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President's Message

by Justin Green

JUSTIN GREEN joined Kreindler & Kreindler LLP in 1997 after clerking for the Honorable Alfred J. Lechner in the Federal District Court for the District of New Jersey. He became a partner in January of 2003. Justin focuses his practice on helping families of aviation disaster victims, but also litigates other complex matters. Justin learned to fly while in the United States Marine Corps and served as his squadron's aviation safety officer after graduating from the Naval Postgraduate School's aviation safety program. He was responsible for his squadron's aviation safety, and also for investigating accidents. He holds an airplane and helicopter commercial license from the Federal Aviation Administration. As an aviation lawyer, Justin has successfully represented families in dozens of major aviation cases, including most recently the families of Continental Connection Flight 3407 and Turkish Airlines Flight 1951 victims. He edits Kreindler, Aviation Accident Law published by Lexis/Nexis.

This is my first newsletter article as IATSBA president. I have been trying my best over the last few months to fill the very large shoes willed to me by Gary Halbert of Holland & Knight who performed above and beyond the call of duty during his two years as president. As everyone knows, among other positions in his storied career, Gary was General Counsel of the National Transportation Safety Board and the IATSBA benefited greatly from his expertise and hard work. I am truly honored to follow him.

I joined the IATSBA because I was invited to attend an annual convention where I found an organization of aviation lawyers who love aviation, rather than an organization for lawyers who just happen to practice aviation. I also found that we are a surprisingly diverse bunch. Hell, we even have a parachuting attorney. The conventions that we hold are the best in the aviation law business. We are able to attract terrific keynote speakers, have terrific education classes and, as importantly, we throw unforgettable social events.

I am proud to announce that we have decided to hold the 2014 annual conference on November 13 and 14 in the heart of New York City. We will kick it off with a cocktail reception the night of the 12th and then enjoy two days of learning and fun. We want to make this the largest attended event ever, so please put it on your calendars and spread the word. November is a great time of year in New York City and we will have rooms available at a reduced rate for those who want to stay into the weekend. The hotel will be walking distance to Broadway and some of the finest restaurants in the world. Also, the Intrepid and Space Shuttle will be open and a short walk or cab ride. We hope to put together a tour of the Intrepid for Saturday, November 15.

We need all hands on deck in promoting the event and in helping to grow our membership. I ask that anyone reading this, please make sure that you have renewed your membership and please also reach out to your colleagues and let them know about the benefits of joining the IATSBA, and also about the upcoming New York City conference in November.

We have a team, lead by Greg Winton, who will be putting together the program for the New York City conference. Please contact either Greg or me if you would like to contribute to the planning.

You will hear a lot more from me in the coming months!

Safe flying,
Justin T. Green
President, IATSBA

Editor's Column

by
Greg Reigel

WE NEED YOU!!!!

Since assuming the position of editor of the Air & Transportation Law Reporter, my goal has been, and continues to be, production of an informative and scholarly publication that will educate IATSBA members and assist them with their practices and businesses. I found out right away that this is no easy task. As you probably recall from my prior columns, the single most difficult part of producing the Reporter is soliciting or creating content. Several of our members deliver articles on a regular basis, and for that I am sincerely grateful. Others have submitted articles less frequently, and they are appreciated as well. However, each quarter it has been increasingly more difficult to find members who are willing to write or submit an article for publication in our Reporter. Although I am not sure why this is the case, I am hoping that we can change that trend.

To accomplish this goal, I need your help. As practitioners in the field, you, our members, have experiences that are both relevant and valuable to the rest of our members. We need articles and other contributions from you, our members, to continue the tradition of publishing insightful and educational materials on aviation and transportation law and safety. Please consider writing an article for the Reporter or contributing your research, perceptions, observations and outcomes to share with our members. This is also a perfect opportunity to gain exposure or to add publications to your list of accomplishments. Submitting articles for the Air & Transportation Law Reporter is an easy and guaranteed way to accomplish that goal.

If you would like to submit an article or if you have questions regarding topic, availability etc., please feel free to contact me. I will be happy to answer questions and help you through the process. Also, if you are aware of an upcoming event that may be of interest to our members, please send me the details so we can include the information in the newsletter.

Now on to this edition of the Reporter. In his inaugural President's Message, Justin Green shares his thoughts on his new position, the value of IATSBA and upcoming events. In his FAA Enforcement column, John Yodice reviews recent NTSB decisions that demonstrate the problematic nature of certain appeals to the Board.

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Editor's Column

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Similarly, Katie Inman summarizes several recent post-Pilot's Bill of Rights NTSB decisions in which the Board is reviewing issues on appeal concerning the application of the Federal Rules of Civil Procedure and Federal Rules of Evidence.

Additionally, two of our emerging leaders, Sarah Passeri and Sean Berry, discuss a recent U.S. Supreme Court decision in which the Court further limited the circumstances under which a foreign corporation may be subjected to a court's general jurisdiction. Past IATSBA president Tony Jobe provides us with a review of current Department of Transportation regulations that prohibit an individual from using his or her specimen obtained in connection with a DOT test for non-DOT purposes and the prejudicial impact of that limitation. And finally, your editor discusses a recent Eighth Circuit Court of Appeals decision which confirms the availability of judicial review of an FAA decision to terminate a voluntary disclosure reporting program procedure.

Remember, this is your publication. If you see something you like, please let me know. If you see something you don't like, please let me know that as well (politely and constructively, of course). Help us continue to be one of the pre-eminent aviation transportation law and safety publications. As always, I hope you enjoy this edition of the Air & Transportation Law Reporter. Fly safe.

GREG REIGEL is an aviation attorney and holds a commercial pilot certificate (single engine land and sea and multi-engine land) with instrument rating. His practice concentrates on aviation transactional and litigation matters. Greg is also an Adjunct Professor at William Mitchell College of Law teaching the Advocacy and Advanced Advocacy courses, and he is an Adjunct Professor at Minnesota State University - Mankato teaching the Aviation Law and Aviation Transactions courses.

FAA Update

by
John Yodice

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.

PROBLEMATIC APPEALS TO THE NATIONAL TRANSPORTATION SAFETY BOARD

Two recent opinions of the National Transportation Safety Board merit reporting as a reminder to the Bar that certain appeals to the NTSB are problematic, and the decision to take such appeals should be very carefully considered in light of these precedents.

The first case, *Administrator v. Fatout*, NTSB Order No. EA-5895 (2013), deals with an FAA demand of a pilot to reexamine his or her qualifications to hold the pilot's certificate or ratings, a familiar tool that the FAA uses in its enforcement efforts. This tool comes from the same provisions of the Federal Aviation Act that give the FAA administrator the authority to issue airman certificates. The act authorizes the administrator to "at any time… reexamine an airman holding a certificate issued under…this title." 49 USC 44709. Experience has shown that contesting the required "reasonableness" of such a demand is often much more troublesome than taking the reexamination.

In this case, the FAA demanded reexamination of a private pilot's qualifications based on the complaint of an airport manager at an airport at which the pilot landed his Maule aircraft. The manager said that the pilot had difficulty following the manager's marshalling directions to put the aircraft into a parking space. Also, the manager observed in the terminal, that the pilot was having difficulty programming his hand-held GPS for his return to his home airport. The manager knew that there was restricted airspace along the route home. The manager attempted, unsuccessfully, to prevent the pilot from departing. On his way home the pilot's aircraft was seen on radar by the controlling FAA TRACON facility to be entering the restricted area.

