALJ found that the February 2 flight was a flight for compensation or hire conducted under Part 135 of the Federal Aviation Regulations, he concluded that the flight was not conducted under Darby's air carrier certificate because Platinum did not follow the appropriate procedures to notify Darby and, therefore, Darby was unaware of the flight. Accordingly, the ALJ reversed the FAA's emergency order. In reaching this conclusion, the ALJ placed great

weight on the fact that the FAA investigating office did not conduct a base inspection to evaluate operational control. The FAA appealed the ALJ's decision to the full Board.

Upon evaluating the evidence in the proceeding, the Board found that Darby failed to maintain operational control.¹² The Board determined that Platinum, not Darby: controlled the initiation, conduct, and termination of each flight listed in the emergency order; controlled crew and aircraft scheduling; accepted charter flights from the public; handled flight planning; designated the pilot-in-command for each flight; specified the conditions under which a flight could be released, such as weather minimums, flight planning, airworthiness of aircraft, aircraft loading and fuel requirements.¹³ As a result, the Board concluded that **"each of these functions performed by Platinum represents areas in which Darby surrendered operational control."**¹⁴ (Emphasis added.)

Mr. Armstrong places great significance on the differing viewpoints of Aviation Safety Inspectors in the Birmingham, Alabama FSDO and the Teterboro, New Jersey FSDO regarding whether Darby exercised the requisite operational control over flights conducted in the aircraft that Platinum purportedly provided to Darby. He appears to set forth an equitable estoppel argument, where the FAA should have been precluded from even arguing a lack of operational control because the Birmingham FSDO had knowledge of and approved the Charter Management Agreement between Darby and Platinum. This premise is illogical given the Supreme Court's holding in *United States v. Mead*,¹⁵ where the Court implicitly recognized that large Federal agen-

cies will inevitably reach inconsistent conclusions in rulings made at a local level, and that it is inappropriate to afford substantial deference to such local rulings.

Mirroring the Court's sentiment in *Mead*, the Board recognized that "[i]n a large organization such as the FAA there will inevitably be differing views."¹⁶ The FAA Administrator was within her rights to take a position different from the Birmingham FSDO to protect the public interest. Indeed, the Board strongly endorsed the Administrator's action when it declared that "the Administrator can, and ... should, overrule a FSDO's position if she believes it is incorrect or may be inconsistent with safety."¹⁷

V. Conclusion

While an air carrier, such as Darby, may find great financial reward in allowing an uncertificated entity, such as Platinum, to conduct flights in air transportation under the apparent authority of its air carrier certificate, safety is compromised when the certificated air carrier is unwilling or unable to maintain operational control. The certificated air carrier will not be making the safety critical decisions necessary to conduct flights at the highest level of safety, e.g., decisions regarding crew qualifications and scheduling, duty and rest requirements, and conditions under which the flight can be released, such as the airworthiness of the aircraft.

Because these practices degrade the level of aviation safety contemplated by statute and existing regulations, the FAA believes we must act to curb the types of abuses found in *Darby*. Increased enforcement will capture those carriers

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Ninth Circuit Further Interprets GARA's Statute of Repose, Confirms Its Application To Foreign Manufacturers

In a recent unpublished opinion, *LaHaye v. Galvin Flying Service, Inc.*, 144 Fed. Appx. 631 (9th Cir. Aug. 9, 2005), the Ninth Circuit reaffirmed its interpretation of the so-called "rolling provision" of the General Aviation Revitalization Act of 1994 ("GARA"), 49 U.S.C. § 40101 note, which restarts the Act's eighteen-year period of repose when a replaced component part leads to an accident or injury. The Court also upheld the statute's application to foreign aircraft manufacturers. Although the opinion currently has no official precedential value (see below for possible changes to the rules for citing unpublished decisions), it provides valuable insight into how courts within the Ninth Circuit are applying GARA, as well as the statute's likely implications for both foreign and domestic manufacturers of general aviation aircraft.

