Air & Transportation Law Reporter

International Air & Transportation Safety Bar Association

ISSUE 02
AUG 2014

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.

I write with exciting news. We will hold the 2014 IATSBA Conference in the city that never sleeps -- New York! This November the conference will take place at the Millennium Broadway Hotel in New York City's Times Square, the heart of the city. Appropriately, the first event will be a cocktail reception on the evening of November 12. We will then have two days of memorable presentations, speeches and panels. The annual gala will take place the evening of November 13 at the beautiful Hudson Theatre which is the second oldest theatre on Broadway.

The theme of our conference will be the past, present and future of aviation law and regulation. The faculty will include some of the most august members of our bar presenting on issues that are of critical importance to aviation law and safety.

November is a wonderful time in New York. Our venue is within walking distance to the best restaurants, shows, shopping and the USS Intrepid Museum. The Times Square area has so many attractions nearby that it is impossible to list them all. We were able to negotiate an incredible room rate with the hotel and will have a limited number of rooms at the reduced rate for those members who want to extend their stay through the weekend.

I am calling on you to support the conference. Your help is critical. We have offered a discount rate for early registrations and it will greatly assist our planning if you would drop everything and register right now (you will save money). Terrific opportunities for sponsorships, both large and not so large, are still available and it is these sponsorships that allow us to hold such amazing conferences and social events. I ask you to please consider becoming a sponsor -- your contribution will be greatly appreciated and prominently recognized before, during and after the conference.

A copy of the conference registration form is included in this edition of the Reporter on page 17. We will post information regarding the conference on our website, www.IATSBA.org. You will also receive mailings, electronic and postal, with the agenda and registration materials. In addition to personally registering, I hope that you will spread the word. The conference is a perfect time to seek new blood for our bar and the New York venue may be attractive to folks who were not able to make it down to Pensacola last year.

See you in New York!

Editor's Column

by
Greg Reigel

As I write this column, preparations are in progress for the annual pilgrimage to the Mecca of general aviation in Oshkosh, Wisconsin: EAA's Airventure. The annual trip provides an opportunity to immerse myself in all things aviation; the latest and greatest, as well as the timeless and classic. And, of course, it doesn't hurt to fan the flames of my passion for aviation.

EAA's Airventure is also a chance to meet with clients, prospective clients, colleagues and friends, and to stay connected with the industry that we aviation attorneys serve. Staying connected is important. The client and prospective client connection is vital: we represent clients, and we need to pay the bills. However, the connections with colleagues are equally as critical. Maintaining a network of other aviation attorneys and industry experts provides a ready base of support from which we can draw as needed for the work we perform for our clients.

Finally, the connections to friends with a passion for aviation, many of which are also clients and colleagues, add an element of fun that makes the practice of aviation law more than just a job. I'm looking forward to all that this year's Airventure will offer and a chance to re-charge my aviation battery. But before I go, this issue of the Air & Transportation Law Reporter needs to go to press!

In this issue of the Reporter, our President Justin Green provides a preview of the upcoming IATSBA conference in New York City. John Yodice explains the limitations contained in the Equal Access to Justice Act which require that attorney's fees and expenses by "incurred" by an applicant who must also be a "prevailing party." Katie Inman from the NTSB Office of the General Counsel discusses several recent district court cases in which airmen were seeking review of Board decisions under the Pilot's Bill of Rights and the jurisdictional and procedural issues raised in those cases.

Member at Large and Past President Tony Jobe provides us with insights into DOT drug and alcohol testing and compliance gained from attendance at the 2014 Drug and Alcohol Testing Industry Association meeting recently held in Phoenix, Arizona. Christina Graziano and Michael Fabiani have created an aviation law matching test in which you can gauge your knowledge of court decisions that have been significant in the development of aviation law. And lastly, we have a tribute to Albert Orgain, a fellow member who recently flew west.

I hope you enjoy this issue of the Air & Transportation Law Reporter. As always, I welcome your comments, input and contributions. I look forward to seeing many of you in New York City in November.

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

INSIDE THIS ISSUE

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.

THE EQUAL ACCESS TO JUSTICE ACT

Many practitioners are aware of the Equal Access To Justice Act which was enacted in 1980 to help persons who defend against government actions to recover their attorneys' fees and other costs if the government was not justified in taking action against them in the first place. The Act applies government-wide. For IATSBA purposes, it has particular applicability to the suspension or revocation of an FAA airman certificate that is appealable to the National Transportation Safety Board. In such cases, the NTSB may award attorneys' fees and other litigation expenses if they were "incurred" by a "prevailing party" unless the FAA was substantially justified in bringing the case in the first place, or an award would otherwise be unjust. In the past, the NTSB has made significant awards under the Act. But, the applicability of the Act is limited. Two recent decisions of the NTSB, each denying an award, illustrate for practitioners the two limitations in quotations, above. These decisions offer very helpful guidance for practitioners.

Administrator v. Roberts, NTSB Order No. EA-5696 (2014), illustrates the concept of "incurred" in the situation in which an applicant's employer paid the costs of successful legal representation in an enforcement action. This case concludes that the petitioner did not "personally" incur the attorney fees, and therefore petitioner was not entitled to an award under EAJA.