An FAA inspector was assigned to investigate the matter. From a telephone call with the pilot, the inspector said that the pilot's answers to his questions were vague, and the pilot did not seem to understand such common traffic pattern terms as "downwind" and "base leg." Based on all of the circumstances, including the airport manager's complaint and the TRACON evidence, the inspector asked the pilot to submit to an FAA reexamination. The pilot refused, and, in routine fashion, the FAA issued an order suspending his private pilot certificate until he successfully completed a reexamination.

The pilot appealed the FAA order to the National Transportation Safety Board. In a hearing before an administrative law judge of the NTSB, and on further appeal to the full Board, the FAA order was upheld.

At the hearing the airport manager testified to his observations, and that testimony was corroborated by another witness who recalled that the pilot had an unsteady gait as he walked to the terminal, that the pilot had difficulty programming his GPS, and seemed "agitated and belligerent" when the manager offered to

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help him. FAA controllers testified to the radar evidence that showed the flight of the pilot's aircraft into restricted airspace. The pilot, in his defense, testified that the manager was trying to "hijack" his aircraft and hold him at the airport until the pilot paid the manager (for what the pilot was supposed to pay is not identified in the NTSB decision). Reading between the lines, there may well have been some bad feelings between the pilot and the airport manager. The pilot accused the FAA witnesses of lying. But, the pilot did not deny the airspace intrusion; in response to a direct question from the judge, the pilot said that he didn't know if he flew into the restricted airspace. At the conclusion of the hearing, the law judge found that the FAA had a reasonable basis to demand reexamination, based mainly on the law judge's credibility findings in favor of the FAA witnesses.

It is on the appeal to the full Board, that the Board cited to its long line of precedents to the effect that the FAA has significant discretion in determining when a reexamination is warranted, and that the FAA need only make a "minimal" showing of a reasonable basis for requesting reexamination. Based on these precedents and the board's review of the record before the law judge, the board sustained the suspension.

The ordinarily uselessness of an appeal to the NTSB prompts this advice. When a pilot receives a letter requesting that he or she be reexamined, unless the request is demonstrably unreasonable (rarely), the pilot should take the FAA letter to his or her flight instructor. He or she should ask for flight and ground instruction on the matters that are specified in the letter to be examined. The instruction should be logged. After the instructor is satisfied, the pilot should present him/herself for reexamination.

Two things have been accomplished. First, the pilot has demonstrated to the FAA inspector a safety and compliance disposition as well as the competency for which the inspector is looking. Secondly, while a reexamination will still be conducted, this procedure makes it difficult for the FAA inspector to fail the pilot in light of the instruction that was received and supported by an FAA certificated flight instructor's logbook entries.

The second case, *Administrator v. Gellert*, NTSB Order No. EA-5695 (2014), involves a very similar procedural situation, and a similarly problematic appeal, but this time in the context of a pilot's application for renewal of his FAA airman medical certificate. The FAA demanded that the pilot undergo a mental evaluation by a board certified forensic psychiatrist. The pilot believed that the demand was unjustified. He refused. His refusal triggered a routine order by the FAA suspending the pilot's medical certificate on an emergency basis (meaning immediate grounding) until the pilot complied with the FAA demand.

The pilot appealed the suspension order to the NTSB, challenging the reasonableness of the FAA demand for a psychiatric evaluation. His appeal was unsuccessful; after a hearing before an NTSB law judge, and a further appeal to the full Board, the Board affirmed the FAA-ordered suspension.

In deciding the case, the Board synopsized the applicable law: "By regulation, the Administrator may require an airman to provide additional information concerning an airman's

qualifications to possess a medical certificate 'whenever the Administrator finds that additional medical information or history is necessary.' The FAA may suspend or revoke an airman's medical certificate if the airman fails to comply with a reexamination demand; any suspension remains in effect until the airman provides the required information." *See, generally*, 14 CFR 67.413. The Board's precedents, as in this case, consistently show that its review of the FAA's "reasonableness" in demanding further medical information is very narrow. The precedents support the conclusion that the Board is inclined to accept almost any reason that the FAA offers. As the NTSB law judge said, "the standard here is a very light one."

The facts of this case could be considered as amply justifying the FAA's demand and its subsequent order of suspension. The pilot involved is a former Eastern Airlines captain. His mental health issues relate almost exclusively to the 1970s. In the 1970s he was evaluated by doctors in connection with his employment, one of whom diagnosed a clinical disorder related to paranoia. "Because of [the pilot's] efforts to conceal and to hide the fact of his paranoid distortions, it is difficult to obtain much more in the way of hard evidence." Subsequent evaluations by four psychiatrists and psychologists, still in the 1970s, conducted at Eastern's request, produced varying conclusions but did not result in definitive diagnoses of clinical disorders. For example, in 1974, one doctor did not diagnose a mental condition but recommended Eastern "ground [the captain] until further psychiatric appraisal." Then there is a long gap in which the pilot was apparently successful in obtaining from the FAA various airman medical certificates.

What brought the matter up in 2012, is that the pilot, while holding a third-class medical certificate, wrote a letter to the Acting FAA Administrator complaining that an FAA employee made inappropriate comments to unnamed individuals regarding the pilot's deceased daughter and asked the Administrator to address the employee's behavior. The pilot described the statements as "material false and detrimental statements published to airports, airlines and other innocent parties, concerning the brutal unsolved murder of my beloved 21-year old daughter."

In response to the letter, an FAA psychiatrist took the occasion to review the pilot's FAA airman medical file. The review disclosed the 1970's history. The FAA psychiatrist then recommended that the pilot undergo a psychiatric evaluation in view of "instances of suspected paranoid ideation dating back to the early 1970s" and the 'highly improbable' allegations of his 2012 letter to the then-Acting Administrator." By precedent, the time lapse was not a problem. The Board, in sustaining the FAA, cited to an earlier case, *Administrator v. Smith*, 5 NTSB 1772 (1987), that "held clinical diagnoses [of a nervous or mental disorder] 26 years prior were not too remote in time to conclude that the Administrator reasonably sought additional information concerning an airman."

So, the message of these two cases is that counsel should carefully consider these precedents before recommending an appeal to the NTSB challenging the reasonableness of an FAA demand for additional medical information or a demand for a reexamination of a pilot's qualifications. Depending on the circumstances, of course, compliance with FAA demands may more likely lead to successful certification than a problematic appeal to the NTSB.

NTSB General Counsel

by: Katie Inman

KATIE PLEMMONS INMAN joined the Office of General Counsel in 2005. Ms. Inman handles cases on the Board's enforcement docket,and serves as the attorney overseeing rulemaking under the Administrative Procedure Act. Ms. Inman has also served as the attorney overseeing compliance with and litigation regarding various statutes involving the availability of information, such as the Freedom of Information and Privacy Acts. Prior to joining the Board, Ms. Inman served as a law clerk to a Federal judge in the Eastern District of Texas, where she assisted in research and drafted opinions on a variety of issues. Ms. Inman has also authored and published articles in scholarly journals concerning the legislative process and Federal programs.