Signed into law by President Clinton in 1994, GARA establishes a federal statute of repose barring all claims against a manufacturer—"in its capacity as a manufacturer"—of general aviation aircraft or component parts where the allegedly defective part was first delivered (i.e., sold) more than eighteen years before an accident. GARA §§ 2(a), 3(3). A significant exception to this repose period, however, is that it will restart whenever a plaintiff alleges that an accident or injury was caused by a "replaced" component part. *Id.* § 2(a)(2). That is, even if an aircraft itself is more than eighteen years-old at the time of an accident, if the component that supposedly caused the accident had

been replaced more recently, then GARA will not bar the claim. The Ninth Circuit had previously given this exception (sometimes referred to as GARA's "rolling provision") some extra bite in failure-to-warn cases when it held in *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1157 (9th Cir. 2000) that a modification to a written flight manual could constitute a "replacement" of a component part within the meaning of GARA so long as the plaintiff could show that the revision in question led to the accident.

In *LaHaye*, the Ninth Circuit affirmed that *Caldwell's* reasoning applies to standard components as well as written manuals. Ironically, however, the *LaHaye* panel used *Caldwell* to defeat a plaintiff's design defect claim against a foreign manufacturer, finding that an overhauled part had not been "replaced" within the meaning of GARA and that the accident in question had not been proximately caused by any act of the manufacturer. Significantly, the Court also rejected plaintiff's claim that the term "manufacturer" should be construed by means of legislative history to apply only to domestic aircraft manufacturers. Finding no ambiguity in the term, the Court held instead that GARA applied to all manufacturers—foreign as well as domestic—of aircraft for which the FAA has issued a type or airworthiness certificate. In March of this year, the United States Supreme Court unanimously denied certiorari in the case. 2006 U.S. LEXIS 2256 (Mar. 20, 2006).



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The facts of *LaHaye* are as follows. On December 12, 1999,
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GARA's Statute of Repose

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Peter LaHaye was fatally injured when his 1981 Israel Aircraft Industries, Ltd. (“IAI”) Westwind 1124A jet lost control and crashed in Pennsylvania. The NTSB determined that the trim actuator on the aircraft, originally designed by TRW, Inc., had been incorrectly installed, which led to a detachment of the horizontal stabilizer from the airframe and a subsequent loss of controllability. The 1124A’s trim actuator system had been the subject of a 1997 Service Bulletin (SB 136) issued by Galaxy Aerospace Company, an aircraft product support company, with IAI’s concurrence. SB 136 required that all original trim actuators be removed and replaced with actuators overhauled by TRW, and TRW had in fact overhauled the actuator on Mr. LaHaye’s aircraft in 1998. IAI had also issued a separate Service Bulletin (SB 133), later made mandatory by the FAA, calling for partial disassembly, inspection and reassembly of the actuators in the field to check for possible failures of the tie rods or jackscrews. Sometime prior to Mr. LaHaye’s accident, the overhauled actuator was incorrectly installed on his aircraft, allegedly by a mechanic at Galvin Flying Service, Inc., which had performed maintenance on the aircraft just prior to its fatal flight.

Sandra LaHaye, Mr. LaHaye’s widow, brought products liability and negligence actions against all four defendants but settled with TRW, Galaxy and Galvin prior to trial. At a bench trial before Chief Judge Robert S. Lasnik, of the United States District Court for the District of Washington, LaHaye

alleged that the accident was due to the defective design of the Westwind’s trim actuator and airframe, as well as defective procedures contained within SB 133. The problem for LaHaye, however, was that the trim actuator in question was first manufactured by TRW and installed by IAI in 1981, more than eighteen years before Mr. LaHaye’s accident. Moreover, TRW’s design of the actuator had essentially remained unchanged for 40 years. LaHaye was thus left arguing that the overhaul procedures required by SB 136, including new jackscrews and tie rods, effectuated a “replacement” of the trim actuator system itself, thereby triggering the rolling provision and taking LaHaye’s design defect claims out of GARA’s time-bar.