In the underlying case, the petitioner prevailed in an action brought by the FAA Administrator to suspend his mechanic certificate as a result of allegedly improper maintenance work he performed in the course of his employment as director of maintenance for an aviation company. Although a NTSB law judge initially affirmed the FAA Administrator's order of suspension, the full Board reversed it on appeal, concluding that the Administrator failed to prove the mechanic violated the regulations as charged. The mechanic, or "applicant", then filed an application under EAJA for an award of fees and expenses that his attorney billed in the course of defending him in the certificate action.

An NTSB law judge denied the applicant's application for fees, concluding that an award of fees to applicant would be improper because the applicant did not personally incur the fees, but rather his employer company had assumed responsibility for the legal expenses associated with the certificate action. On applicant's subsequent motion for reconsideration (that was denied by another judge), the judge relied on the precedent of Application of Livingston, NTSB Order No. EA-4797 (1999). In Livingston, an applicant whose employer paid his legal fees in an FAA enforcement action, and who had agreed to reimburse the employer upon any recovery of fees from the FAA, was held not entitled to recovery of fees and expenses under EAJA because he had not actually incurred the fees. In the appeal from the judges to the full Board in the Roberts case, the Board affirmed the law judges' denial of EAJA fees, relying to a significant extent on Livingston.

In doing so, the full Board reviewed the record presented by the applicant which contained copies of multiple invoices issued by the applicant's current counsel as well as by his predecessor counsel. The Board noted that the invoices were inconsistently addressed, sometimes to applicant and sometimes to his employer company. The applicant's counsel also represented the employer company in multiple unrelated matters. One invoice was directed to the attention of the chief financial officer of the employer company, and listed fees for legal work performed for applicant's case as well as other matters on behalf of the aviation company. The record contained an affidavit by a company official in which the official attested that the company "inadvertently" paid $1,992.32 in fees associated with applicant's case, which were "mistakenly" included in the lawyer's invoices "for work performed for the company in separate matters." The company official further attested by affidavit that no express indemnity agreement existed between the company and applicant. As we say, on this record, the Board affirmed law judges' denial of EAJA fees.

Probably the most significant part of this decision for practitioners is the Board's encouragement to "litigants and their attorneys, from the outset of legal representation, to document litigant's responsibilities with respect to the payment of attorney fees incurred in the course of defending enforcement actions." Had applicant properly documented in advance the arrangement with his employer, the result could have been different. The Board also provides a helpful reference to the case of Administrator v. Peacon, NTSB Order No. EA-4921 (2001), in which the Board spells out for petitioners' counsel how to arrange contingency fee arrangements. "In the future [after 2001], to support a finding of an actual contingency arrangement, we will require written documentation created at the time counsel is hired. Oral statements, under oath or not, will not suffice. Nor will written agreements entered after the fact. With the possibility of EAJA recovery well known to the administrative bar, it is not unreasonable to expect that parties be aware of our precedent [including this Roberts case] at the time of going forward. Nor is it unreasonable to expect parties to enter written agreements evidencing their obligations to each other." Ed.: A word to the wise is sufficient.

Administrator v. Bond, NTSB Order No. EA-5698 (2014), illustrates the statutory requirement that an applicant for an EAJA award be a "prevailing party," a sometimes complicated concept. In this case, the FAA Administrator issued an emergency order suspending applicant's Boeing 777 aircraft type rating pending reexamination. The emergency order was based on the FAA's examination of training records at the Part 142 training center at which applicant received the type rating. The FAA alleged that the training records were incomplete and did not establish that the applicant had received the training necessary for the issuance of the type rating. The applicant appealed the FAA order to the NTSB. While the appeal was pending, the applicant produced evidence establishing that he had undergone simulator training necessary to obtain the rating. Accordingly, the FAA Administrator filed a motion withdrawing the emergency order (that by procedural rule constitutes the Administrator's "complaint" in the appeal) and requesting that the proceedings in the matter be terminated. The NTSB law judge then entered an order terminating the proceeding. Significantly, as it turns out, the judge's order did not specify that the termination was with or without prejudice.

JOHN S. YODICE is senior partner in the law offices of Yodice Associates located in Frederick, Maryland, with an extensive practice in aviation law. He is general counsel of the Aircraft Owners and Pilots Association and the AOPA Air Safety Foundation. He holds Commercial Pilot and Flight Instructor Certificates with airplane single engine, multiengine, helicopter, seaplane, and instrument ratings. He owns and flies a Cessna Turbo 310 and a Piper J3 Cub.

The applicant, through counsel, then filed an application for attorney fees and expenses under EAJA, seeking $37,825 in attorney fees he incurred in the course of his defense. The FAA Administrator opposed the application, arguing that the applicant was not a "prevailing party" because the complaint was withdrawn, effecting the termination of the proceedings without any change in the parties' legal relationship. Based on the FAA's opposition, the law judge denied the application, citing Application of Bordelon, NTSB Order No. EA-5601 (2011), agreeing that applicant was not a prevailing party. On appeal to the full Board, the full Board affirmed the law judge.