In the wake of the Pilot's Bill of Rights, Pub. L. 112-153 (Aug. 3, 2012), the Board is now beginning to review issues on appeal concerning the application of the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE).

Federal Rules of Civil Procedure

In *Administrator v. Harless*, NTSB Order No. EA-5699 (Jan. 28, 2014), the Administrator revoked, on an emergency basis, the respondent's airline transport pilot (ATP), flight instructor, and mechanic certificates. The Administrator alleged the respondent falsified ten airman certificate and/or rating applications submitted by ten different airmen, by incorrectly verifying the airmen had undergone certain checks necessary for obtaining the certificates for which they applied.

The Board stated FRCP 6(d) applied to aviation enforcement cases on appeal, thereby permitting a respondent three additional days in which to file the notice of appeal under 49 C.F.R. § 821.53(a). However, because the *Harless* case proceeded as an emergency, application of FRCP 6(d) to the case was not practicable. The Board reasoned the time constraints applicable to emergency cases, which proceed under Subpart I of the Board's Rules of Practice, precluded the Board from permitting extra time for the filing of appeals.

In *Administrator v. Dangberg*, NTSB Order No. EA-5694 (Dec. 17, 2013), the Administrator stated the respondent flew his Beechcraft 95-B55 multiengine aircraft on a flight in which he performed a crash landing shortly after taking off, due to fuel starvation. The Administrator charged the respondent with violation of 14 C.F.R. §§ 61.31(d), 91.13(a), and 91.151(a)(1), and ordered revocation of the respondent's private pilot certificate, on an emergency basis.

The Administrator sent the emergency order to respondent via certified mail, overnight delivery service, and regular mail. Exhibits in the case record established the respondent received the order from the overnight delivery service provider as well as the United States Postal Service. However, the respondent's appeal of the order was untimely.

On appeal, the respondent argued FRCP 4 and Nebraska law meant the date of *receipt* of the Administrator's order served as the date of official service. The Board rejected this argument, finding 49 U.S.C. § 46103, which provides, "[t]he date of service made by certified or registered mail is the date of mailing," applied to all aviation certificate enforcement cases. Based on the applicability of § 46103, the Board determined Nebraska law and FRCP did not obviate the standards of § 46103. The Board determined the

evidence in the record established the respondent's appeal was four days late, and the respondent did not articulate good cause for the late-filed appeal.

In *Petition of Repetto*, NTSB Order No. EA-5682 (Oct. 23, 2013), the Administrator denied the petitioner's application for a medical certificate based on the petitioner's history of alcohol abuse and dependence. During discovery, the Administrator requested records from the petitioner concerning the petitioner's treatment at a behavioral health facility. The petitioner did not provide records, nor did he provide a release to the Administrator's attorney to allow him to obtain the records. The law judge granted summary judgment in favor of the Administrator.

The petitioner appealed, and argued the Pilot's Bill of Rights indicated he was entitled to additional discovery. The petitioner argued *Celotex v. Catrett*, 477 U.S. 317 (1986), and FRCP 56(c) require parties to engage in adequate discovery prior to filing a motion for summary judgment. The Board noted FRCP 56(c) provides summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" establish the absence of a genuine issue as to any material fact.

The Board disagreed with the petitioner's position that *Celotex* required additional discovery in the petitioner's case. The Board noted the Supreme Court stated in *Celotex* that Rule 56 permits the disposition of a case via summary judgment when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." The Board also stated the Court's opinion did not specify a timeframe or types of discovery obligations the FRCP required; instead, the Court indicated summary judgment was proper in some cases even though the moving party has not supplied affidavits in support of its motion.

Federal Rules of Evidence

In *Administrator v. Rigues*, NTSB Order No. EA-5666 (June 14, 2013), the Administrator ordered revocation of the respondent's ATP certificate on an emergency basis. The Administrator alleged the respondent violated 14 C.F.R. § 61.59(a)(2) by not providing accurate logbooks to his flight training provider upon his receipt of training.

At the hearing, when respondent took the stand in his own defense, he denied intentionally falsifying any documents. He stated he sent a copy of his logbook in an Excel spreadsheet certifying it was true and correct, but, after sending it, he realized the spreadsheet contained errors. The law judge did not allow respondent to elaborate on what errors the spreadsheet contained or

how he corrected them. In addition, the law judge denied the admission of the spreadsheet into evidence, but permitted the admission of the email message to which the spreadsheet was attached.

The Board determined the law judge's exclusion of the spreadsheet, as well as his interruption of the respondent's testimony on the issue, was erroneous. The Board held the law judge inconsistently applied the FRE, because he denied the testimony and spreadsheet, but admitted a very similar exhibit the Administrator offered. The Board mentioned the Pilot's Bill of Rights in stating, "[i]n light of the fact respondent is pro se and Congress has instructed the Board to apply the [FRE] to our proceedings, to the extent practicable," the law judge's rulings could not withstand scrutiny.

In *Administrator v. Fatout*, NTSB Order No. EA-5685 (Nov. 15, 2013), the Administrator ordered reexamination of the respondent's qualifications under 49 U.S.C. § 44709, after the respondent flew into restricted airspace in his Maule, MXT-7-180A. The respondent, who proceeded pro se, attempted to offer several items into evidence that consisted of hearsay under FRE 801.

In particular, the respondent offered letters from the airport manager at the airport at which he arrived prior to taking off and proceeding into restricted airspace. The respondent did not call the airport manager to testify at the hearing. The law judge excluded the letters, based on the FRE prohibiting hearsay. The Board affirmed the law judge's ruling.

The Board also mentioned FRE 403, in affirming the law judge's exclusion of an exhibit that consisted of respondent's own written statement addressed to a "Magistrate Court." The law judge found the document, which the respondent offered, was not subject to admission because the respondent was present to testify at the hearing. Citing FRE 403, the Board stated the law judge's exclusion of the document was within his discretion in balancing the probative value of the evidence against the degree to which it was unnecessary and cumulative.

by:
Sarah G. Passeri and
Sean P. Barry

The Supreme Court Further Limits General Jurisdiction Over Foreign Corporations

Following its landmark decision *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), the Supreme Court recently reinforced its holding that a defendant corporation will be subject to general jurisdiction in a state *only if* its affiliations within the state are continuous and systematic as to render it essentially at home there. *See Daimler AG v. Bauman*, No. 11-965, 571 U.S. _____ (2014). Taking *Goodyear* one step further, the Supreme Court held that a foreign corporation may not be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. *Id.*

In *Daimler AG*, plaintiffs, citizens of Argentina, sued DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company with no U.S. presence, in federal court in California. Plaintiffs alleged that Daimler's Argentine subsidiary, Mercedes-Benz Argentina (MB Argentina), collaborated with Argentinean state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives who worked at MB Argentina's plant during Argentina's "Dirty War." Plaintiffs asserted jurisdiction over Daimler in California though Daimler's "agent" Mercedes-Benz USA, LLC (MBUSA), an indirect subsidiary of Daimler. MBUSA is incorporated in Delaware with its principle place of business in New Jersey. Additionally, MBUSA is Daimler's exclusive importer and distributor of Mercedes-Benz automobiles in the U.S and has multiple California-based facilities. California accounts for roughly ten percent of all new vehicle sales in the United States, and 2.4% of Daimler's worldwide sales.