The trial court rejected this argument, however, noting that the relevant design features of the actuator had remained unchanged since Mr. LaHaye’s aircraft was first sold. Further, LaHaye had not claimed that any changes to the actuator during the 1998 overhaul (i.e., the replacement of parts) caused the accident; rather, she claimed that the *original* design of the actuator and airframe did. Moreover, IAI never “manufactured” or “remanufactured” the trim actuator—TRW did. Thus, even if GARA’s rolling provision could be invoked, LaHaye had settled with the wrong defendant.¹ The trial court also determined that appellant had failed to demonstrate that any alleged defect in the maintenance manual procedures incorporating SB 133 proximately caused the defective installation of the trim actuator, and that GARA applied equally to foreign and domestic manufacturers.

The Ninth Circuit affirmed on all grounds. First, it agreed that the overhaul of the trim actuator did

not trigger GARA’s rolling provision because “[t]he replacement of certain components of the trim actuator as a result of SB 136 did not change the allegedly defective aspect of the design,” which “had been in the marketplace for over eighteen years.” *LaHaye*, 144 Fed. Appx. at 633. Thus, there had been no “substantive alteration” of the allegedly causative design within the meaning of *Caldwell* and plaintiff’s design defect claim against IAI was therefore time-barred. In so holding, the Court implicitly rejected LaHaye’s argument that *Caldwells* (and GARA’s) requirement that the modified or replaced part must have actually caused the incident in question in order to trigger the rolling provision should be limited to written manuals.

Second, the Court soundly rejected LaHaye’s argument that GARA’s legislative purpose—revitalizing the U.S. aviation industry—should be interpreted to limit the Act’s protection to domestic manufacturers. Although LaHaye argued that the term “manufacturer” was ambiguous because it was not immediately apparent whether it applied to foreign as well as domestic manufacturers, the Court disagreed. According to the Court, it had “implicitly” held that GARA applies to foreign manufactures in *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1088 (9th Cir. 2001), which applied GARA’s statute of repose to bar an action against a foreign manufacturer “without commenting that the defendant was a foreign entity.” Moreover, the Court found that the Act’s reference to “manufacturers of general aviation aircraft” unambiguously included foreign manufacturers because a general aviation aircraft “includes any air-

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This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

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“CARELESS OR RECKLESS.”
Such a Charge, By Itself, Is Not Sustainable Unless Notice Of Basis Is Given. Routinely, the FAA will add a charge of “careless or reckless” in violation of FAR 91.13(a) to other charges alleging violation of operational regulations. In such cases, if the operational violations are established, the “careless or reckless” charge is sustained by the NTSB as “residual” to the operational violations. The FAA may also charge an independent “careless or reckless” violation, and the NTSB will sustain the charge if it is independently established. Here is a case in which the “careless or reckless” charge was dismissed because the companion operational charge was not established, and the respondent was not given notice that FAR 91.13(a) was being independently charged. The respondent was charged with operating an un-airworthy balloon in violation of FAR 91.7(a), along with the routine “careless or reckless” charge. After a hearing, the law judge dismissed the FAR 91.7(a) because the FAA failed to prove that the balloon was un-airworthy. However, the judge found that respondent was careless in not more carefully inspecting the balloon before flight. On appeal to the full Board, the respondent

argued that the FAA complaint did not put him on notice that his pre-flight inspection was insufficient. The Board agreed, and dismissed the “careless” charge. “Whether respondent was careless and whether he was on notice that he was being charged with being careless independent of the [operational violation cited in the complaint] are two separate questions.” He may have been careless, but he was not put on proper notice so that he could prepare to defend the independent carelessness charge. Administrator v. Van Der Horst, NTSB Order No. EA-5179, September 30, 2005. While this case is a hopeful sign that the NTSB is beginning to look more critically at the FAA practice of automatically charging careless or reckless, consider the following case that reaches a seemingly contradictory result without citing and distinguishing this Van Der Horst case.