The termination of the appeal without an indication whether it was with prejudice or not, proved crucial. The Board said that in determining whether a party is a "prevailing party," it applies the three-part test of District of Columbia v. Straus, 590 F.3d 898 (D.C. Cir. 2010) which requires that "(1) there must be a court-ordered change in the legal relationship of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." The Board held that "the mere termination of a proceeding without prejudice generally is not sufficient, in and of itself, to create prevailing party status. Under the Board's rules of practice, the FAA may withdraw a complaint without leave of the law judge, who may then terminate the proceedings based on withdrawal of the complaint. Termination of the proceedings then becomes a matter of judicial administration – the logical result of the Administrator's voluntary withdrawal of the complaint – rather than an affirmative judicial act that determines the rights of the parties or awards relief," i.e., termination with prejudice. Again, this should be helpful guidance to practitioners -- in an appropriate case counsel should specifically request that any termination or dismissal be "with prejudice."

National Officers

President	Justin Green	New York, New York
Executive Vice President	Jim Waldon	Seattle, Washington
Member at Large	Tony B. Jobe	Madisonville, Louisiana
Secretary	John Yodice	Frederick, Maryland
Treasurer	Ray Speciale	Frederick, Maryland
Membership Chairman	Matt Robinson	Denver, Colorado
Emerging Leaders Chairman	TO BE DETERMINED	
FAA Liason	Linda Modestino	Oklahoma City, Oklahoma
Immediate Past President	Gary Halbert	Washington, D.C.

Regional Vice Presidents

Alaskan	Brent Cole	Anchorage, Alaska
Central	Elizabeth Vasseur-Browne	Kansas City, Missouri
Eastern	Jeffrey Small	Coraopolis, Pennsylvania
Great Lakes	Brett Venhuizen	Grand Forks, North Dakota
New England	Paul Lange	Stratford, Connecticut
Northwest	TO BE DETERMINED	
Southern	Wayne Ferrell	Jackson, Mississippi
Southwest	Mitch Llewellyn	Ft. Smith, Arkansas
Western Pacific	John T. Van Geffen	San Francisco, California

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.

Under the Pilot's Bill of Rights, respondents have the opportunity to pursue appeals in either United States District Courts or United States Courts of Appeal. Pub. L. 112-153, 126 Stat. 1159, 1161 § 2(d)(1) (2012). In the past few months, District Courts have issued the first decisions reviewing the Board's opinions and orders. These decisions contain interesting perspectives on jurisdiction and procedural issues.

In Smith v. Huerta, the federal court in the Eastern District of Michigan determined the respondent did not exhaust his administrative remedies before bringing the case in federal court against the FAA, because the full Board did not issue a decision concerning the merits of the case. The Board only affirmed the chief judge's order dismissing the emergency appeal as untimely; therefore, the Board's only review consisted of determining whether the respondent should have received leave to file his appeal after the deadline. In this regard, the court recognized the good cause standard in the Board's Rules of Practice.

In addition, the Smith court stated it did not have jurisdiction to determine whether the Board's order affirming the chief law judge's dismissal—which was based on procedural grounds—was correct. The court stated, "[u]nder the plain terms of the Pilot's Bill of Rights, a person may only appeal an NTSB decision 'upholding an order or a final decision by the Administrator *denying an airman certificate* ... or *imposing a punitive civil action or an emergency order of revocation*....' 126 Stat. at 1161, § 2(d)(1) (emphasis added). A decision denying a motion to file a late appeal is not an order the statute designates as one subject to judicial review." Smith v. Huerta, 2014 WL 1400111 slip. op. at *3 (E.D. Mich. Apr. 10, 2014).

In Dustman v. Huerta, the respondent appealed the Board's decision in an emergency medical certificate revocation case involving alcohol dependence. NTSB Order No. EA-5657 (2013). The Board granted the Administrator's appeal. The Board determined the evidence established respondent had an extensive medical history of alcohol dependence at a relatively young age. In particular, the evidence included several blackouts and driving under the influence of alcohol with a blood alcohol content level of 0.239 percent. The respondent appealed the Board's decision in the Northern District of Illinois.

In October 2013, the court determined, under the Pilot's Bill of Rights, the District Court had jurisdiction to review the Board's opinion and order in Dustman to determine whether the Board's decision was "arbitrary, capricious, an abuse of discretion, or not in accordance with law" under the Administrative Procedure Act. 5 U.S.C. § 706(a)(2).

After receiving the court's opinion regarding its jurisdiction and the standard of review, respondent appealed the Board's decision in the same court. The court granted the Administrator's motion for summary judgment, affirming the Board's decision. The court discussed the Board's evidentiary findings and concluded its decision was supported by substantial evidence. As a result, the court held the Board's decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The court's decision also indicated the standard for alcohol dependence in the Federal Aviation Regulations supersedes the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) standard, with regard to medical certificate actions. Dustman v. Huerta, 2014 WL 2515172 slip. op. at *6 (N.D.Ill. May 30, 2014).

In another case appealed shortly after the passage of the Pilot's Bill of Rights, two respondents challenged a decision of the NTSB chief judge, who determined the Administrator proved they intentionally falsified maintenance records, in violation of 49 C.F.R. § 43.12(a)(1). Administrator v. Dexter and Coots, Docket Nos. SE-19355 and SE-19356. After the chief judge issued his decision, respondents appealed to the Board and waived the applicability of emergency procedures. Approximately six weeks later, respondents withdrew the appeal, and instead filed an appeal in the Federal District Court for the Middle District of North Carolina. In response to the appeal the Administrator argued the court did not have jurisdiction, because respondents did not receive a decision from the Board concerning their appeal; therefore, under the Administrative Procedure Act, respondents failed to exhaust their administrative remedies.