At the outset, the district court dismissed the action for lack of personal jurisdiction. The Ninth Circuit reversed, however, finding general jurisdiction over Daimler proper because of MBUSA's contacts in the forum. The Supreme Court unanimously[1] overruled the Ninth Circuit, holding that it erred for three reasons.

First, the Supreme Court rejected the Ninth Circuit's use of the "important service test" in determining jurisdiction. Under that test, a court hypothetically determines whether a company would perform the services itself if the "agent" subsidiary or affiliate did not exist. If the answer is "yes", then the court gains general jurisdiction over the "principal" company. The Supreme Court found that this test "stacks the deck" and would always yield a pro-jurisdiction answer. The Court, however, reserved judgment on

1 Justice Ginsburg wrote for the eight-justice majority and Justice Sotomayor concurred in judgment.

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whether general jurisdiction may be based on an agency theory.

Second, the Supreme Court clarified that general jurisdiction over a corporation will exist only when a corporation: (1) is incorporated in the state, (2) maintains its principal place of business in the state, or (3) has affiliations in the state that are so continuous and systematic as to render it essentially at home in the forum. Here, neither Daimler nor MBUSA had a principal place of business in California nor were either incorporated in California. Additionally, the Court found MBUSA's physical locations and considerable sales in California insufficient to render it essentially at home in California. The Supreme Court reasoned that "a corporation that operates in many places can scarcely be deemed home in all of them." Accordingly, Daimler failed to satisfy any portion of the test.

Lastly, the Court criticized the Ninth Circuit for paying too little attention to the risks of international comity. That other nations do not share the "uninhibited approach" to personal jurisdiction reinforced the Court's determination that subjecting Daimler to personal jurisdiction in California would offend "fair play and substantial justice" due process demands.

The Supreme Court's decision is a breath of fresh air for foreign corporations that have subsidiary or affiliate entities in the United States. These corporations will be able to rest a little easier knowing that the foreign affiliates can no longer serve as an all-purpose hook to litigation wherever they happen to do business.

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DOT Restrictions on Specimen Use

by:
Tony Jobe

"If the opposite of pro is con, what is the opposite of progress?" Paul Harvey*

As you may know, the Department of Transportation ("DOT") promulgated Drug and Alcohol regulations in 49 CFR Part 40. One provision in Part 40, Section 40.13, was first published in 1988, was revised in 2000, and then again in 2010. Since its initial publication, Section 40.13 has become outdated, and it now impinges on the Constitutional rights of pilots and mechanics who are working in safety-sensitive job positions;[1]

In 1999, the DOT proposed a major revision to Part 40 in a Notice of Proposed Rule Making ("NPRM").[2] The NPRM included Section 40.15, which was intended to build a firewall between DOT and non-DOT testing. Section 40.15 stated:

> Sec. 40.15 **If an employer conducts** non-DOT testing, under its own authority, as well as DOT testing, what Federal restrictions apply for the two tests?
>
> (a) Non-DOT tests must be completely separate from DOT tests in all respects.
> (b) The DOT tests must take priority and must be conducted and completed before a concurrent non-DOT test is begun.
> (c) **No tests may be performed on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations. For example, you may not test a DOT urine specimen for additional drugs, and a laboratory may not make a DOT urine specimen available for a DNA test or other types of specimen identity testing.**
> (d) The single exception to paragraph (c) of this section is when a DOT drug test collection is conducted as part of a physical examination required by DOT agency regulations. It is permissible to conduct required medical tests related to this physical examination on any urine remaining in the collection container after the drug test urine specimen has been sealed into the specimen bottles.
> (e) No one may change or disregard the results of DOT tests based on the results of non-DOT tests. For example, an employer

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* In addition to being a colorful and sometimes controversial personality, Harvey was also an avid pilot. He was an Aircraft Owners and Pilots Association member for more than 50 years, and would occasionally talk about flying to his radio audience. He also was a member of the Experimental Aircraft Association, and was frequently seen at EAA AirVenture in Oshkosh, Wis. He was responsible for funding the Paul Harvey Audio-Video Center at EAA headquarters in Oshkosh.

1 For purposes of this article, the term "pilot" or "airman" also includes "mechanic."

2 Fed. Register, Dec. 9, 1999 (Vol. 64, No. 236), pages 69075 – 69136 (emphasis added)

DOT Restrictions on Specimen Use

continued

> may not disregard a verified positive DOT drug test result because the employee presents a negative test result from a blood or urine specimen collected by the employee's physician or a DNA test result purporting to question the identity of the DOT specimen.[3]

In explanation of Section 40.15's intent, the NPRM stated in pertinent part: "Tests not expressly authorized by DOT rules on 'DOT specimens' are forbidden (e.g., tests for additional drugs, DNA tests)."[4] Thus, Section 40.15 forbids the conducting of tests not specifically authorized by DOT rules on "DOT specimens." It is important to note that this provision was written for, and addressed to, employers, not to the individual airman. In practice, however, this section has precluded DNA testing of samples collected under DOT regulations, even if the individual airman's own personal need to test the sample arises from a state or federal case totally unrelated to the DOT collection, testing or any resulting administrative proceeding.

Subsequently, in January, 2010 the policy was revised to comply with language changes adopted by the Department of Health and Human Services:

> In § 40.13, paragraph (c) is revised, to read as follows:
>
> § 40. 13 How do DOT drug and alcohol tests relate to non-DOT tests?
>
> * * * * *
>
> (c) Except as provided in paragraph (d) of this section, you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations. For example, you must not test a DOT urine specimen for additional drugs; and a laboratory or IITF **is prohibited from making a DOT urine specimen available for a DNA test or other types of specimen identity testing.**
> (d) The single exception to paragraph (c) of this section is when a DOT drug test collection is conducted as part of a physical examination required by DOT agency regulations. It is permissible to conduct required medical tests related to this physical examination (e.g., for glucose) on any urine remaining in the collection container after the drug test urine specimens have been sealed into the specimen bottles.[5]

Further, 49 CFR § 40.331(f) provides:

> § 40.331 To what additional parties must employers and service agents release information?

3 *Id*. at page 69099
4 *Id*. at page 69077

5 Title 49: Transportation, Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs (updated 9/27/11), Subpart B – Employer Responsibilities, §40.13(c)(d). (Emphasis added.)

DOT Restrictions on Specimen Use

continued

> **As an employer or service agent** you must release information under the following circumstances:
> (f) Except as otherwise provided in this part, as a laboratory you must not release or provide a specimen or a part of a specimen to a requesting party, **without first obtaining written consent from ODAPC**. (ODAPC is the DOT's Office of Drug and Alcohol Policy & Compliance.) If a party seeks a court order directing you to release a specimen or part of a specimen contrary to any provision of this part, you must take necessary legal steps to contest the issuance of the order (e.g., seek to quash a subpoena, citing the requirements of § 40.13). This part does not require you to disobey a court order, however.[6]

These onerous provisions prohibit the laboratory from releasing back to the airman any of the urine sample submitted by the airman during DOT random drug and alcohol tests other than in connection with an FAA Enforcement case. As a result, in cases such as state or federal civil litigation where use of the sample may be desired or required, these provisions deprive the airman of his or her constitutional rights to seek to prove the airman's innocence or to bring civil suit against a negligent laboratory or collection facility. Although it is likely that this is an unintended consequence of the regulations drafted decades ago, it is clear that curative amendments or remedial legislation is needed to allow for use of DOT specimens in civil state and federal court cases.