“CARELESS OR RECKLESS.”
The Old Lindstam Precedent Is Resurrected To Avoid The Van Der Horst Case. Just two and one-half months after the Van Der Horst decision the Board (without realizing it?) succumbs to the FAA’s blandishments to avoid it. In this case, an airline transport pilot had his certificate suspended for 30 days based on the allegations that he violated the minimum safe altitude rule of FAR 91.119(d). In routine fashion, the FAA also charged “careless or reckless” in violation of FAR 91.13(a). It does so in virtually every case charging a violation of an operational rule, a much criticized practice. The respondent was departing a hospital helipad, taking off between two buildings as he had



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some 50 times before in his Sikorsky helicopter, when he became momentarily distracted by a large section of torn awning flapping below in the rotor downwash. The blades of the helicopter struck one of the buildings. The helicopter crash-landed on a road near the building. On appeal of the suspension to the NTSB, the law judge, after a hearing, rejected the FAA’s conclusion that respondent had violated FAR 91.119(d). But the law judge affirmed the “careless or

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reckless” charge. The judge reduced the period of suspension to 20 days. On appeal to the full Board, the respondent argued that the FAR 91.13(a) violation is a residual claim that was not charged, and cannot stand, independent of the FAR 91.119(d) violation. He argued that he did not have adequate notice of the charges against him. The full Board rejected the respondent’s argument on a questionable basis. The Board dredged up a 1964 decision in Administrator v. Lindstam for the proposition that the FAA need not allege or prove specific acts of carelessness to support a violation of FAR 91.13(a). “Instead, using circumstantial evidence, she [FAA] may establish a prima facie case by creating a reasonable inference the event would not have occurred but for respondent’s carelessness. The burden then shifts to respondent to promulgate an alternative explanation for the event that casts reasonable doubt on, or overcomes the inference of, the [FAA] Administrator’s claim of carelessness.” The full Board affirmed the violation of FAR 91.13(a), and it did so without ever citing or attempting to distinguish the Van Der Horst case. Administrator v. Bassett, NTSB Order No. EA-5195, December 12, 2005. Query, has the Board, utilizing Lindstam, effectively made every what-used-to-be residual charge of FAR 91.13(a) into a substantive one that respondents in every case must be prepared to defend? Is that fair? Is the Board continuing to condone the FAA’s abuse of FAR 91.13(a) by charging it in every operational incident? Isn’t it obvious that FAR 91.13(a) was intended to cover

operational incidents for which there are no specific regulation covering them, as well as incidents where an operational violation was committed in a careless or reckless manner? The Board and its lawyers would do well to review the well-reasoned dissenting Board members who have over the years criticized the FAA practice.

“CARELESS OR RECKLESS.

The Concept Of Potential

Endangerment. Another criticism of the FAA’s and NTSB’s application and interpretation of FAR 91.13(a) has to do with the requirement of endangerment. Not every act of carelessness or recklessness is a violation. The regulation prohibits only “operat[ing] an aircraft in a careless or reckless manner so as to endanger the life or property of another” (emphasis mine).

However, the FAA and the NTSB have written out of the regulation the requirement for endangerment, contrary to the plain and sensible meaning of the regulation, by requiring no more than “potential endangerment.” “Proof of actual danger is unnecessary.” In reading the innumerable cases in point it is impossible to find an incident in which the FAA has not argued, and the NTSB has not found, potential endangerment. The most recent expression has been in the case of a gear-up landing with no personal injury and only minor damage to the aircraft that the respondent argued was owned by him, i.e., not the property of another. Without any proof, the Board concluded that there was potential danger to “those persons or property that are, or reasonably could have been, in the vicinity of the runway.”

Administrator v. Lorenz, NTSB Order No. EA-5205, January 23, 2006.

EQUAL ACCESS TO JUSTICE ACT. “Substantially Justified”

Standard Interpreted. This case presents a good review of the law and its application. Under the EAJA, the NTSB will award certain litigation expenses to a prevailing respondent when, among other things, the FAA was not substantially justified in pursuing its complaint. The major precedent is a United States Supreme Court decision that defined the term “substantially justified” to mean that the government must show that its position is reasonable in fact and law. The NTSB has further interpreted the term, holding that such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter.