On September 24, 2013, the Federal District Court in North Carolina held the Pilot's Bill of Rights required parties receive a decision from the Board before appealing to Federal District Court. The court stated failure to complete this step amounted to a failure to exhaust administrative remedies. Dexter and Coots v. Huerta, 2013 WL 5355748 slip. op. at *2 (Sept. 24, 2013).

These decisions, though not binding in other district courts or Courts of Appeal, serve to confirm the application of the Administrative Procedure Act to the Board's opinions and orders.

Emerging Leaders

by:
Christina Graziano and
Michael Fabiani

AVIATION LAW MATCHING TEST

This short exam tests the reader's memory regarding some of the most significant decisions that have influenced the development of aviation law. The exam's purpose is to serve as a fun refresher on the law. Match the case name with the corresponding quotation, holding and/or rule of law.

A. Air France v. Saks[1]
B. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng[2]
C. Boyle v. United Technologies Corp.[3]
D. City of Burbank v. Lockheed Air Terminal, Inc.[4]
E. Olympic Airlines v. Husain[5]
F. Abdullah v. Am. Airlines, Inc.[6]
G. Witty v. Delta Airlines, Inc.[7]
H. Greene v. B.F. Goodrich Avionics SystEms, Inc.[8]
I. Kumho Tire Company, Ltd. v. Carmichael[9]
J. Executive Jet Aviation, Inc. v. City of Cleveland, OH[10]
K. U.S. v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)[11]
L. Zicherman v. Korean Airlines Co., Ltd.[12]
M. Piper Aircraft Company v. Reyno[13]
N. Beech Aircraft Corp. v. Rainey[14]
O. Helicopteros Nacionales de Colombia, S.A. v. Hall[15]
P. Dooley v. Korean Air Lines Co., Ltd.[16]
Q. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach[17]
R. Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Com'n[18]
S. U.S. Airways, Inc. v. O'Donnell[19]
T. Elassaad v. Independence Air, Inc. [20]
U. Martin v. Midwest Express Holdings, Inc.[21]
V. French v. Pan Am Exp., Inc.[22]

1 470 U.S. 392, 393 (1985)
2 525 U.S. 155, 169 (1999)
3 487 U.S. 500, 512 (1988)
4 411 U.S. 624 (1973)
5 540 U.S. 644 (2004)
6 181 F.3d 363 (3d Cir. 1999)
7 366 F.3d 380 (5th Cir. 2004)
8 409 F.3d 784 (6th Cir. 2005)
9 526 U.S. 137 (1999)
10 409 U.S. 249, 261 (1972)
11 467 U.S. 797, 813 (1984)
12 516 U.S. 217 (1996)
13 454 U.S. 235, 257 (1981)
14 488 U.S. 153 (1988)
15 466 U.S. 408, 418 (1984)
16 524 U.S. 116, 124 (1998)
17 523 U.S. 26 (1998)
18 634 F.3d 206, 211 (2nd Cir. 2011)
19 627 F.3d 1318 (10th Cir. 2010)
20 613 F.3d 119 (3rd Cir. 2010)
21 555 F.3d 806 (9th Cir. 2009)
22 869 F.2d 1 (1st Cir. 1989)

C H R I S T I N A GRAZIANO joined Kreindler & Kreindler, LLP as an associate in 2013. Ms. Graziano currently works on state and federal matters involving aviation accidents, product liability and medical malpractice, as well as the In Re: Fresenius GranuFlo/ NaturaLyte multi-district litigation.

Ms. Graziano graduated from Suffolk University Law School in 2013. While at Suffolk, Ms. Graziano was awarded a public interest law grant for her work at Community Legal Aid of Massachusetts (formerly Legal Assistance Corporation of Central Massachusetts).

Ms. Graziano graduated magna cum laude from Assumption College in 2010 with a degree in political science.

1. Third Circuit case arising from an in-flight turbulence event in which the Court held that the Federal Aviation Act impliedly preempted the field of aviation safety.
2. Defined the term "accident" under Article 17 of the Montreal Convention as an injury "caused by an unexpected or unusual event or happening that is external to the passenger".
3. Under Federal Rule of Evidence 702, the Court has discretionary authority to determine reliability in light of the facts and circumstances of the particular case.
4. Whenever the discretionary function exception is invoked, the Court's basic inquiry is "whether the challenged conduct of a Government employee — regardless of status — is of a nature and quality that Congress intended to shield from tort liability."
5. Case involving municipal noise abatement law. The Court ruled that the State police power is preempted by the Federal Government with regard to "the field of noise regulation insofar as it involves controlling the flight of aircraft".
6. Holding that a plaintiff could not recover damages for loss of consortium and society under Article 17 of the Warsaw Convention for the death of a relative in a plane crash on the high seas. [Note that after TWA 800, Congress amended the Death on the High Seas Act to allow for non-pecuniary damages for loss of care, comfort, and companionship].
7. The Court held that recovery for personal injury suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of Warsaw Convention, is not available at all.
8. In response to plaintiff's claims that the airline negligently failed to warn plaintiff about the risks of developing deep vein thrombosis during flight and failed to provide passenger with adequate leg room, the Court held that state laws concerning air safety were preempted by Federal Aviation Act and the Airline Deregulation Act.
9. Holding that "maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases".
10. Crash report written by Navy commanding officer that contained "opinions" was deemed admissible, under holding that investigatory reports are not inadmissible solely because they contain the author's conclusion or opinion.
11. Plaintiffs cannot recover damages for their decedents' pre-death pain and suffering through a survival action under general maritime law "[b]ecause Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages."
12. A forum non conveniens determination "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."