A prime example of when DOT samples may be necessary in other litigation arises when DNA testing is desired or necessary in the case. With current technologies, DNA sampling can now be done in a matter of hours as compared to a matter of months as was historically the case. With current legal precedent, the science of DNA is accepted by federal and state law and used prevalently in civil and criminal actions. Unfortunately, as explained above, use of DOT samples for this purpose is currently prohibited.

However, counsel who represents a client who requires DNA testing to prove his or her innocence or harm may have at least two options:

1. In an enforcement appeal to the NTSB or to the DOT, counsel needs to raise the right to DNA testing for use in an unrelated case in federal or state court with the administrative law judge and preserve the record for a subsequent appeal to the DC Court of Appeals.

2. Counsel needs to seek a final order of the DOT or FAA from which an appeal can be taken directly to the United States Court of Appeals arguing that the preclusive application of this DOT regulation works to unconstitutionally prevent the release of a pilot's or mechanic's urine sample, held pursuant to these governmental regulations, and

6 DOT Rule 40 CFR Part 40 Section 40.331. Subpart B, Confidentiality and Release of Information. (Emphasis added.)

DOT Restrictions on Specimen Use

continued

is therefore arbitrary, capricious, and not in accordance with law.

The basis for a Federal Court of Appeals to accept this type of case is The Administrative Procedure Act, which provides in pertinent part that:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."[7]

Further, 5 U.S.C. § 704 states in pertinent part, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[8]

The operational definition of "final agency action" is found in *Bennett v Spear*.[9] In that Supreme Court decision on a case out of the Ninth Circuit Court of Appeals, Justice Scalia identifies two (2) conditions that must be satisfied in order for an agency action to be "final." "First, the action must mark the 'consummation' of the agency's decisionmaking process", referencing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp*.[10] Secondly, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow," citing *Port of Boston Marine*

7 DOT Rule 40 CFR Part 40 Section 40.331. Subpart B, Confidentiality and Release of Information. (Emphasis added.)

8 5 U.S.C. §704 (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393)

9 *Bennett v. Spear* (95-813), 520 U.S. 154 (1997)

10 *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp*., 333 U.S. 103, 113 (1948)

DOT Restrictions on Specimen Use

continued

Terminal Assn. v. Rederiaktiebolaget Transatlantic.[11]

The first condition is met when the agency offers its "last word" on the subject, even if that "last word" does not constitute rule making or adjudication and, even though it is subject to continuing agency review.[12] The second condition is met when the agency action "imposes an obligation, denies a right or fixes some legal relationship."[13]

Thus, once the DOT has refused to allow a laboratory to release an individual's own urine sample, it has "consummated its decisionmaking process." Once that decision is made, the individual has lost his or her right to evidence that may be essential in a non-administrative action and, consequently, the individual has suffered harm because of the "legal consequences (that may) flow."

But, what happens when an agency fails to take action? In a current case being presented to the DOT requesting a final agency order, the Department has failed to act despite several requests over a seven (7) month period. While 5 U.S.C. 706(1) requires a reviewing court to compel agency action that is "unlawfully withheld or unreasonably delayed", the Supreme Court held that in order for an agency action to be subject to 706(1), it must be a "discrete act that it is required to take."[14]

Based on the Court's interpretation of the requirements of 706(1), then, in a situation in which an airman is attempting to obtain his or her own urine sample (or partial sample) for independent testing as evidence in a non-administrative case, if the ODAPC does not decide, either formally or informally, the individual will be required to show that the DOT is required to decide whether or not to allow the laboratory to release the sample based on the language in 49 CFR § 40.331(f). That decision is a "discrete act" that the agency is required to take by its own regulations.

The individual then must also prove that the agency's action was in violation of 5 U.S.C. §706(2)(A). The Court in *Motor Vehicles Manufacturers Assoc. v. State Farm Mutual* relied on 5 U.S.C. §706(2)(A), and employed a four-part test for determining whether a regulation promulgated by the agency was "arbitrary and capricious":

a. The agency relied on factors which Congress has not intended it to consider;

b. The agency entirely failed to consider an important aspect of the problem;

c. The agency offered an explanation of its decision that runs counter to evidence before the agency;

11 *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)

12 *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 594 (9th Cir. 2008)

13 *Reliable automatic Sprinkler Company v. Consumer Products Safety Commission*, 324 F. 3d 726, 731 (D. C. Cir. 2003)

14 *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004)

DOT Restrictions on Specimen Use

continued

or

d. The agency's action is so implausible it could not be ascribed to a difference in view or the product of agency expertise.[15]

Section 40.13 violates both the second and third prongs of that "arbitrary and capricious" test.

First, the DOT violated the second prong of the four-part test outlined in *Motor Vehicles* when it failed to consider an important aspect of the problem. The DOT does not consider the fact that the sample may be required by an individual (not an employer as addressed in the statute) for use in a variety of non-administrative actions: a tort case in state or federal court against the laboratory, paternity suits, criminal court action, to name only a few possibilities.

Clearly the DOT has the mandate to specify procedures to be followed in a federally mandated drug test program. However, state common laws create the duty to use reasonable care. When those federally mandated procedures are not followed with due care, a civil remedy may arise under state law that is totally unrelated to the employer or to the federal agency's administrative action.

This was the situation in the case of *Ishikawa v. Delta Airlines, Inc.*[16] In that case, the plaintiff, Yasuko Ishikawa, was a flight attendant who was fired by Delta Airlines as a result of a random drug test. LabOne reported that Ishikawa's sample's specific gravity was 1.001 and its creatinine was 5mg/dL upon which it based its report to Delta that the tested sample was "not consistent with normal human urine." Because Ishikawa's sample was reported as "substituted", Delta treated the result as they would a refusal to submit to testing, and fired Ishikawa. Ishikawa sued LabOne, alleging that the lab was negligent in analyzing her urine sample and reporting the results. Fortunately for Ishikawa, the judge in the underlying case had ordered that the second half of the sample be tested by another federally approved laboratory.[17] That testing, conducted by Northwest Drug Testing, on a sample from the same urine submitted to the test by LabOne, showed a creatinine level of 5.3 mg/dL and specific gravity of 1.002, a diluted sample but not a sample inconsistent with "normal human urine", as reported by LabOne. In that case, because the Court ordered the testing of the split sample, Ishikawa was rehired by Delta Airlines, paid back pay and benefits, and was awarded both economic and non-economic damages by the Oregon District Court. Those damage awards were upheld by the Ninth Circuit Court

15 *Motor Vehicles Manufacturers Assoc. v. State Farm Mutual*, 463 U. S. 29, 43 (1983).

16 *Ishikawa v. Delta Airlines, Inc.,* 343 F.3d 1129 (9th Cir. 2003)

17 *Ishikawa v. Delta Airlines, Inc.,* 149 Supp. 2d 1246 (D. Or. 2001). A search of documents from that case does not reveal how that split sample was obtained. The Court's Order states only that the parties stipulated that the test should be performed and agreed on the laboratory facility, and the Court so ordered.