However, also holding, that this test is less demanding than the FAA’s burden of proof when arguing the merits of the underlying complaint. In the appeal at hand, in seeking to have an EAJA award to a prevailing respondent overturned, the FAA argued that the law judge made a credibility determination in reaching his decision. FAA was relying on a prior NTSB precedent that “when key factual issues hinge on witness credibility, the [FAA] Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to a hearing where credibility judgments can be made.” In denying the FAA’s appeal in the case at hand, the Board held that the judge’s decision did not require any credibility determinations. The FAA had charged the respondent with falsification of maintenance records. The judge dismissed this charge because, while mechanical problems were not recorded in the

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whom the FAA discovers. But enforcement action alone is insufficient. The FAA must also act to reemphasize important aspects of its regulations and to educate the on-demand community.

Footnote:

¹ 49 U.S.C. § 40104(a).

² 49 U.S.C. § 44702(b)(1)(A).

³ While Mr. Armstrong claims the FAA “maintains it possesses the authority to (in effect) legislate policies and safety initiatives... based on 49 U.S.C. §§ 44709(b)(3)”, the FAA does not rely on statutory restrictions placed on the NTSB for its authority to regulate and issue policy guidance and interpretation.

⁴ See 14 CFR § 119.39(a).

⁵ 49 USC § 44711(a)(4).

⁶ See 14 CFR § 119.3 and § 119.53(b).

⁷ See 14 CFR § 119.53(a) and (c).

⁸ 70 FR 61684 (October 25, 2005).

⁹ 49 U.S.C. § 44701(d)(1).

¹⁰ Aircraft owners are often required to guarantee that they will not permit others to use the aircraft or that the aircraft will not be used for commercial operations in order to procure financing or insurance. The requirement for such a guarantee indicates that the aircraft owner has represented it is not qualified to conduct air carrier operations.

¹¹ The term “operational control” is defined in 14 C.F.R. § 1.1 as the exercise of authority over the initiating, conducting or terminating of a flight.

¹² *Darby* at 11.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 533 U.S. 218 (2001).

¹⁶ *Darby*

¹⁷ *Id.*

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craft for which the [FAA] has issued a type certificate or airworthiness certificate, which includes the aircraft at issue in this litigation.” *LaHaye*, 144 Fed. Appx. at 633, citing GARA § 2(c).

Although unpublished, *LaHaye* is instructive in demonstrating the Circuit’s willingness to use GARA’s “replacement part” exception both for and against aviation plaintiffs. Together with the Supreme Court’s denial of review, the opinion indicates that, despite the dent that *Caldwell* appeared to make in GARA’s effectiveness, the Act continues to provide significant protection for both foreign and domestic aircraft manufacturers.

United States Supreme Court Approves Citation to Unpublished Decisions in Federal Court

Although several federal circuit courts of appeal, including the Ninth Circuit, currently restrict citation to unpublished decisions like *LaHaye*, this may soon change under a new rule recently adopted by the Supreme Court. Unless rejected by Congress, Federal Rule of Appellate Procedure 32.1 will allow lawyers to cite to the numerous so-called “unpublished” or “non-precedential” decisions that are readily available through other sources.

Footnote:

¹ *LaHaye* also argued that IAI should not be entitled to GARA’s protection because TRW, not IAI, actually manufactured the trim actuator system and therefore IAI was not acting “in its capacity as a manufacturer” within the meaning of the statute. The trial court rejected this contention as well, holding that, regardless of whether IAI was the actual manufacturer of the trim actuator, *LaHaye* had sued IAI in its capacity as a manufacturer—rather than, say, a mechanic, pilot, or some other capacity—and therefore GARA’s protections applied. See, e.g., *Bain v. Honeywell*, 167 F. Supp. 2d 932, 937 (E.D. Tex. 2001).

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maintenance records, there were no actual entries that were false, a required element of the charge. The law judge dismissed the remaining charges as stale under the Board’s stale complaint rule. This disposition did not involve any credibility determinations. And, the FAA did not provide “sufficient, reliable” evidence to show that its pursuit in this case was substantially justified. *Application of Tarascio*, NTSB Order No. EA-5199, December 27, 2005.

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