MICHAEL S. FABIANI joined Kreindler & Kreindler in September, 2011 as a law clerk during his third year at Brooklyn Law School. After Mr. Fabiani graduated cum laude from Brooklyn Law School in 2012, he was hired full-time and is now an Associate working on state and federal cases involving aviation accidents, maritime law and products liability.

13. Sixth Circuit case in which a state-law failure to warn claim brought by wife of pilot killed in helicopter crash against gyroscope manufacturer was preempted by federal law, as federal law exclusively maintained the standard of care in the field of aviation safety.
14. Holding that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions".
15. Holding that a court conducting coordinated, pretrial proceedings in multiple cases under the direction of the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407(a) has no authority to retain a transferred case for the actual trial of the case.
16. A flight attendant's repeated refusal to move passenger's seat away from smoking section of flight constituted an "accident" under Article 17 of the Warsaw Convention.
17. The Supreme Court held that a contractor establishes this defense where: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."
18. A Third Circuit case involving a passenger who was injured while disembarking from a plane after it arrived at its destination, in which the Court held that state-law claims of negligence arising from an airline's conduct in overseeing the disembarkation of passengers at a time when the aircraft was not being operated were not preempted by federal law.
19. Holding in a Tenth Circuit case involving the regulation of alcoholic beverages sold on commercial flights that state-law claims were preempted because the sale of alcoholic beverages fell under the field of aviation safety.
20. Ninth Circuit case predating Ginsberg and Ventress in which the court held that state-law claims involving airplane stairs were not preempted by federal law, as the claims were not subject to the FAA's "pervasive regulations" such that preemption would be appropriate.
21. An airline pilot's lawsuit concerning a mandated drug test was preempted by federal law insofar as Rhode Island law could "fly in the face of the Federal Aviation Act" if not "grounded" by preemption.
22. A Second Circuit case involving the safety of lengthy tarmac delays and an airport's desire to cut down trees as a remedy, in which the Court held that although "Congress intended for to occupy the entire field of air safety", the state laws at issue "do not enter the scope of the preempted field in either their purpose or their effect."

ANSWER KEY
A (2); B (7); C (17); D (5); E (16); F (1); G (8); H (13); I (3); J (9); K (4); L (6); M (12); N (10); O (14); P (11); Q (15); R (22); S (19); T (18); U (20); V (21)

Drug & Alcohol Testing

by:
Tony Jobe

WHERE INDUSTRY MEETS GOVERNMENT: THE DRUG AND ALCOHOL TESTING INDUSTRY INTERFACES WITH THE DOT OFFICE OF DRUG AND ALCOHOL POLICY AND COMPLIANCE

The Drug and Alcohol Testing Industry Association (DATIA) states its mission as the "education, resources, and advocacy to those involved in and interested in drug and alcohol testing." (www.datia.org) The DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) serves in an advisory role to the Secretary on "rules related to drug and alcohol testing of safety-sensitive employees" in the transportation industry and is tasked with "publish(ing) regulations and provid(ing) official interpretations on drug and alcohol testing, including how to conduct tests and evaluation and treatment procedures necessary to return employees to duty after testing violations." (www.dot.gov/odapc) On May 29 – 30, 2014, the industry (DATIA) met government (ODAPC) in Phoenix, Arizona for the DATIA 2014 Annual Conference.

The ODAPC team was led by Ms. Patrice Kelly, Esquire, Acting Director. Ms. Kelly has been Acting Director at ODAPC since late 2013 and has been at ODAPC since 2007. Previously, she was the Deputy Division Manager of the FAA's Drug Abatement Division, was Senior Attorney for Aerospace Medical Issues and served as an FAA attorney. Ms. Kelly was the first FAA attorney to revoke an air carrier's certificate for failure to implement drug and alcohol testing and initiated the FAA's first civil penalty to enforce drug and alcohol testing regulations. Ms. Kelly's team included program managers representing the Federal Transit Administration, the Federal Motor Carrier Safety Administration, the Pipeline and Hazardous Materials Safety Administration, the United States Coast Guard, the Federal Railroad Administration, as well as the Federal Aviation Administration.

The Drug and Alcohol Testing Industry was represented by scientific and technical presenters from leading drug and alcohol testing companies, DNA testing companies, and third party administrators, and by attorneys who represent those entities.