DOT Restrictions on Specimen Use

continued

of Appeals.

More recently, a similar situation was presented in *Siotkas v. LabOne, Inc.*, where two (2) employees of Delta Airlines submitted to random drug tests: one as a pre-employment test for a flight attendant position and one as a random test for a pilot position. Both samples tested as "inconsistent with human urine."[18]

Another case currently in a Florida State Court is also on point. A former airline captain lost his pilot and medical certificates following an appeal of an FAA Emergency Order of Revocation to the NTSB in 2007 where the revocation was based upon a urine sample which was identified as indicating high levels of heroin and cocaine.[19] Since 2007, this former pilot has battled, and continues to battle, through the state district, appeals, and supreme courts in Florida, and through the Eleventh Circuit Court of Appeals to prove his innocence by showing that the sample tested by the laboratory was not his sample.[20] In order to do this, he must prove that the tested sample did not come from him. However, this former pilot is currently unable to access the urine sample tested by the laboratory because DOT regulations do not permit the laboratory to release it for that purpose. He continues to battle through his Florida State Court case in an attempt to obtain his urine sample, which is still being held by one of the laboratory facilities, for DNA testing. Unfortunately, the DOT regulation is currently preempting state court discovery orders and, to date, this former pilot has been unable to obtain his sample to submit it for DNA testing. The Fourth District Court of Appeals in Florida ordered that Quest Laboratories cannot be ordered to produce the specimen to the former pilot for DNA testing in the pending state law negligence case because "**federal regulations prohibit it absent DOT authorization**"[21] and that "**request for consent was denied**."[22]

The second condition of the arbitrary and capricious test is met because in 2000 the DOT offered an explanation of its decision to maintain the regulatory language in Section 40 that runs counter to evidence before the agency. The DOT's revisit of Section 40 in 2000 was, in part, in response to changes in technology. The specific question as to whether urine samples taken for DOT testing should be released to the individual for use in DNA testing was addressed. In so doing, the DOT stated:

> One of the most important provisions of this section prohibits the use of DOT specimens

18 *Siotkas v. LabOne, Inc.,* 594 F.Supp.2d 259 (E.D.N.Y.)

19 *Sturgel v. Swaters*, NTSB Order No. EA-5400

20 *Swaters v. Osmus, Acting Administrator, Federal Aviation Administration,* US Court of Appeals for the Eleventh Circuit, No. 08-15409, *Swaters v. Quest Diagnostics, Inc., et al.*, 4D12 – 1183, and CACE1001308621.

21 *Quest Diagnostics Incorporated v. Jeffrey R. Swaters*, 4D12 – 1183 (Fl 4th DCA, 2012), p. 4

22 *Id.*, p. 5

DOT Restrictions on Specimen Use

continued

for tests other than the ones explicitly authorized by this part. For example, the rule forbids laboratories and other parties from making a DOT specimen available for DNA testing. This incorporates in the rule text a long-standing DOT interpretation of Part 40. We say this for two main reasons. First, under these regulations, a properly completed chain of custody conclusively establishes the identity of a specimen. No additional tests are required for this purpose. Second, the only thing a DNA test can do is to determine, to a high level of probability, whether a specimen and a reference specimen were produced by the same individual. If the DNA test establishes a high probability that the original specimen tested for drugs and a reference specimen came from different individuals, this may mean one of four things. It could mean that there was an error in the collection, transmission, or handling of the specimen. It could mean that the employee provided a substituted specimen (e.g., someone else's urine) at the original collection and provided his or her own urine for the reference specimen. It could mean that the employee provided his or her own urine at the original collection and substituted someone else's urine for the reference specimen. It could mean that the individual provided substituted specimens from two different sources at the original collection and for the reference specimen. A DNA test cannot distinguish among these possibilities. Given a proper chain of custody, the last three possibilities are significantly more probable in practice than the first. A DNA finding of difference between the two specimens is not, then, a valid basis for canceling a test.

This reasoning, however, defies logic. Why would an airman substitute a sample for his or her own sample, not knowing whether the substituted sample was clean or not? If a "properly completed chain of custody conclusively establishes the identity of a specimen" and "no additional tests are required for this purpose" as the DOT contends, then would it not also follow that if the chain of custody continues from the laboratory to the DNA testing facility, and there is a completed chain of custody for the comparison sample, then the identity of a specimen would also continue?

So, a redrafting of these regulations or remedial legislation is needed because it is obvious that these regulations were written long ago for only administrative regulatory proceedings of the DOT. The drafters of these regulations seemingly did not foresee that an airman or mechanic may require these same DOT specimens for a civil or criminal action in state or federal court. Thus, the regulation as currently written, at best, likely constitutes an unintended consequence. At worst, it is likely that a federal court of appeals would find the regulation arbitrary, capricious, or not in accordance with law. For these reasons, the regulation needs to be revisited.

Voluntary Disclosure Reporting Program

by:
Greg Reigel

Eighth Circuit Holds FAA Decision To Terminate A Voluntary Disclosure Reporting Program Procedure is Judicially Reviewable

In *GoJet Airlines, LLC v. Federal Aviation Administration*,[1] the Eighth Circuit Court of Appeals was recently presented with an appeal by an air carrier from a determination by the Federal Aviation Administration ("FAA") that the carrier violated 14 C.F.R. §§ 91.13(a) (careless and reckless) and 121.153(a)(2) (operating an unairworthy aircraft). The case arose after GoJet's mechanics installed gear pins in the main landing gear of a CRJ-700 while they were replacing the gear's brake assembly.[2] When the pins were installed, the mechanics failed to make an entry in the aircraft's flight logbook as required by GoJet's general maintenance manual.[3] After the repair was completed, only one of the gear pins was removed. On the aircraft's next flight, the crew observed a warning light indicating the gear would not retract and elected to return to their departure airport.[4]

Upon learning of the error, GoJet immediately disclosed the error to the FAA pursuant to the Voluntary Disclosure Reporting Program ("VDRP").[5] Although the FAA accepted GoJet's VDRP disclosure, the FAA ultimately proceeded with a civil penalty action based upon GoJet's alleged failure to comply with all of the VDRP's requirements.[6] After the FAA's finding that GoJet had violated the regulations as alleged, GoJet appealed the finding of violation and also raised a procedural defense with respect to the FAA's decision to terminate the VDRP procedure.[7]

The Policy Behind The VDRP

The VDRP is available to certificate holders issued certificates under FAR Parts 21, 119, 121, 125, 129, 133, 135, 137, 141, 142, 145, 147,

1 *GoJet Airlines, LLC v. Fed. Aviation Admin.*, No. 12-2719, ___ F.3d ___ (8th Cir., March 4, 2014)(Not yet published).
2 *GoJet Airlines*, ___ F.3d ___, Page 1.
3 *Id.*
4 *Id.* at 1-2.
5 *Id.* at 2. See also FAA Advisory Circular No. 00-58A, Voluntary Disclosure Reporting Program (September 8, 2006). AC 00-58A has been superceded by AC 00-58B Voluntary Disclosure Reporting Program (Apr. 29, 2009)(hereinafter AC 00-58B). AC 00-58B is available online at http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_00-58B.pdf. The differences between the two advisory circulars do not have a substantive impact on the GoJet decision, so for purposes of this article all references will be to the current version, AC 00-58B.
6 *Id.*
7 *Id.*

Voluntary Disclosure Reporting Program

continued

Production Approval Holders ("PAH") and for program managers of qualified fractional ownership programs operating under Part 91K.[8] The FAA established the VDRP to provide a positive incentive to certificate holders, rather than the negative incentives of civil penalties and certificate actions, to promote and achieve compliance and aviation safety.[9] The FAA believes that when a certificate holder detects violations, promptly discloses the violations to the FAA, and takes prompt corrective action to ensure that the same or similar violations do not recur, safe operating practices and compliance with the FAA's regulations will result.[10]

How The VDRP Works

The VDRP does not apply to all violations by a certificate holder. A violation must meet the following five conditions to qualify:

1. The certificate holder has notified the FAA of the apparent violation immediately after detecting it and before the FAA has learned of it by other means;
2. The apparent violation was inadvertent;
3. The apparent violation does not indicate a lack, or reasonable question, of qualification of the certificate holder;
4. Immediate action, satisfactory to the FAA, was taken upon discovery to terminate the conduct that resulted in the apparent violation; and
5. The certificate holder has developed or is developing a comprehensive fix and schedule of implementation satisfactory to the FAA. The comprehensive fix includes a follow-up self-audit to ensure that the action taken corrects the noncompliance. This self-audit is in addition to any audits conducted by the FAA.[11]

The initial notification/disclosure to the FAA must be "timely."[12] Although the FAA states that the disclosure should ordinarily occur within 24 hours of the discovery of the apparent violation, an inspector may accept disclosures that exceed the 24-hour policy when the inspector determines that specific circumstances justify the later submission, and in view of those circumstances, the submission is still

8 AC 00-58B §§ 1 and 3.
9 AC 00-58B § 5.
10 *Id.*
11 AC 00-58B, § 7(b)(1) through (5).
12 AC 00-58B, Appendix 1, § 3

Voluntary Disclosure Reporting Program

continued

considered timely.[13] The notification/ disclosure may be made verbally, in writing or via the FAA's web based VDRP.[14]

The initial disclosure should include the following information:

1. A brief description of the apparent violation, including an estimate of the duration of time that it remained undetected, as well as how and when it was discovered;
2. Verification that noncompliance ceased after it was identified;
3. A brief description of the immediate action taken after the apparent violation was identified, the immediate action taken to terminate the conduct that resulted in the apparent violation, and the person responsible for taking the immediate action;
4. Verification that an evaluation is underway to determine if there are any systemic problems and a description of the corrective steps necessary to prevent the apparent violation from recurring;
5. Identification of the person responsible for preparing the comprehensive fix; and
6. Acknowledgment that a detailed written report will be provided to the certificate holder's principal inspector ("PI") within 10 working days.[15]

Upon receipt, the FAA PI will determine whether to accept the disclosure, return it for editing, or find it invalid.[16]

The detailed written report submitted by the certificate holder within 10 days of the initial notification/ disclosure must include the following:

1. A list of the specific FAA regulations that may have been violated;
2. A description of the apparent violation, including the duration of time it remained undetected, as well as how and when it was detected;
3. A description of the immediate action taken to terminate the conduct that resulted in the apparent violation, including when it was taken, and who was responsible for taking the action;
4. An explanation that shows the apparent violation was inadvertent;
5. Evidence that demonstrates the seriousness of the apparent violation and the regulated entity's analysis of that evidence;
6. A detailed description of the proposed comprehensive fix, outlining the planned corrective steps, the responsibilities for implementing those corrective steps, and a time schedule for completion of the fix;
7. Identification of the company official responsible for monitoring the implementation and completion of the comprehensive fix; and

13 *Id.*
14 *Id.*
15 AC 00-58B, Appendix 1, § 3(a) through (f).
16 AC 00-58B, Appendix 1, § 4(b).

8. Identification of the company official(s) responsible for monitoring the implementation and completion of the comprehensive fix and the self-audit.[17]

Once the PI receives the proposed comprehensive fix, he or she will work with the certificate holder to implement the fix and to ensure that any systemic problems that caused the violation are identified and remedied.[18] Typically, this occurs over a period of time. After initial implementation of the fix is completed, the PI will issue a letter of correction.[19] The PI then monitors the remaining corrective steps identified in the plan. If the certificate holder does not complete the fix or takes actions inconsistent with the fix proposed in the plan, the PI may rescind the letter of correction, re-open the investigative report, and initiate appropriate legal enforcement action.[20]

When all corrective steps are completed, the PI will perform a final assessment to confirm that all required steps were satisfactorily completed.[21] The certificate holder will also perform a self-audit to confirm that the condition that gave rise to the violation has been corrected.[22] If the PI determines that the fix was satisfactory, he or she will then complete a statement of follow-up investigation and close the case.[23]

As an additional incentive to certificate holders, records submitted to the FAA for review pursuant to the VDRP are protected from release to the public under FAA Order 8000.89, Designation of Voluntary Disclosure Reporting Program (VDRP) Information as Protected from Public Disclosure under 14 CFR Part 193.[24]

The Eighth Circuit's Decision

The Court began its review with an analysis of whether an FAA decision to terminate the VDRP in a particular case is judicially reviewable. It initially noted that under 5 U.S.C. § 701(a)(2) a federal agency's decision to initiate an enforcement action is normally unreviewable because that decision is within the agency's discretion.[25]

17 AC 00-58B, Appendix 1, § 5(b)(1) through (8).
18 AC 00-58B, Appendix 1, § 7(a).
19 *Id.*
20 AC 00-58B, Appendix 1, § 7(b)
21 AC 00-58B, Appendix 1, § 8.
22 *Id.*
23 *Id.*
24 AC 00-58B § 13.
25 *GoJet Airlines*, ___ F.3d ___, Page 7.

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continued

However, the Court then observed that "if the agency has made clear its intent that a policy statement or set of enforcement guidelines impose binding limitations on the exercise of its enforcement discretion", then such a decision may be subject to judicial review.[26]

With respect to the VDRP, the Court stated that the "purpose of the VDRP is to encourage voluntary disclosure and compliance by advising certificate holders of circumstances in which the FAA will refrain from commencing civil penalty actions."[27] It then identified the VDRP's explanation of how the FAA "will" proceed if it accepts a certificate holder's initial disclosure as "language that implies the Program is intended to be binding."[28] Interestingly, the Court also found the FAA's consideration of the merits of GoJet's VDRP procedural defense, rather than if the FAA had rejected the defense by taking the position that its decision to commence a civil penalty proceeding is an unreviewable exercise of enforcement discretion, as further evidence the VDRP is intended to limit the FAA's prosecutorial discretion.[29] As a result, the Court concluded "the FAA has made clear its intent that, when it accepts a certificate holder's notice of voluntary disclosure, the VDRP Program imposes binding limitations on how the agency will thereafter exercise its enforcement discretion".[30] Consequently, the FAA's decision to terminate a VDRP procedure is subject to judicial review.[31]

Having determined that it could review the FAA's decision, the Court next turned to the merits of GoJet's procedural defense. GoJet argued that the FAA's unilaterally terminated the VDRP procedure after rejecting GoJet's proposed comprehensive fix and thereby denied GoJet the discretionary administrative appeal authorized by the VDRP.[32] In reviewing

26 *Id.*

27 *Id.* at 8.