The industry and government meet at the intersection of safety and security for the travelling public and compliance with 49 C.F.R. Part 40. According to Ms. Kelly, 6.1 million drug and alcohol tests were conducted under DOT regulations in 2013, and

TONY B. JOBE (JD Tulane Law '74) has practiced aviation, maritime, products liability and commercial law as well as FAA enforcement defense for thirty-seven years in the New Orleans area with offices in Madisonville, LA. Former Marine combat helicopter pilot and FAA licensed SEL, MEL, helicopter and instrument rated civilian pilot. Former CEO of a Continental Express Airline (1981 – 1988). Lead counsel in air mass disaster cases. AV Rated and selected as "Top Lawyer for 2009" by New Orleans Magazine.

that number continues to rise each year. In the 3 million tests conducted in the second half of 2013, approximately 1.76% of those were reported by the labs as positives prior to MRO verification.

Ms. Margie Rustin, representing the FAA, stated that collection sites are the weakest link in the drug and alcohol testing process. As a result, FAA enforcement cases become a credibility issue. She made eight recommendations to remediate the most commonly occurring errors in the collection process:

1. Collectors must explain procedures to the employee;
2. Collectors must show the employee the back of the collection form;
3. Collectors must not complete the chain of custody form (CCF) in advance;
4. Collectors must complete the CCF accurately;
5. The CCF must accurately indicate the type of test being administered;
6. Collectors must document any unusual circumstances including the start and discontinue times for "shy bladder" and the documentation of any refusals;
7. Collectors must use tamper evident tape to seal urine samples; and
8. Collection facilities are encouraged to use a checklist for collectors.

It should be noted that some of the errors listed by Ms. Ruston constitute correctible errors, while others are considered "fatal flaws" that are not able to be corrected and yield the sample invalid. For example, if the collector fails to mark the Reason for the Test (Recommendation 5), that error can be corrected and is not considered a "fatal flaw". If the collector fails to sign the CCF, that is uncorrectable and is a "fatal flaw", and the collector must then complete refresher training within thirty (30) days. If a collector conducts more than one collection at a time, or has multiple bottles on the table, or if the form gets torn, a mismatch between the bar code at the top of the CCF and the barcode on the actual specimen(s) may occur, resulting in a fatal flaw.

Written documentation of the chain of custody reflects the chronology of the life of the sample from the time the sample is collected to the final disposition of the sample. According to Ms. Debra Lyon, JD, Director of Business Development and Client Services, DNA Solutions, factors which are critical to the chain of custody and which are often used to attack the chain of custody include the shipping procedures, individuals identified by name and signatures, and proper protocols both at the shipping

and receiving ends of the process. Clear and accurate chain of custody is essential for legal admissibility.

In an administrative update for the FAA, Ms. Rustin reminded industry attendees to check the FAA website for the new format for the FAA/ Drug Abatement Division suggested release of information form for aviation employers. The regulation requires that the employer report not just positive test results for an employee for the last two years but requires a report if that employee ever provided a sample that resulted in a positive test. That regulation, she said, protects the employer. For pre-employment testing, the employer must wait for a verified negative test prior to hiring, not just prior to moving the new employee into a safety-sensitive position.

The DOT, through Ms. Kelly, voiced a "prevention philosophy" which includes the involvement of Substance Abuse Professionals in providing training opportunities and a return to safety-sensitive position when the employee "comes clean." From an FAA perspective, the return to duty of an aviation employee with a positive test includes a follow-up testing plan in which:

1. The employee knows they will get a directly observed test;
2. If the employee is hired by another employer, that employer gets documentation that the employee went through the Return to Duty process; and
3. A schedule of follow-up testing that includes a minimum of six tests in six months of employment service (i.e., if a break in service occurs, the "clock stops" and starts again when the employee goes back to work in a safety-sensitive position.

Both the industry and the government are concerned regarding the increase in both the recreational use of marijuana, the legalization of marijuana by states, and the increased use of medical marijuana. Latest statistics reported by Ms. Faye Caldwell, Esquire, attorney with Quest Diagnostics, indicate that 17.3% of the population in the United States currently report use of marijuana and 40% of those describe themselves as daily users. Legally, the level of THC that proves impairment is not clear. Unlike breath alcohol concentrations (BAC of .04, .08, .20, etc.), a definitive level of THC that equates to impairment does not exist either in the objective effects of the drug like decreased psychomotor performance, attention span, bloodshot eyes, etc. nor for subjective effects like errors in time/ space judgment or emotional changes. Laws and protections for employees' use of medical marijuana vary widely from state to state.

According to Ms. Caldwell, employee protections for recreational use do not exist. Arizona is the only state that allows the employer to go behind the registry card to see if it is valid. In Rhode Island, an employer may not refuse employment solely because an individual has a registry card; this statute explicitly applies to both patient and caregiver. However, as both industry and government representatives point out, marijuana is still illegal under federal law, is classified as a Schedule 1 drug by the DEA, and "medical" marijuana is not a legitimate medical explanation under DOT drug testing regulations. Research shows that for infrequent users of marijuana the effects of the drug last from 5 to 8 hours, and for people who use marijuana consistently or chronically the individual may test positive for up to thirty (30) days even if they have abstained. The DOT remains very concerned regarding the use of marijuana by employees in safety-sensitive positions even during off-duty hours.