28 *Id.*

29 In rejecting GoJet's procedural defense, the Administrator noted the VDRP expressly requires that a proposed comprehensive fix be "satisfactory to the FAA" and "satisfactorily implemented and completed" before the FAA will close a VDRP case with no enforcement action. GoJet Airlines at Page 10. Given the Court's initial focus on the "will" language, it isn't clear whether the FAA's consideration of GoJet's procedural defense was actually a deciding factor for the Court. If the FAA had refused to consider the merits of the procedural defense and simply relied upon its prosecutorial discretion, it is uncertain whether the "will" language would have been enough for the Court to conclude that the FAA's decision to terminate the VDRP proceeding was reviewable.

30 *Id.*

31 *Id.*

32 *Id.* at 8-9. Under the VDRP "[w]hen disputes occur regarding the acceptance of a proposed comprehensive fix, or a modification thereto before the fix is considered satisfactory, the PI and the pertinent regulated entity may request that the issue be resolved at the next

the record below, the Court determined that after the FAA's rejection of GoJet's comprehensive fix, the FAA identified the deficiencies in GoJet's fix and suggested an alternative fix which, if submitted, would be acceptable to the FAA.[33] The FAA also provided GoJet with a deadline by which it could submit a comprehensive fix that would be acceptable to the FAA and informed GoJet that failure to provide an acceptable fix would result in termination of the VDRP procedure and initiation of enforcement action.[34] However, GoJet did not submit an alternative fix nor did it request discretionary administrative review of the rejection of its comprehensive fix as permitted by the VDRP.[35]

The Court agreed with the FAA's finding that GoJet had not submitted a comprehensive fix that was "satisfactory to the FAA" and that such a fix was not "satisfactorily implemented and completed."[36] Rather, GoJet elected not to accept the FAA's suggested comprehensive fix and simply failed to pursue the informal administrative appeal afforded by the VDRP.[37] As a result, once the deadline passed, the FAA was not required to give GoJet any further notice before it terminated the VDRP procedure and initiated the civil penalty action.[38] After deferentially reviewing the facts and the FAA's adherence to VDRP procedures, the Court held the FAA's termination of the VDRP procedure and commencement of the civil penalty action were not an abuse of discretion.[39]

Conclusion

This is a welcome decision. In the absence of any decisions to the contrary,[40] the FAA's decision to terminate a certificate holder's VDRP procedure will now be subject to judicial review, not only in the Eighth Circuit, but hopefully in the rest of the circuits as well. However, as in the *GoJet* case, this doesn't guarantee that the certificate holder will be successful in asserting this procedural defense. But at least a certificate holder will be able to raise the issue and receive a judicial determination regarding the defense.

level of management within the FAA. This procedure will provide for an independent assessment of the areas in disagreement." AC 00-58B §11

33 Id. at 9-10

34 *Id.*

35 *Id.* at 10.

36 The Court provided some additional commentary on this point when it stated in a footnote that "It is hardly surprising that a policy declaring when the FAA will not exercise its statutory discretion to commence enforcement proceedings requires that an informal resolution of the disclosed violations be to the agency's satisfaction." *GoJet Airlines* at 10.

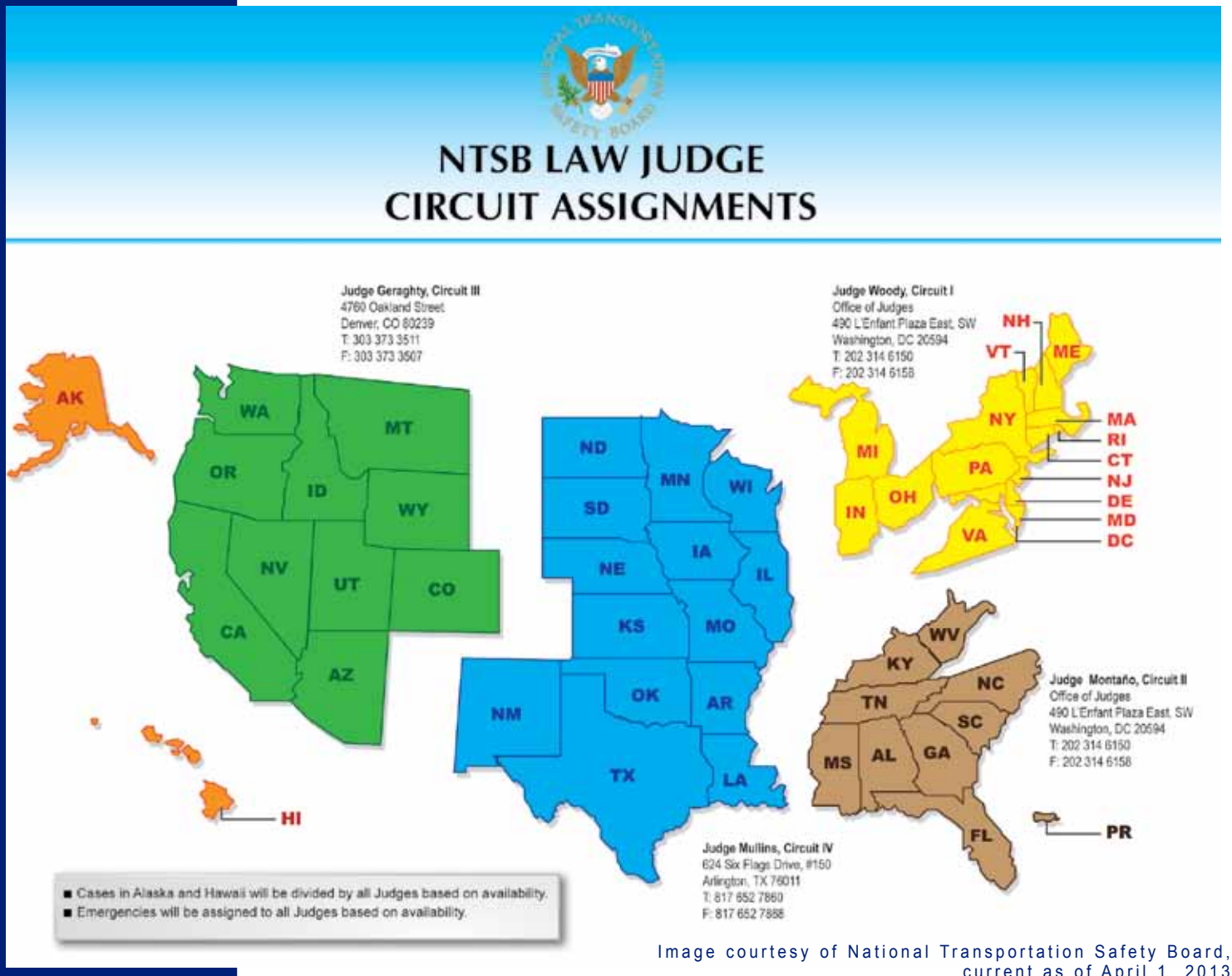
37 *Id.*

38 *Id.*

39 *Id.* at 10-11.

40 A search for cases addressing or analyzing the VDRP did not disclose any cases other than the GoJet case.

Circuit Assignments



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