The 2014 DATIA Conference reflects the intersection and collaboration of government and the drug and alcohol testing industry in providing for the safety and security of the travelling public. Clearly, safety is the responsibility of all of the stakeholders: employers, employees, drug and alcohol testing facilities, and the Department of Transportation. Only through the proper training of collectors, MROs and SAPs; only through the validity of the collection process; and only through the proper issuance, interpretation, and implementation, and exercise of authority regarding DOT regulations and policies is the drug and alcohol testing of employees in safety-sensitive positions conducted with integrity. Attorneys who represent employees in an enforcement proceeding involving drug and alcohol testing are encouraged to monitor the ODAPC website for program information and changes at www.dot.gov/odapc. DATIA also offers a publication that contains all of the up-to-date applicable regulations, regulations for government contractors, and executive orders related to drug and alcohol testing. (www.datia.org)

A Tribute To Albert M. Orgain IV

by
Greg Reigel

It saddens me to report that IATSBA member Albert M. Orgain IV died on June 27, 2014 during a forced landing in his C182 after he reported losing power to ATC. He was flying solo on a business trip at the time.

Mr. Orgain was a member of the Sands, Anderson, Marks and Miller law firm in Richmond, Virginia for 43 years and he served as the leader of Coverage and Casualty Litigation Group for over twenty of those years. He was a specialist in aviation litigation, earning many honors over the course of his career to include selection to the "Best Lawyers in America" list for the last six years and "Virginia Super Lawyers" for the last seven years. In 2011, Mr. Orgain was named a Virginia Lawyers Weekly Leader in the Law in recognition of his aviation law practice and support of aviation history in the Commonwealth. In 2013, he was named a Fellow of the Virginia Law Foundation.

Although Mr. Orgain was born in Columbia, S.C., he was raised in Richmond. He left home to spend his high school years at Randolph Macon Academy in Front Royal, Va., where he graduated in 1961 and would later serve on the Academy's Board of Trustees. After graduating from Virginia Military Institute in 1965, Mr. Orgain served three years in the United States Army as an armor officer, helicopter gunship pilot and instrument flight instructor. During the Vietnam War, he was twice awarded the Distinguished Flying Cross and the Purple Heart and received six Air Medals. He served as a Captain in the Virginia Army National Guard and did a tour as a helicopter pilot and Section Leader.

Upon graduating from Washington and Lee Law School in 1971, Mr. Orgain clerked for the Honorable Judge John A. McKenzie in Norfolk, Va. for two years before being hired as an associate at Sands, Anderson. grew an active aviation and transportation practice there that, although concentrated in the mid-Atlantic, spanned the country. Mr. Orgain also served as the Chairman of the Virginia Aviation Historical Society and was inducted into the Virginia Aviation Hall of Fame in 2010 for his work in promoting aviation in the Commonwealth of Virginia.

IATSBA extends its sincerest condolences to the Orgain family, his firm, and to all of those individuals whose lives he touched. He will be missed.

Ed. Note: Special thanks to the Orgain family, Gary Allen and Tony Jobe for providing the information in this article.

Annual IATSBA Conference

CONFERENCE REGISTRATION

Name: _____ (As you wish it to appear on your badge)

Guest's Name: _____ (As you wish it to appear on their badge)

Firm: _____ (As you wish it to appear on your badge)

Address: _____

City: _____ State: _____ Zip Code: _____

Phone: _____ Alt. Phone: _____

Your Email: _____ Fax: _____

Bars of licensure for which CLE will be requested: _____

EVENT FEES	**Through September 5, 2014**	**After September 5, 2014**
IATSBA or LPBA member	$625 __	$675 __
Government Employee	$480 __	$530 __
Full Time Student	$300 __	$300 __
Non-Member	$700 __	$750 __

Lawyers attending the Nov 13th dinner only(Conference sessions not included) $225 __

Additional Awards Ceremony and Dinner Tickets Fees *(Guests tickets limited to spouses or family members of paying attendees. Must accompany conference attendee to the dinner. Includes Cocktail Reception. Limited seating, first come first served.)*

Guests $150 ☐

Additional Conference Activity Tickets for Guests

Cocktail Welcome Reception $30 ☐
Breakfasts $20 ☐
Lunch $25 ☐

Check if you/your firm are a sponsor……...☐

Sponsors at the $2,500 level receive one free conference registration and sponsors at the $5,000 level receive three free conference registrations. If your firm or company is a sponsor at one of these levels, please check this block and submit your payment by check after deducting the cost of your Conference Registration Fee shown above. If you have not already paid your sponsorship pledge, you may do so by including that amount in your check. Sponsors above the $2,500 and $5,000 level must pay by check to receive their free registration. If you have not yet paid your sponsorship pledge, please do so by enclosing a separate check for the pledged amount.

Check appropriate boxes if you will attend

Nov. 12 Cocktail Welcome Reception …… ☐
Nov. 13 Breakfast ……. ☐
Nov. 13 Lunch ……... ☐
Nov. 13 Cocktails, Awards Ceremony and Dinner... ☐
Nov. 14 Breakfast …….. ☐
Nov. 14 Lunch …… ☐

PLEASE MAIL THIS FORM AND CHECK IN THE ENCLOSED ENVELOPE

Circuit Assignments

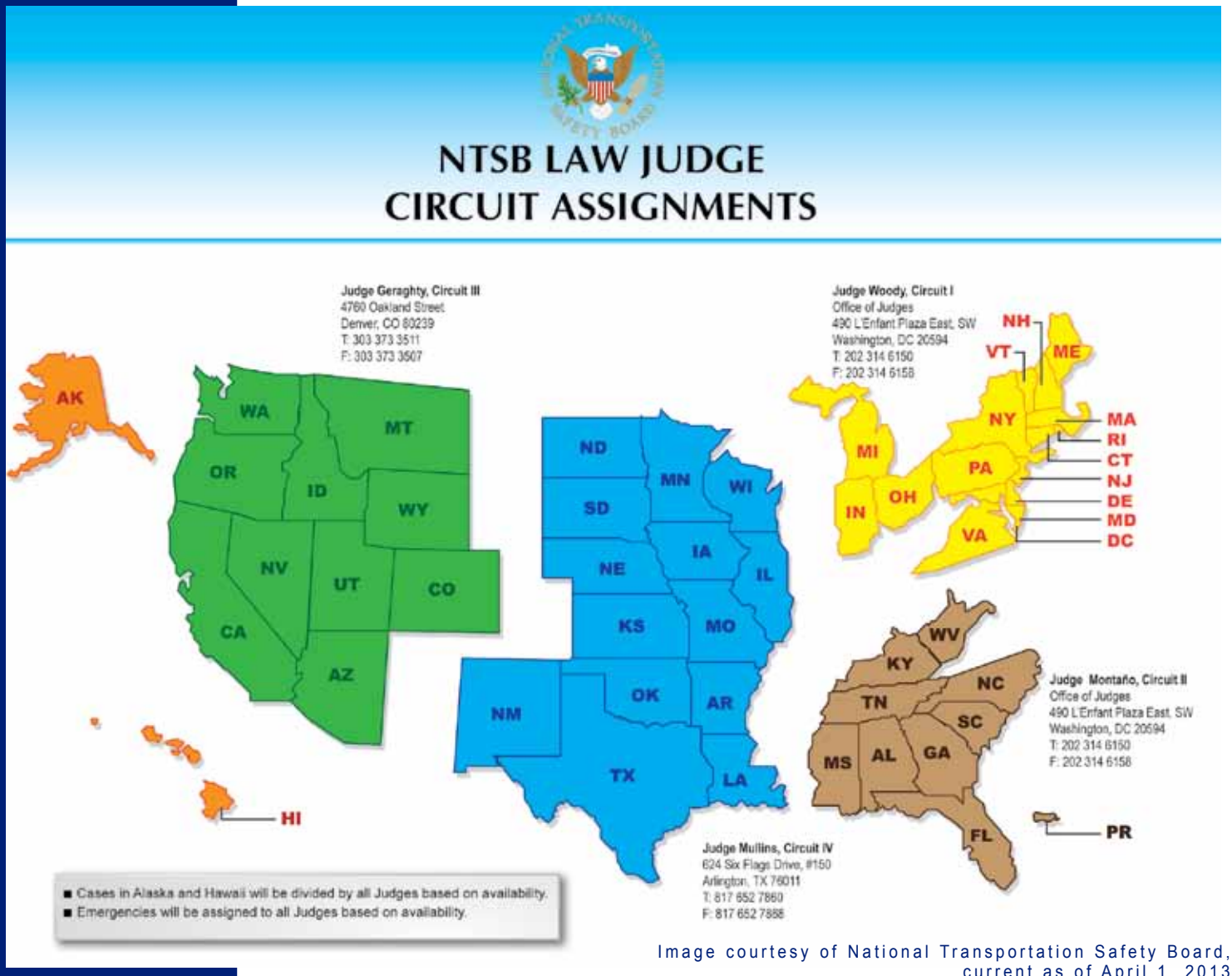

Image courtesy of National Transportation Safety Board, current as of April 1, 2013

IATSBA Membership

Name: _____

Firm/Company/Affiliation: _____

Address: _____

City: _____ State: _____ Zip: _____

Work Phone: _____ Fax Number: _____

Email: _____ Website: _____

Membership Directory Listing/Area of Practice:

_____

_____

_____

PLEASE CIRCLE MEMBERSHIP TYPE

Checks are to be made payable to "IATSBA" and sent to the mailing address below.
Online application and payment by credit card at www.IATSBA.org.

Regular/Full Annual Membership: ---------- $119.00
Federal Government Annual Membership: ---------- $59.00
Recent Law School Graduate Annual Membership:
(Within two years of graduation from law school) ---------- $49.00
Law School Student Annual Membership: ---------- NO CHARGE
Associate Annual Membership
(Associate Membership is for those not eligible for a Regular/Full Membership. Associate Membership is non-voting. There are two types of Associate Membership.)
Associate with listing: ---------- $129.00
(May list credentials in Membership Directory - use the lines provided above.)
Associate without listing: ---------- $119.00

International Air & Transportation Safety Bar Association
PO Box 5035 ● Frederick, MD ● 21705-3035 ● Tel: 757-777-8769 ● Fax: 800-886-4685